



# MONTHLY CASE LAW UPDATE

Vol. 1, No.8

May, 2013

## Pakistani Judgments

### BANKING LAWS

- 1) GULISTAN TEXTILE MILLS LTD vs. ASKARI BANK LTD

(2013 Lhc. 1803)

*Syed Mansoor Ali Shah, J.*

The above referred case elaborates the powers of the Banking Court under Order VII Rule 11 CPC and the specialized nature of plaint under Section 9 of the FIRO, 2001. The questions before the Court that required determination were, inter alia, as follows:

- a) Scope and extent of powers enjoyed by the Court under Order VII Rule 11 CPC,
- b) The standard of plaint required under section 9 of the Ordinance (FIRO, 2001) and
- c) The nature of cause of action to be disclosed in such a plaint in the context of Section 9 of the Ordinance.

It was held that the Court enjoys an independent, suo moto and sua sponte power to examine the plaint at any stage of the suit under Order VII Rule 11, CPC. It matters little, if application for leave to defend or written statement, have been filed by the defendant.

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## CONSTITUTION

### 2) DR. M. TAHIR-UL QADRI vs. FEDERATION OF PAKISTAN

(PLD 2013SC 413)

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

In this judgment Supreme Court revisited the scope of Art.184(3), reiterated and formulated following guidelines:

- There must be question of public importance which is considered by the Court on case to case basis.
- That question must relate to enforcement of fundamental rights.
- In spite of meeting of these two conditions, relief is not an automatic outcome but well within the discretion of the court.
- This jurisdiction can be invoked individually and collectively by the citizens.
- Petitioner has to establish its Locus Standi and bone fide.
- If above condition are met, then there is no bar on any person to trigger jurisdiction of court on behalf of any person or group of persons who are unable to seek relief for them.
- Onus to prove infringement of fundamental right is on the petitioner
- Mere acquisition of nationality of any foreign country by itself is no impediment in filing of petition under above Article.

Attending circumstances of the matter disentitled petitioner from relief, particularly when he is debarred to participate in the election process as candidate, on account of his dual nationality and allegiance to foreign rule coupled with laches.

### 2) WUKALA MAHAZ BARAI TAHAFAZ DASTOOR vs. FEDERATION OF PAKISTAN

(Civil Petition No.2408-L of 2009)

*Tassaduq Hussain Jilani and Amir Hani Muslim, JJ.*

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

The august Court refused to grant leave against the order of Division Bench of High Court vide which petitioner's I.C.A was dismissed and the order of the Hon'ble Single Judge in chamber was upheld. Vide the latter order, Hon'ble High Court had dismissed petitioner's Constitution petition, wherein following prayers were made:-

- (i) Respondent Federation be directed to command the Armed Forces of Pakistan to defend Pakistan against the external aggression currently carried out by the American Forces under NATO cover which are in occupation of Afghanistan.
- (ii) An authoritative declaration be made that USA is an Enemy State and for taking all measures provided by the domestic law such as expulsion of its diplomatic personnel and seizure of assets. CP 2408-L/20092
- (iii) If Nuclear Arsenal is found to be incapable of protecting Pakistan and instead poses a threat to its survival, respondent Federation may be directed either to sell it in international market to the highest bidder or to place it in safe-custody of Iran."

The august Court observed that the matters of foreign policy, defence and security of the country are neither justiceable nor they fall within the judicial domain for interference under Article 199 of the Constitution of Islamic Republic of Pakistan. Any such interference by the courts would be violative of one of the foundational principles of the Constitution, which envisages a trichotomy of powers between the Legislature, Executive and Judiciary.

## FAMILY LAWS

### 4) MUHAMMAD IKRAM vs. MST. NABEELA NASIM CHEEMA

(2013 MLD 939 Lahore)

*Ijaz Ahmad, J.*

The suit for recovery of dowry articles was decreed against the petitioner by the learned Judge Family Court, Gujranwala. The appeal filed by the petitioner was also dismissed by the learned Additional District Judge, Gujranwala. Hon' ble High Court dismissed the constitutional petition and observed about Problematic and Crucial social custom as under:-

“In Punjab we are confronted with two diverse situations. One, in which the parents are bounded by the cruel custom obliging them to give articles of dowry to their daughters beyond their financial capacity. From the day a girl takes birth, her mother reserves a box for her for depositing whatever the articles of dowry she can stealthily buy for this prospective bride. No receipt regarding the purchase of these articles is prepared or kept.

The other is the case of the real wretched and downtrodden class of the people who could not think of preparing the articles of dowry for their daughters at any cost. They are too destitute to do it. The day of their daughters marriage is to be a day of hope and jubilation when they can dream of wearing proper clothes and feeding themselves and their children properly for a couple of days. Definitely all the funds are to flow from the groom, a well-to-do and superannuated man, driving for his second or 3rd marriage”

The court further observed:

In 99% cases, the plaintiff/wife tells a lie that the list was prepared at the time of marriage. In 01% cases, she still insists that she is not telling a lie. Insistence upon production of the list that was prepared at the time of marriage so as to entitle a plaintiff for a decree for the return of articles of dowry would be pressuring her to tell more lies.

## PRE-EMPTION

### 5) MUHAMMAD IDREES vs. SARDAR ALI

(2013 SCMR 913)

*Tassaduq Hussain Jillani and Sarmad Jalal Osmany, JJ.*

The issue involved in the case was as to whether the land in dispute was an urban property and not subject to the pre-emption law. Appellant in the written statement took the plea that the suit land was no longer agricultural and had assumed urban characteristics. Suit was decreed by trial court declaring suit property as agricultural; First Appellate Court set aside the decree. High Court restored judgment and decree of Trial Court. This appeal was allowed, impugned judgment of High Court was set aside and order of First Appellate Court, whereby pre-emption suit was dismissed, was restored with this observation.

“that the urban immovable property is not merely the immovable property which fell within the limits of a town as declared by the Board of Revenue but the courts of law could also hold any property to be urban immovable property if there was evidence to that effect.”

## RENT LAWS

### 6) RANA ABDUL HAMEED TALIB vs. ADJ, LAHORE

(Civil Appeal No.679-L of 2012)

*Tassaduq Hussain Jillani, Mian Saqib Nisar and Muhammad Ather Saeed, JJ.*

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

This case is about the interpretation and the effect of non-compliance of the provisions of Section 9(b), independently, and also when read in the context of Section 8 of the Punjab Rented Premises Act, 2009. In relation to the above proposition, the facts of the case are that respondent brought an ejectment petition against the appellant, on the ground(s), inter alia, of default in the payment of the rent due of a room. The appellant filed an application for leave to contest the ejectment petition, which was dismissed, his appeal was also disallowed and same was the fate of his constitutional petition, Honourable court ruled as under:-

“All such Courts seized of the matter shall halt the proceedings and should direct the original petitioner/applicant of the case to first pay the fine as mandated by Section 9, by determining the exact amount payable and by fixing the period in which the needful should be done; and if the amount of fine is paid, the case/matter shall be proceeded and decided on merits, if however, the order is not complied and the needful is not done the original petition/application, of the landlord or the tenant as the case may be, shall be dismissed;

It may be pertinent to mention here, that where the order passed on the original side (petition/application) has attained finality and the execution proceedings are pending, the executing forum shall stop further

proceedings in the matter and shall first direct the execution by the petitioner to pay the fine. However, where the order is already executed, the rule of past and closed transaction shall be attracted and no order shall be annulled on the basis the fine envisaged by Section 9 ibid has not been paid”

## SERVICE LAWS

### 7) DISTRICT OFFICER EDUCATION, SHEIKHUPURA vs. TARIQ MAHMOOD

(2013 SCMR 859)

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

The respondent challenged the order of his dismissal from service on the allegation of fake appointment letter initially before the Services Tribunal (without relief) and afterwards before the High Court, where the writ was allowed and relief was granted. The august Supreme Court has held:

It was specifically averred in the comments submitted by the Department that the so-called appointment order was fake. This aspect was not attended to in the impugned judgment. Besides the learned High Court, we may observe with respect, ought to have kept in view the mandate of Article 212(3) of the Constitution. More-so when the respondent himself had gone to the Tribunal and after the dismissal of his appeal before the said Tribunal instead of challenging the said order before this Court opted to file Constitution petition. The impugned judgment in the afore-referred circumstances is not sustainable. Consequently, this appeal is allowed and the impugned judgment is set aside.

## TAX LAWS

8) Messrs AZGARD NINE LTD  
vs. PAKISTAN

(2013 PLD 282 Lah.)

*Umar Ata Bandial, J.*

In this judgment court after making survey of whole range of case law on the subject beautifully explained the delicate difference between tax and fee and authoritatively held as under:

“... tax is levied to raise funds for meeting the "necessary expenses" of the State. Therefore, a tax is not co-related to services rendered or special benefit or privilege conferred on the tax payer. Accordingly, the tax payer is simply sharing/discharging his obligation under the common burden without being a beneficiary of a corresponding benefit. In contrast, a fee is not part of the common burden but is a payment made in lieu of a benefit, service or privilege received by the payer.

Court also explained the meaning and scope of “Fund” and held that, “The Fund cannot be applied for the general requirements of the State. As such the Fund is not part of the common burden and thus lacks an essential attribute of a tax.”

Honourable Chief Justice aptly concluded that Workers' Welfare Fund, lacks the attribute of tax and thus amendment there thorough Money Bill, in WWF Ordinance 1971, are not warranted and are ultra vires to the constitution.

9) D.G KHAN CEMENT COMPANY  
LTD vs. FEDERATION OF  
PAKISTAN

(2013 Lhc. 1504)

*Syed Mansoor Ali Shah, J.*

The above referred case encapsulates the scope of section 8(1)(ca) of Sales Tax Act, 1990 and declares it unconstitutional.

The questions before the court were, inter alia, as follows:

- Does section 8 (1) (ca) qualify as a valid “law” or provides ‘reasonable restriction’ to abridge the fundamental rights guaranteed to the petitioner under articles 23 and 24 of the Constitution?
- Is there any benefit arising out of section 8 (1) (ca) in the public interest and is it proportionate to the harm suffered by the petitioner?

The court while examining the constitutional fundamental rights; their limitations imposed through sub-constitutional legislation and in light of the principle of proportionality observed, inter alia, that section 8 (1) (ca) imposes the liability of person A on person B in the absence of any relationship between the two. Every person has a separate legal character enjoying distinct rights and liabilities under the law. To impose the liability of one over the other is opposed to basic fundamentals of law and offends due process, logic and rationality. Section 8 (1) (ca) axes an innocent person for the wrong of the other. It diminishes the legal character of a person under the law as if implying that every person is the agent of the other. This assumption also negates free and fair competition in a market economy. Section 8 (1) (ca), therefore, does not advance any public interest or passes the test of proportionality as discussed above. Infact the said provision is illogical, absurd and unreasonable.

## Foreign Judgment

### UK SUPREME COURT

In the matter of A (Children) (AP)  
[2013] UKSC 60

On appeal from  
[2012] EWCA Civ 1396 and  
[2013] EWCA Civ 232

*Lady Hale (Deputy President), Lord Wilson, Lord Reed, Lord Hughes, Lord Toulson, JJ.*

#### BACKGROUND TO THE APPEAL

The issue in this appeal is whether the High Court of England and Wales has jurisdiction to order the 'return' to this country of a small child who has never been present here on the basis that he is habitually resident here or that he has British nationality. The child, called Haroon in the judgment, was born on 20 October 2010 in Pakistan. His father was born in England and his mother in Pakistan. They married in Pakistan in 1999 and lived in England from 2000. They have four children: two daughters, born in 2001 and 2002, and two sons, one born in 2005 and Haroon. The father and the first three children, who were born in England, have dual British and Pakistani nationality and the mother has indefinite leave to remain in the United Kingdom.

From 2006 the father began to spend a lot of time in Pakistan. The marriage was unhappy and in 2008 the mother moved into a refuge with her three children complaining of abuse. The mother arranged a three week trip to Pakistan in October 2009, in order to visit her father with the children. When she was there she was put under pressure by her father, her husband and his family to reconcile with her husband and was forced to give up the children's passports. She strongly wished to return to England and telephoned the refuge asking for their help to return from February 2010, when she became pregnant with Haroon.

Eventually in May 2011 her family helped her to return to England without the children and she began proceedings for their return in the High Court. On 20 June 2011 all four children were made wards of court and the father was ordered to return them forthwith.

The father challenged the jurisdiction of the court to make orders for the return of the children. The judge found that all four children were habitually resident in England and Wales as the mother had not agreed that the children should live in Pakistan. The older children had retained their habitual residence in England. Haroon had habitual residence because he was born to a mother who was being kept in Pakistan against her will. The Court of Appeal by a majority allowed the father's appeal in relation to Haroon only, on the ground that habitual residence was a question of fact (rather than deriving from the habitual residence of the parents) and required physical presence in the country.

#### JUDGMENT

The Supreme Court unanimously allows the mother's appeal and holds that the court had inherent jurisdiction to make the orders in this case on the basis of Haroon's British nationality. The case is however remitted to the judge to consider as a matter of urgency whether it is appropriate to exercise this exceptional jurisdiction. Lady Hale gives the main judgment, with which Lord Wilson, Lord Reed, and Lord Toulson agree. Lord Hughes gives an additional judgment explaining why he would have held that Haroon was habitually resident in the circumstances of this case.

#### NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

[www.supremecourt.gov.uk/decided-cases/index.html](http://www.supremecourt.gov.uk/decided-cases/index.html)