



MONTHLY CASE LAW UPDATE

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Pakistani Judgments

BANKING LAWS

- 1) Mst. Meeran Bibi etc. vs. Manager, Zarai Taraqiati Bank Ltd. Etc.
(2012 CLD 2029)

Umar Ata Bandial, J

In this case, the petitioner impugned action of sale of his mortgaged property by the respondent Bank under sec.15 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 on the ground that sec.15 of the Ordinance had been declared unconstitutional by Full Bench of the Lahore High Court in Muhammad Umer Rathore v. Federation of Pakistan (2009 CLD 257). The contention of the respondent Bank was that Supreme Court had suspended said judgment of the Full Bench of High Court in 2009 CLD 257 which had declared sec.15 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 to be unconstitutional. **Held**, said suspensory order of the Supreme Court was to have effect inter parties only and was not a judgment in rem. The court declared the order of bank regarding sale of mortgaged property as illegal.

- 2). Irfan Nawab vs. Soneri Bank Ltd.
(2012 CLD 1976)

Munib Akhtar, J

Choice of Procedural Law..... a mortgagee to whom both sec.69(TPA) and sec.15 Financial Institutions (Recovery of Finances) Ordinance 2001, apply must be put to an election. Such a mortgagee must choose to proceed either in terms of sec. 69 or sec.15 but not both together. The election or choice made by the mortgagee must be clear on a bare reading of the notice or notices concerned. What the mortgagee cannot do is shift course, as it were, midway and/or switch from one provision to the other or in the end seek to rely upon both when the sale exercise is actually initiated.

NEW

Email Update

The Research Centre proudly announces that from this month onwards, a daily email update on various constitutional, legal and other relevant developments around the globe will be sent to Hon'ble Judges at their Lordships' official email addresses. The Centre welcomes any suggestions in this regard.

CONSTITUTION

- 3). Air Marshal (Retd.) Muhammad Asghar Khan vs. General (Retd.) Aslam Baig, Former Chief of Army Staff etc.
(2012 SCMR 2008)

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

“Duty to treat all equally”... President being head of the State represented the unity of the Republic under Art.41 of the Constitution and as per oath of his office, he had to do right to all manner of people, according to law, without fear or favour, affection or ill-will, in all circumstances. Holder of office of President, would violate the Constitution, if he failed to treat all manner of people equally and favoured any set.

In the same judgment the court also held that in “Political affairs” intelligence agencies had no role, such as formation or destabilization of government, or interference in holding of honest, free and fair elections. Involvement of the officers/members of secret/intelligence agencies in unlawful (political) activities, individually or collectively called for strict action being, violative of oath of their offices, and if involved, they were liable to be dealt with under the Constitution and the law.

CIVIL PROCEDURE CODE

- 4). Province of Punjab vs. Muhammad Farooq
(2012 SCMR 1942)

*Sardar Muhammad Raza Khan and
Nasir-ul-Mulk, JJ*

The question of limitation period under section 115 CPC viz a viz section 5 of the Limitation Act 1908 has been discussed. The august Court has distinguished the cases decided by itself cited as 2001 SCMR 286, 1995 SCMR 69 and 1994 SCMR 833 by holding that the revision petitions in those cases were filed prior to 1992 amendments in CPC. The Act III of 1992

prescribed a period of 90 days for filing revision u/s 115 CPC.

The Court held that “a plain perusal of first and second proviso would indicate that a limitation of 90 days is relevant only when some Revision petition is filed by some person or party to the proceedings. Such impediment is non-existence when Court itself exercises the power of Revision under sub-section (1) of section 115, CPC.” (p. 1944)

The august Supreme Court further observed (p. 1944):

What we intend to bring home is that if merits of the case demand that the challenged order be set aside, a High Court should not avoid hearing under section 115(1), CPC for which no limitation is provided, merely because the application is filed by somebody who is bound by limitation.

- 5). Nawabzada Tilla Muhammad Khan vs. Muhammad Afzal
(PLJ 2012 Peshawar 262)

*Qaiser Rashid Khan and Nisar Hussain
Khan, JJ*

When appeal is decided in continuation of a suit, the doctrine of merger comes into field and the date of judgment / decree of the appellate court will be relevant for counting limitation period for filing of execution petition. Reliance was also placed on 1992 SCMR 241. (p. 265)

- 6). Hazoor Bakhsh vs. Ameer Mai
(2012 YLR 2806)

Ali Baqar Najafi, J

On the authority of *Muhammad Ashraf v Javed Iqbal*, 2001 PSC 765, it has been held that the evidence recorded during pendency of an application under section 12(2) CPC cannot be treated as evidence in the suit on merits (p. 2809).

- 7). Muhammad Shafique vs.
Muhammad Rafique
(2012 YLR 2801)

Nasir Saeed Shaikh, J

Relying on 1991 SCMR 1957, 2007 SCMR 289 and PLD 1983 SC 344, it has been held that a withdrawal of a suit on the basis of compromise will not operate as *res judicata* nor is hit by the provisions of Order XXIII Rule 1 CPC and a second suit instituted on the same cause of action is entertainable (p. 2804).

8). Muhammad Anwar vs. Additional District Judge etc.
(2012 CLC 1976)

Shahid Waheed, J.

It has been held, on the authority of PLD 1963 SC 191 and 1994 SCMR 2240, that “allowing addition of relief of possession in the prayer clause of the suit neither would change nature of the suit nor cause of action would be affected. Relief of possession is a consequential relief for declaration.” (p. 1979)

On the authority of PLD 1965 Lahore 172, it has further been held

“A suit which is defective under section 42 of the Specific Relief Act should not, therefore, be dismissed for failure on part of the plaintiff to pray for further relief and the Court should allow the plaintiff to amend the plaint. It is a settled rule of practice not to dismiss suit for non-compliance of the provisions of section 42 but to allow the plaintiff necessary amendments”. (p. 1980)

CRIMINAL PROCEDURE CODE

9). Hasil Khan vs. The State
(2012 SCMR 1936)

Tassaduq Hussain Jilani, Mian Saqib Nisar and Sarmad Jalal Osmany, J.

Sentence, quantum of---Mitigating circumstances---Motive not successfully proved---Effect---Where motive alleged by prosecution had not been successfully proved, it might be considered as a mitigating circumstance *qua quantum* of sentence.

10). Muhammad Sufyan vs. The State
(2012 YLR 2900)

Shahid Hameed Dar, J.

S. 497(2)---Penal Code (XLV of 1860), S.489-F -Mere bouncing of cheque by bank without satisfaction of basic ingredients of S. 489-F, P.P.C. did not call for invocation of said section---Complainant had failed to hint that accused issued cheque knowing that it would bounce on presentation as complainant simply contended that accused owed hire certain amount---accused was charged with offence which did not catch the prohibition of S. 497, Cr. P. C and sufficient reasons existed to make his case one of further inquiry---Accused was admitted to bail, in circumstances.

FAMILY LAW

11). Razia Bibi vs. Muhammad Iqbal
(2012 MLD 1943)

Ibad-ur-Rehman Lodhi, J.

Maintenance is not a benefit but a right and thus cannot be withdrawn in lieu of *khula*. The judgment further discusses case law where it has been held that “the decree passed by the family court for dissolution of marriage on the basis of *khula* to the extent of relinquishment of claim of maintenance allowance was declared to be without lawful authority and of no legal effect. (p. 1945)

QANUN-E-SHAHADAT

12). Sahab Khan vs. Muhammad Bashiruddin
(2012 YLR 2944)

Ch. Shahid Saeed, J.

Regarding statement of a witness describing the facts of signing the agreement to sell, it has been held that “forgetting something out of the whole scene is part of human nature. Furthermore, people commonly take the signatures as both signatures and thumb impressions or mere signatures or thumb impressions....there is no reason to disbelieve witnesses merely on the basis of typical wording being commonly used in our society.” (p. 2947)

RULES OF INTERPRETATION

- 13). Sethi and Sethi Sons vs. Federation of Pakistan etc.
(2012 PTD 1869)

Syed Mansoor Ali Shah, J.

With reference to the question of determination of territorial jurisdiction of a High Court under Article 199 of the Constitution of Pakistan 1973, viz a viz the acts done or proceedings taken by a person performing functions in connection with affairs of federation, it has been held (p. 1882):

...where a person, enjoying limited territorial jurisdiction, does an act or passes an order or initiates proceedings by locating himself outside his legally earmarked territorial jurisdiction, the High Court within whose territorial jurisdiction such an act is done or order passed or proceedings initiated, will assume jurisdiction under Article 199 of the Constitution.

It has further been held that 'the above test is to be applied strictly in terms of Article 199' and that

...[it] is not dependent on section 20 of the Civil Procedure Code, 1908 which cannot be relied upon to expand or interpret the Constitution.
(p. 1882):

TAX LAWS

- 14). Waseem Yaqoob vs. Chief Commissioner, Income Tax, Lahore etc.
(2012 PTD 183)

Ayesha A. Malik, J.

Failure of petitioner after attaining majority to pay tax due from him for assessment year during his minority as shareholder of company. The issuance of warrants of detention of petitioner under R.186 of Income Tax Rules, 2002 and demand notice under S.138(1) of Income Tax Ordinance, 2001 was declared illegal by the high court on the ground that no

person could be made liable for tax of company for assessment years during which he either ceased to be its shareholder or was a minor --- Record, in the present case, showed that petitioner was a minor during disputed years, thus, he could not be made liable for total income tax of company for such years.

Foreign Judgments

- 15). ADC v. PAMI [Decided by Supreme Court of Argentina in December 2012]

The Court provided a broad and generous recognition of the right of access to information which –according to the Court— applies to all public entities and even to private persons who exercise public functions (para. 10).

The Court sketched some basic features of this right:

- All persons have the right of access to public information (para.10).
- The state is obliged to provide an answer to all requests and provide reasons when information is denied (para.10).
- There is no need to show a specific interest in the information requested (para.9).
- The right has two dimensions: on the one hand, it protects the individual right to seek public information, on the other, the duty of the state to guarantee everybody's right to receive public information (para.10).
- The state has the duty to adopt legislative or regulatory measures to guarantee this right (para.10).
- The state is obliged to promote a culture of transparency within the state (para.10).
- The Court recognized the principle of maximum disclosure, according to which all information is presumed public (para.10).
- Limitations to access must be exceptional: they must be intended to satisfy an imperative objective (para.10).
- There is a direct and immediate relationship between access to public information and the distribution of public advertising budgets, because information is relevant to assess whether the right of freedom of

expression is being respected or not (para.11).

16). R v Mabior SCC 47 Supreme Court of Canada

The Supreme Court of Canada has ruled that some people with low levels of HIV who use condoms during sex do not need to disclose their condition to sexual partners. In a 9-0 ruling, the top court updated a landmark 1998 decision that made it a crime if HIV carriers did not reveal their status when there was a significant risk of transmission to a sexual partner. The court ruled that the "realistic possibility of transmission of HIV is negated" provided the carrier of the virus has a low viral load and a condom is used during sexual intercourse. Otherwise, HIV carriers have to disclose their status to their partners. The court also said the new ruling does not preclude the law from adapting to future advances in medical treatment and to circumstances where different risk factors are at play. Under the previous law, HIV-carriers who didn't tell partners they had the virus could be charged with aggravated sexual assault. The maximum penalty is life in jail.

17). CASE C-286/12 of ECJ [Commission vs Hungary]

The lowering of the retirement age of judges was subjected to judicial review recently. Hungary had reduced the retirement age of its judges from 70 years to 62 years. This action was challenged before the European Court of Justice in the case of Commission v Hungary. The court held that the lowering of the retirement age of judges amounted to discrimination on the grounds of age.

Hungarian legislation establishes compulsory retirement for judges, prosecutors and notaries at age 62. The ECJ considered this limitation discriminatory on the grounds of age. The judgment is interesting for two reasons: first, because it continues to provide interpretative guidance on EU rules on equality and non-discrimination on the grounds of age, and secondly, because it makes a decision on the

validity of the rules on compulsory retirement.

This ruling is also a new manifestation of the tendency to project ECJ rules on EU employment and occupation beyond the implementation of a labour regime. In this case, as in previous ones (on this issue or other issues), the ECJ assumes that the relevant European standards also apply to public employment, and even to public officials such as judges, prosecutors and notaries.

18). Bharat Aluminium Co vs. Kaiser Aluminium Technical Services Inc (India)

The long-awaited decision of the Indian Supreme Court has been delivered. This landmark judgment, delivered by a five-judge constitutional bench, restricts the ability of local courts to interfere in international arbitrations seated outside India and overrules the controversial decision of *Bhatia International vs. Bulk Trading S.A.*

However, whilst the decision is likely to be largely welcomed by the international arbitration community, it is notable that the judgment only has prospective applicability and, as such, there is no doubt for the foreseeable future that Bhatia will continue to have an impact in commercial arbitrations where arbitration agreements have already been entered into.

The key favourable implications of the judgment are as follows:

- The Supreme Court has confirmed that there can be no "overlapping or intermingling" of the provisions contained in Part I of the Act with the provisions contained in Part II (which relates to the enforcement of foreign awards).
- Part I of the Act will have no application to international commercial arbitrations, seated outside India.
- The seat or legal place of the arbitration is the "centre of gravity" in an international arbitration.

- Awards rendered in commercial arbitrations seated outside India will only be subject to the jurisdiction of the Indian courts when they are sought to be enforced in India in accordance with the provisions contained in Part II of the Act.
- The Indian courts cannot order interim relief under Section 9 or any other provision of the Act in support of foreign seated arbitrations. Parties will therefore need to rely on the relief afforded by the courts of the jurisdiction in which the arbitration is seated. As the choice of seat can have significant implications for the way arbitration is conducted, parties should carefully consider their choice at the drafting stage.

19). Dudley Lee vs. the Minister of Correctional Services. [South African Constitutional Court]

This is a landmark judgment handed down by the Constitutional Court on the management of tuberculosis in prisons. It highlights the State’s responsibility for ensuring that the constitutional rights of detainees are maintained and safeguarded. The Court described the judgment as “of importance, not only to the parties, but also to other inmates and the health sector generally” . The judgment also upholds the right to a remedy for individuals in the position of Lee. In overturning the SCA ruling, the Constitutional Court said the test for causation had been applied too rigidly by the SCA and that Lee had, in fact, sufficiently proven that he contracted TB as a result of the DCS’s negligence. In reaching this conclusion, the Court stressed the importance of flexibility in determining issues of causation. It also confirmed that:

“It is indeed so that prisoners are amongst the most vulnerable in our society to the failure of the state to meet its constitutional and statutory obligations ... To suggest otherwise, in

circumstances where a legal duty exists to protect Lee and others similarly placed, will fail to give effect to their rights to human dignity, bodily integrity and the right to be detained in conditions that are consistent with human dignity under the Constitution, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, and medical treatment.”

The majority of the Court found that the Department of Correctional Services (DCS) negligently caused Dudley Lee to become infected with tuberculosis (TB) while it detained Lee in Pollsmoor prison from 1999 to 2004. The Court therefore held that the DCS should be liable to Lee.

20). National Federation of Independent Business v. Sebelius, 567 U.S. (2012)

It is a landmark United States Supreme Court decision in which the Court upheld Congress’ power to enact most provisions of the Patient Protection and Affordable Care Act (ACA) and the Health Care and Education Reconciliation Act (HCERA), including a requirement for most Americans to have health insurance by 2014. The court upheld the Affordable Care Act on the grounds that its controversial individual mandate constituted a tax and so fell under the purview of the federal legislature. The Supreme Court, in an opinion written by Chief Justice Roberts, upheld the individual mandate to buy health insurance as a constitutional exercise of Congress’ taxing power.

A majority of the justices, including Chief Justice Roberts, agreed that the individual mandate was not a proper use of Congress’ Commerce Clause or Necessary and Proper Clause powers, but they did not join in a single opinion. A majority of the justices also agreed that another challenged provision of the Act, a significant expansion of Medicaid, was not a valid exercise of Congress’ spending power, as it would coerce states to either accept the expansion or risk losing existing Medicaid funding.