



# MONTHLY CASE LAW UPDATE

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## Pakistani Judgments

### BANKING LAWS

- 1) Meezan Bank Limited vs. WAPDA First Suku Company Limited (2013 CLD 439)

*Munib Akhtar, J*

Application of Financial Institution (Recovery of Finance) Ordinance, 2001.

It is held that to apply Financial Institution (Recovery of Finance) Ordinance, 2001 it is crucial that the finance should originally have been provided by the financial institution. If the finance was held at the time of default by Financial Institution, it was merely a holder of debt and was therefore in such capacity not entitled to bring the suit under the Financial Institution (Recovery of Finance) Ordinance, 2001. All the suits concerning recovery of finance are not dealt by Financial Institution (Recovery of Finance) Ordinance, 2001.

### CONSUMER PROTECTION ACT

- 2) Zia Ullah Malik vs. Nadeem Baig (PLD 2013 Lahore 439)

*Shahid Waheed, J*

Term "consumer" did not include a person or entity which obtained any product either for resale or for any commercial purpose.....

Firm being a "person" fell within the definition of "consumer" as provided in S.2(c) of Punjab Consumer Protection Act, 2005 and might competently maintain a complaint against a manufacturer in respect of a product before the Consumer Court.

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NEWS

The Research Centre is proud to publish its first **Bench Book** consisting of Election Case Laws.

## CONSTITUTION

### 3) Suo Motu Powers of the High Court

(This recent judgment has not yet been formally reported, however, the same is available on the website of Balochistan High Court.)

<http://bhc.gov.pk/Significantjudges.htm>

In his latest judgement Hon'ble Chief Justice Balochistan High Court has surveyed the scope of suo motu powers of High Court. After discussing all the judgment cited by Counsels and Amici Curiae it was held that:

- High Court has suo motu powers as Art.199 of the Constitution does not prohibit such powers.
- High Courts should make rules regarding suo motu jurisdiction.
- High Court can array any one as petitioner or respondent in suo motu proceeding.
- Article 4 is also a fundamental right.
- High Court and Supreme Court both have power of suo motu jurisdiction.
- Decision of superior courts given at a time when independence of judiciary had been undermined can no longer be treated as binding precedent with regard to decision of question of a law.
- Even an amendment in constitution may not abridge a fundamental right or a power of high court to enforce it. (Detailed dilation on the point was avoided as matter was not directly before the court.)
- Only Chief Justice of the provincial high court should take suo motu notice and should be heard by bench of two judges ideally comprising of Chief Justice and another judge.

## CRIMINAL LAW

### 4) Salman Akram Raja vs. Government of Punjab (2013 SCMR 203)

*Iftikhar Muhammad Chaudhry, C.J.,  
Jawwad S. Khawaja and Khilji Arif Hussain, JJ.*

The august Supreme Court of Pakistan has laid down new guidelines for the authorities concerned in matters of investigation and prosecution of all rape matters in Pakistan (at pp. 218-219):

(a) Every Police Station that receives rape complaints should involve reputable civil society organizations for the purpose of legal aid and counselling. A list of such organization may be provided by bodies such as the Nation Commission on the Status of Women. Each police Station to maintain a register of such organization of rape, the Investigating Officer (I.O.)/ Station House Officer (S.H.O.) should inform such organizations at the earliest.

(b) Administration of DNA tests and preservation of DNA evidence should be made mandatory in rape cases.

(c) As soon as the victim is composed, her statement should be recorded under section 164, Code of Criminal procedure, 1898, preferably by a female Magistrate.

(d) Trials for rape should be conducted in camera and after regular court hours.

(e) During a rape trial, screens or other arrangements should be made so that the victims and vulnerable witnesses do not have to face the accused persons.

(f) Evidence of rape victims should be recorded, in appropriate cases, through video conferencing so that the victims, particularly juvenile victims, do not need to be present in court.

5) AZHAR IQBAL vs. The STATE  
(2013 S C M R 383)

*Asif Saeed Khan Khosa and Ijaz Ahmed Chaudhry, JJ.*

Where prosecution had failed to prove its case against accused beyond reasonable doubt, he should have been acquitted, even if he had taken a plea and admitted to killing the deceased---Appeal was allowed and accused was acquitted of the charge.

### LIMITATION ACT

6) Trustees of the Port of Karachi vs.  
Organization of Karachi Port Trust  
(2013 SCMR 238)

*Tassaduq Hussain Jillani, Tariq Parvez and Mian Saqib Nisar, JJ.*

The Hon'ble apex Court formulated the following question for determination:

The significant question which thus would arise is, that where a claim of a person emerging from the breach of contract, which (claim) admittedly is barred by time if agitated before the Court of plenary / original civil jurisdiction, whether such claim can be directed to be enforced by the High Court in the exercise of its extra-ordinary jurisdiction, within the parameters of Article 199 of the Constitution of Pakistan 1973.

The Court Held (at p. 262):

...the provisions of Limitation Act, 1908 cannot be stricto sensu made applicable to the claims set forth in constitutional jurisdiction of the High Court, but if the claim on the face of it is barred by law of limitation in relation to the suit, the relief should be refused to the writ petitioners on the rule of laches and past and closed transaction.

### PRE-EMPTION LAW

7) Abaid Ullah Malik vs. Additional  
District Judge, Mianwali  
(PLD 2013 SC 239)

*Mian Saiqb Nisar and Muhammad Ather Saeed, JJ.*

While relying on its previous judgments (Mst. Ghulam Bibi and others v Sarsa Khan and others, **PLD 1985 SC 345** and Mian Pir Muhammad and another v Faqir Muhammad through LR's and others, **PLD 2007 SC 302**), the Court has held that mentioning of date, time, venue and names of witnesses was essential to a preemption suit. Thus, amendment cannot be allowed after evidence has been recorded whereby the witnesses deposed a different time as compared to one mentioned in the plaint. The Court has also distinguished its earlier judgment titled Qamar-ud-Din v Muhammad Din and others, **PLD 2001 SC 518**, whereby the amendment was allowed by the Supreme Court being in nature of clerical mistake.

### RULES OF INTERPRETATION

8) Muhammad Tariq Badr vs. National  
Bank of Pakistan  
(2013SCMR 314)

*Tassaduq Hussain Jillani, Mian Saqib Nisar and Sarmad Jalal Osmany, JJ.*

While relying on 1996 SCMR 1688 and PLD 2002 SC 757, the Supreme Court has elaborated the meanings of terms 'omit/omission' and 'repeal' as under:

...it is clear that the concept and meaning of repeal has a wider compass and amplitude and it embodies in it, the idea / traits of omission, which in fact is an exclusion, a subtraction, 'to call back', to dismiss, to give up, to retract, to reverse a particular part or portion of

the statutes. When a statute as a whole is abrogated and annulled it is called “repeal” but when the legislation in order to do away with a particular provision or part of a statute it uses the expression, omit/omitted, delete/deleted etc. as is stipulated by section 6-A of General Clauses Act which manifests all the features and characteristics of repeal for all intent and purposes, and legal consensus and effect to attract the mischief and purview of section 6 of G.C. Act.

## SERVICE LAWS

- 9) Sh. Riaz-ul-Haq vs. Federation of Pakistan  
(C.P. No.53 of 2007 & 83 of 2012)

*Iftikhar Muhammad Chaudhry, C.J.  
Gulzar Ahmed, Sh. Azmat Saeed, JJ.*

(This recent judgment has not yet been formally reported, however, the same is available on the website of the Supreme Court of Pakistan.)

<http://www.supremecourt.gov.pk/web/page.asp?id=1382>

Through this marvelous judgment, the Hon'ble Supreme Court of Pakistan has brought fundamental change in Service Tribunal's jurisprudence. The Court held that the Service Tribunals in fact perform judicial function and are for all intent and purposes 'courts'.

The Court thus further held that these Tribunals are to be manned, controlled and regulated in accordance with the law relating to management, regulation and control of Courts in Pakistan and need to be independent and separate from the executive, just on the same grounds as the judiciary itself is protected under the constitution.

An important point in the judgment is that the appointments of chairman and members of the

Service Tribunals without consultation of the Chief Justices of the provinces or HCJP, as the case may be, have been held as against the spirit of the Constitution and thus the relevant provisions of respective service tribunal acts have been held as ultra vires to the Constitution of Pakistan 1973.

Government has been provided 30 days time to make necessary amendments in the law.

- 10) Tanveer Ahmad Khan vs. Registrar,  
Lahore High Court, Lahore  
{2013 PLC (C.S.) 248/2013 LHC 7}

*Ijaz-ul-Ahsan and Syed Mansoor Ali Shah, JJ.*

In this judgement sanctity of Rule 26 of “Lahore High Court Establishment Rules” was settled holding that it

“has an unsavoury history and has achieved an unpalatable notoriety over the years as it allows officers to jump the queue without necessarily being the best man for the job”.

Regulating the use of above rule it was held that it has a limited use and can be invoked in special emergent circumstances and can never be invoked to pick and choose. It was explored that administrative decision of Hon'ble Chief Justice under the rules must be for the benefit and welfare of the institution passing through the test of due process.

Quote of the month

**“There is no power on earth that can undo Pakistan”.**

(Quaid-e-Azam's speech at Mammoth Rally at university stadium, Lahore on 30<sup>th</sup> Oct, 1947)

## Foreign Judgments

### Australia

#### 11) TCL Air Conditioner v The Judges of the Federal Court of Australia [2013] HCA 5

A recent decision of the High Court of Australia has provided a strong indication of support for the right of parties to have their disputes resolved by arbitration. International arbitration enables parties from different legal systems to agree to resolve an international commercial dispute according to their choice of the laws to be applied and the processes to be followed. TCL applied for an order restraining the judges of the Federal Court from enforcing an arbitration award that had been made against it. The High Court unanimously dismissed the application, and upheld the constitutional validity of Australia's international arbitration laws. The decision highlights that there is nothing in the IA Act which requires an arbitral award to be free from errors of law, and a failure by an arbitral tribunal to apply the chosen rules of law correctly is not a basis, in and of itself, for a court to refuse to enforce the award. The grounds on which a court can refuse to enforce an award are very limited under the legislation. Overall, this decision provides greater certainty for parties to contracts which include an international arbitration clause. Consistent with a number of recent decisions of lower courts, the High Court has demonstrated support for the practice of international arbitration, and a willingness to enforce arbitral awards in Australia.

<http://www.austlii.edu.au/au/cases/cth/HCA/2013/5.html>  
[http://www.molinocahill.com.au/blog/news/post/19\\_March\\_2013-High\\_Court\\_endorses\\_validity\\_of\\_international\\_arbitration/](http://www.molinocahill.com.au/blog/news/post/19_March_2013-High_Court_endorses_validity_of_international_arbitration/)

### India

#### 12) Criminal Appeal No. 1460 of 2012 Central Bureau of Investigation, Hyderabad vs. K. Narayana Rao

A lawyer cannot be prosecuted for a criminal offence merely because he gave wrong advice or his opinion was not acceptable merely because his opinion is not acceptable, the lawyer cannot be slapped with criminal prosecution, "particularly in the absence of tangible evidence that he associated with conspirators. Writing the judgment, Justice Sathasivam said "It is beyond doubt that a lawyer owes unremitting loyalty to the interests of the client and it is the lawyer's responsibility to act in a manner that would best advance the interest of the client. But there is a world of difference between giving improper legal advice and wrong legal advice."

The Bench said: "A lawyer does not tell his client that he shall win the case in all circumstances. Likewise, a physician would not assure the patient of full recovery in every case. A surgeon cannot and does not guarantee that the result of surgery would invariably be beneficial, much less to the extent of 100%, to the person being operated upon... A professional may be held liable for negligence on one of the two findings, viz., either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess."

Dismissing the CBI's appeal against this order, the Supreme Court said: "The liability against an opining advocate arises only when the lawyer was an active participant in a plan to defraud the bank.

<http://www.indiankanoon.org/doc/159488390/>  
<http://barandbench.com/brief/2/2809/supreme-court-criminal-liability-against-opining-advocate-arises-only-when-the-lawyer-was-an-active-participant-in-the-plan-to-defraud>

## Ireland

### 13) M.R & Anor -v- An tArd Chlaraitheoir & Ors [2013] IEHC 91

A woman in the [Republic of Ireland](#) who is the genetic mother of [twins](#) has won a legal battle to be declared their legal mother. Authorities had previously refused to list the woman as genetic mother on the twin's birth certificates. But sitting at the [High Court of Ireland](#) in [Dublin](#), [Mr Justice Henry Abbott](#) ruled that the woman was the children's legal mother and both she and the children were entitled to a legal declaration to that effect.

The judge declared that the previous assumption under [Irish law](#) that the birth mother was automatically the legal mother was no longer valid in the era of [in-vitro fertilisation](#). He said: "To achieve fairness and constitutional and natural justice for both the paternal and maternal genetic parents, the feasible inquiry in relation to maternity ought to be made on a genetic basis and on being proven, the genetic mother should be registered as the mother."

In [English law](#), by contrast, the [Human Fertilisation and Embryology Act 2008](#) specifies that the surrogate mother is always the legal mother of the child.

<http://www.bailii.org/ie/cases/IEHC/2013/H91.html>

## United States of America

### 14) American Civil Liberties Union etc. vs. Central Intelligence Agency,

In this case United States Court of Appeals for the District of Columbia circuit, for the first time, allowed to lift the veil of secrecy from information pertaining to drone's attack available with CIA. ACLU application under Freedom of Information Act seeking information of drone's attack was declined by United States District Court for the District of Columbia but same was allowed by court of appeal and remanded the case for further consideration. Glomar response of CIA, by which it neither confirmed nor denied the availability of information, was not accepted by the court and while relying upon previous decision of Supreme Court it was held that:

The Glomar doctrine is in large measure a judicial construct, an interpretation of FOIA exemptions that flows from their purpose rather than their express language. In this case, the CIA asked the courts to stretch that doctrine too far -- to give their imprimatur to a fiction of deniability that no reasonable person would regard as plausible.

"There comes a point where . . . Court[s] should not be ignorant as judges of what [they] know as men and women".

[http://www.cadc.uscourts.gov/internet/opinions.nsf/6471FF102FC611A685257B2F004DEA2A/\\$file/11-5320-1425559.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/6471FF102FC611A685257B2F004DEA2A/$file/11-5320-1425559.pdf)

## United Kingdom

### 15) The Queen on The Application of Noor Khan vs. The Secretary of State for Foreign and Commonwealth Affairs

*Lord Justice Moses Mr Justice Simon*

In this case, a judicial review challenge was made to question the decision of Secretary of State for Foreign and Commonwealth Affairs in relation to the passing of intelligence by employees of GCHQ to forces of the United States. It is alleged that employees of GCHQ are assisting US agents by supplying locational intelligence for use in drone strikes in Pakistan and are thereby exposing themselves to be prosecuted under criminal laws of England and Wales as secondary party to murder. However court while basing its decision on technical grounds, dismissed this challenge holding that:

"The real aim and target of these proceedings is not to inform GCHQ employees that if they were prosecuted, no defence of combatant immunity would be available. The real aim is to persuade this court to make a public pronouncement designed to condemn the activities of the United States in North Waziristan, as a step in persuading them to halt such activity".

<http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/khan-v-SSFA-approved211212.pdf>