



# MONTHLY CASE LAW UPDATE

Vol. 1, No.6

March, 2013

<b>Contents</b>	<b>Page</b>
<b>Pakistani Judgments</b>	
<i>Arbitration Act</i>	1
<i>Constitution</i>	1
<i>Civil Procedure Code</i>	2
<i>Criminal Procedure Code</i>	2
<i>Customs Act</i>	3
<i>Family Laws</i>	3
<i>Limitation Act</i>	3
<i>Rent Laws</i>	3
<i>Rules of Interpretation</i>	3
<i>Service Laws</i>	4
<i>Article Review: Revisiting the 1960 Indus Water Treaty</i>	4
<b>Foreign Judgments</b>	
<i>Indian</i>	5
<i>United Kingdom</i>	6
<i>United State of America</i>	6

## Pakistani Judgments

### ARBITRATION ACT

- 1) Farmers' Equity Private Limited (FEP)  
Multan vs. Mehboob Alam

(2013 CLC 434)

*Shahid Waheed, J.*

There is no bar on the parties to get their case decided by mutual agreement at any time prior to the final adjudication....An arbitration agreement without the orders of the court in a pending suit, being a departure from the mandatory provisions of sections 21 to 25 of the Act cannot be categorized as a lawful agreement. Such an agreement is not enforceable in law...". (p. 437)

### CONSTITUTION

- 2) Reference No.01 of 2012 by the  
President of Pakistan under Article 186

(PLD 2013 S.C. 279)

*Khilji Arif Hussain, Tariq Parvez, Ejaz Afzal Khan, Gulzar Ahmed and Sh. Azmat Saeed, JJ*

Judicial Commission, composition of---Judicial Commission nominating names for appointment of Judges of the Islamabad High Court in the absence of the most senior Judge of Islamabad High Court in the proceedings of Judicial Commission---

Legality---Contentions on behalf of Referring Authority (the President) were that Judge of Islamabad High Court who sat, voted and took part in the proceedings of the Judicial Commission was not the most senior Judge of Islamabad High Court; that Judicial Commission could not be said to have been properly constituted in the absence of the most senior Judge of Islamabad High Court, therefore, nominations made by the Judicial Commission would not have any legal or constitutional sanctity, notwithstanding that they had been confirmed by the Parliamentary Committee, sent to the Prime Minister and then forwarded to the President---

Validity---Failure of most senior Judge of Islamabad High Court to attend the meeting of the Judicial Commission would not vitiate the proceedings of the Commission---Art.175A(14) of the Constitution clearly provided that no action or decision taken by the Commission or Committee would be invalid or called in question only on the ground of the existence of a vacancy therein or of the absence of any member from any meeting thereof---Accepting that Judge of Islamabad High Court who sat, voted and took part in the proceedings of the Commission culminating in the nomination of Judges, was a non-entity, yet it would not vitiate the proceedings when the Judicial Commission, in view of Art.175A(8) of the Constitution, had nominated the Judges by majority of its total membership--

Proceedings of the Commission would have been vitiated or materially affected if it had nominated the Judges with a margin of one, but where the Commission nominated the Judges by a majority of 7 against 2, the presence or participation of a Judge, who was not the most senior Judge of Islamabad High Court, in the meeting would not be of any consequence---Reference under Art.186 of the Constitution was answered accordingly.

## **CIVIL PROCEDURE CODE**

3) Muhammad Anwar vs. Mst. Ilyas Begum  
(PLD 2013 S.C. 255)

*Mian Saqib Nisar and Sh. Azmat Saeed, JJ*

O. XVI, R. 1(2)---Summoning of witness with permission of the court---Party seeking to summon witness to show "good cause" for failing to submit list of witnesses before court or for omitting to name of such witness in the list---Expression "good cause"---Meaning---No absolute criteria could be set forth as benchmark to test if a case of omission to file the list of witnesses or a name in such list was on account of "good cause", as it depended upon the facts of each case---Party in default had to show a legally sufficient reason, as to why its request should be granted or its inaction/omission should be excused, in other words, the judicial conscious of the court should be satisfied with justifiable reasons---Party in default could not, as a matter of right or as a matter of course, without assigning or establishing any good cause for the omission, ask for calling/summoning or even producing witness(es) only on account of a lame excuse/reason and a bald assertion that it shall be in the interest of justice and/or it shall facilitate the court in deciding the matter.

## **CRIMINAL PROCEDURE CODE**

4) Ghulam Ahmed Chishti vs. The State  
(2013 SCMR 385)

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

S. 497---Qanun-e-Shahadat (10 of 1984), Art. 43---Bail---Statement of co-accused implicating accused for the offence---Evidentiary value---Scope---Such a statement could be used as a circumstantial piece of evidence even at bail stage to form a prima facie view about the involvement of a person.

## CUSTOMS ACT

- 5) Ghulam Nabi vs. Federation of Pakistan  
(2013 PTD 581)

*Ijaz ul Ahsan, J*

The Hon'ble High Court in this judgment while referring to PLD 2001 SC 340 apex court has observed that:

If the notification has been used for the benefit of the subject then it can be made operative retrospectively but if its operation is to the disadvantage of a party who is the subject of the Notification then it would operate prospectively.

## FAMILY LAWS

- 6) Almas Mubashar vs. Mubashar Hanif  
(2013 LHC 429)

*Atir Mahmood, J*

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

Where the executant of notice of Talaq has not denied its execution, the provisions of Art. 79 of QSO are not attracted as the provisions of this article cannot be read in isolation and Art. 17 of QSO is also to be taken into consideration.

## LIMITATION ACT

- 7) Abrar Hussain vs. Saeeda Fatima  
(2013 MLD 476)

*Shujaat Ali Khan, J.*

Relying on 2008 SCMR 287, the Court held (at p. 480):

...that provision of Article 181 of the Limitation Act, 1908 are applicable only to the ex parte judgments and decrees where the defendant never joined the proceedings whereas in the cases where the defendant does not appear after joining the proceedings the provisions of Article 164 of the Limitation Act 1908 are applicable.

## RENT LAWS

- 8) Ch. Muhammad Aslam vs. Civil Judge / Rent Tribunal Rajanpur  
(PLJ 2013 Lahore 142)

*Ijaz Ahmad, J.*

While distinguishing the final order and interim order under the Punjab Rented Premises Act 2009, this Hon'ble Court has held (at p. 146):

A final order under the Act *ibid* includes an order for arrears of rent. Thus, the impugned order passed by the Rent Tribunal directing the petitioner to pay the arrears of Rent is a final order under section 2(b) of the Act and is appealable under section 28. An interim order for payment of the arrears or the future rent is not appealable.

## RULES OF INTERPRETATION

- 9) Reference No. 1 of 2012  
(PLD 2013 SC 279)

*Kilji Arif Hussain, Tariq Parvez, Ejaz Afzal Khan, Gulzar Ahmed and Sh. Azmat Saeed, JJ*

Interpretation of the Constitution:

The Constitution, being a living organ for all times is to be interpreted dynamically, as a whole, to give harmonious meaning to every Article of the Constitution. (at p. 312)

The Constitution was framed by its framers, keeping in view the situation and conditions prevailing at the time of its making, but

being an organic document it has been conceived in a manner so as to apply to the situations and conditions which might arise in the future. The words and expressions used in the Constitution, in that sense, have no fixed meaning and must receive interpretation based on the experience of the people in the course of working of the Constitution. (at p. 313)

#### Interpretation of the Statutes (at pp. 312-3):

The function of the Court while interpreting the statute, is to discover the true legislative intent. Having ascertained the intention, the Court must strive to interpret the statute as to promote / advance the object and purpose of the enactment. For this purpose, where necessary, the Court may even depart from the rules that plain words should be interpreted according to their plain meaning.

## **SERVICE LAWS**

- 10) Regarding pensionary benefits of the Judges of Superior Courts from the date of their respective retirements, irrespective of their length of service as such Judges.

(Constitution Petition No.127 of 2012)

(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=1420>

In this judgment a previous judgment of apex court (PLD 2008 SC 522) was revisited by a larger bench. The short order of the apex court reads:

.....For the reasons to be recorded separately later; we hereby, in exercise of all the enabling powers vested in this Court, hold and declare that the law enunciated in

the case of Accountant General Pakistan Sindh and others versus Ahmed Ali U. Qureshi and other (PLD 2008 S.C. 522) is per incuriam and consequently this judgment is set aside. The titled appeal is accepted and the judgment impugned therein is also set aside. Other miscellaneous applications moved therein and in these proceedings are dismissed accordingly.

- 11) Secretary, Government of Punjab (C&W) vs. Ikramullah  
(2013 SCMR 572)

*Tassaduq Hussain Jillani and Sarmad Jalal Osmany, JJ*

Where competent authority proposed to enhance the penalty it had to give reasons germane to the charges leveled and the evidence collected during inquiry and that too with reference to the liability of the official who was inquired into.

## **Article Review**

- 12) Revisiting the 1960 Indus Water Treaty by Hamid Sarfraz

This Article analyses the strengths and weaknesses of Indus Water Treaty in the light of UN Water Courses Convention. The detailed study of the paper suggests the following strengths and weaknesses opined by the author:

#### **SHORTCOMINGS:**

1. The IWT is not a water sharing treaty which could facilitate the “equitable and reasonable utilization” of water as envisaged by the UNWC’s articles 5 and 6.
2. The IWT also lacks environmental protection, preservation and management. In contrast, UNWC gives comprehensive treatment to the protection and presentation of

international water courses and related ecosystem.

3. The IWT is also silent about transboundary environmental impact assessment, provided by principal 21 of Stockholm declaration (1972), whereas UNWC makes explicit reference to the EIA process.

#### **STRENGTHS:**

1. The IWT has no-harm principle (Article IV).
2. Third party arbitration (Article IX).
3. Ratification on amendment being required for modification or termination of the treaty (Article XII).

#### **RECOMMENDATIONS:**

The author provides the following recommendations for the improvement of the treaty according the International Water Course Law i.e. UNWC:-

1. The treaty is in need to be amended for emerging needs to promote co-operative water management between two countries, for which treaty itself provides guidance under article XII (3).
2. In building upon provisions under article VII of the IWT, both countries should undertake joint research in the area of climate change, hydrogeology, glaciology and geo-informatics.
3. The mandate of the permanent Indus commission (Article VIII), should be further expanded to accommodate the functions cited above.
4. Both countries (India & Pakistan) being highly vulnerable to climate change, should develop a joint adaptation strategy to offset the impacts of surplus and deficient water supply.

5. Environmental flow requirements should therefore be factored into any sharing arrangement between India and Pakistan for the Indus.
6. Both countries, on account of expanding industrialization, should have joint water development for energy generation in view of (article VII)(1)(C) of the IWT.
7. In order to realize the above said recommendation, both countries should start building confidence through track II diplomacy, paving the way for a duly ratified treaty amending the IWT.

## **Foreign Judgments**

### **India**

- 13) **Girish Ramchandra Deshpande vs. Central Information Commissioner and others, reported in (2013) 1 SCC 212**

It has been observed in this case that Information relating to ACR relates to the personal information and may cause unwarranted invasion of privacy of the individual if the same is disclosed, therefore, the information sought for by the appellant relating to analysis of ACR is exempted under Section 8(1)(j) of the RTI Act and hence the same cannot be furnished.

The performance of an employee/officer in an organization is primarily a matter between the employee and the employer and normally those aspects are governed by the service rules which fall under the expression "personal information", the disclosure of which has no relationship to any public activity or public interest. On the other hand, the disclosure of which would

cause unwarranted invasion of privacy of that individual. It was held that as there was no bona fide public interest involved in seeking information, the disclosure of such information would cause unwarranted invasion of privacy of the individual under Section 8(1)(j) of the RTI Act.

[http://www.supremecourtcases.com/index2.php?option=com\\_content&itemid=99999999&do\\_pdf=1&id=25301](http://www.supremecourtcases.com/index2.php?option=com_content&itemid=99999999&do_pdf=1&id=25301)

## United Kingdom

### 14) Hayes v Willoughby 2013 UKSC 17

The UK Supreme Court has considered in the case of Hayes v Willoughby 2013 UKSC 17 what happens when a whistle-blower goes too far and whistle-blowing turns into harassment. In this case Mr. Hayes brought an action against Mr. Willoughby who he accused of unlawful harassment and sought an injunction to prevent the conduct continuing. What the Supreme Court has now clarified is that a whistle-blower in these circumstances is not given unlimited rights and will still be guilty of harassment if they take things too far. The Supreme Court has confirmed that, whilst the Protection from Harassment Act 1997 does protect whistle-blowers from allegations of harassment, it is based on a premise of rationality. Those seeking to prevent or detect crime must first have thought rationally about the evidence they have and the appropriateness of any conduct which could be considered oppressive or harassing in pursuit of that aim. Delivering the leading judgment, Lord Sumption rejected the idea that either a wholly objective or wholly subjective test should be applied in determining “the purpose”. Instead, he found that “the necessary control mechanism is to be found in the concept of rationality”:

The effect of applying a test of rationality to the question of purpose is to enable the court to apply to private persons a test which would in any event apply to public authorities engaged in the prevention or detection of crime as a matter of public law. It is not a demanding test,

and it is hard to imagine that Parliament can have intended anything less.”

<http://worklifelaw.co.uk/2013/03/hayes-v-willoughby-harassment-and-the-prevention-or-detection-of-crime/>

## United States of America

### 15) Florida vs. Jardines, 569 US (2013),

It is a decision by the United States Supreme Court holding that the use by police of a trained detection dog to sniff for narcotics on the front porch of a private home is a "search" within the meaning of the Fourth Amendment to the United States Constitution, requiring probable cause and a search warrant.

The Court's opinion in this 5-4 decision was delivered by Justice Antonin Scalia, and joined by four justices, while four other justices dissented. Justice Kagan, joined by Justice Sotomayor and Justice Ginsburg, filed a concurring opinion. 27 U.S. states and the Federal government, among others, had supported Florida's argument that this use of a police dog was an acceptable form of minimally invasive warrantless search.

[http://en.wikipedia.org/wiki/Florida\\_v.\\_Jardine](http://en.wikipedia.org/wiki/Florida_v._Jardine)  
[http://www.supremecourt.gov/opinions/12pdf/11-564\\_5426.pdf](http://www.supremecourt.gov/opinions/12pdf/11-564_5426.pdf)

## Words and Phrases

Forward PLD 2013 SC 279

Negligence 2013 SCMR 480

Good/Sufficient Cause  
PLD 2013 SC 255