



MONTHLY CASE LAW UPDATE

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1).PLD 2012 Lahore 515 (Constitution)

Messrs Hudabiya Paper Mills Ltd. vs. National Accountability Bureau.

Mr. Justice Syed Mansoor Ali Shah and Khalid Mehmood Khan, JJ)

Test For Determination Of Political Question

The test of the Doctrine of Political Question rests on two questions: (i) whether there is legal standard or criteria to adjudge the issue and (ii) whether it is desirable to decide the dispute in court or should it rather be resolved by other organs of the state. Constitutional democracy is deeply anchored in the rule of law. As far as normative non-justiciability is concerned, there is no decision or action of the State that can transgress the framework of law. "In a democracy, law is not politics, and politics is subject to law." According to Dr Thomas Fuller: "Be you never so high, the Law is above you." As no decision or action of the State can be outside the four corners of law it will always remain susceptible to judicial scrutiny and audit. Tom Paine made this point in 1776 when he said: 'that in America THE LAW IS KING. For as in absolute governments the King is law, so in free countries the law ought to be King and there ought to be no other.'

2).P L D 2012 Lhr 536 (Constitution)

Malik Allah Yar Khan vs. Federation of Pakistan,

Mr. Justice Nasir Saeed Sheikh, J

The judgment dilates upon the principle that the titles "My Lord" or "Your Lordship" are used in recognition of the known ability, nobility and learning of the office holders of the higher judiciary. None of the books of literature or

legal background hints that the honourable Judges who are addressed with the title of "My Lord" or "Your Lordship" are imagined or thought to be involving the touch of Godly attributes. The dictionaries of English language also certainly project that when the term lord is to be used for the God or Jesus Christ in the linguistic sphere it is to be preceded by stressing article "The".

In our country the absolute sovereignty and Oneness of Almighty Allah is enforced without an instinct of doubt. The form of judicial system which we inherited after independence has no origin relatable to application of the concept of God Almighty with the office of a Judge. If the learned members of the Bar who are not directly ordained by the honourable Judges of the Superior Courts to address them in particular manner, adopt the ceremonial and historical form of address to the honourable Judge by using the word "My Lord" or "Your Lordship", the concept of freedom of thoughts of speech as enunciated in our Constitution of 1973, fully gives protection to such a practical exercise. Such practice of the learned members of the Bar cannot be directed to be discontinued by an order passed by this Court as prayed for by the learned counsel for the petitioner on religious grounds.

3). 2012 CLC 1729 (Constitution)

Mian Aurangzeb Noor vs. Rent Controller Lhr.,
Mr. Justice Shahid Waheed, J

The judgment discusses the maintainability of Constitutional petition against interim order. When a statute did not provide an appeal against an interlocutory/interim order then the same could not be challenged by way of constitutional petition as allowing such an order to be impugned through a constitutional petition would amount to negating the provisions of the statute which did not provide for an appeal against an interlocutory order. Party affected by such an order had to wait till it matured into a final order and then could attack the same in the proper exclusive forum created for the purpose of examining such orders.

4). PLD 2012 S.C.923 (Contempt of Court)

Baz Muhammad Kakar etc. vs. Federation of Pakistan

Mr. Justice Iftikhar Muhammad Chaudhry, CJ, Mian Shakirullah Jan, Tassaduq Hussain Jillani, Jawwad S. Khawaja and Khilji Arif Hussain, JJ

Severability of statute, doctrine of---

.... the doctrine, of severability permits a Court to sever the unconstitutional portion of a partially unconstitutional statute in order to preserve the operation of any uncontested or valid remainder, but if the valid portion is so closely mixed up with the invalid portion that it cannot be separated without leaving an incomplete or more or less mixed remainder, the Court will declare the entire Act void

Doctrine of colourable legislation

"the idea conveyed by the expression 'colourable legislation' is that although apparently a Legislature in passing a statute purported to act within the limits of its powers, yet in substance and in reality it transgressed these powers, the transgression being veiled by what appears, on proper examination, to be a mere presence or disguise."

5).2012 CLD 1873 (Cooperative Societies Act)

Riaz ud Din vs. Province of the Punjab etc.,

Mr. Justice Ch. Shahid Saeed, J

Dispute was with regard to merger of co-operative society with private limited company.

Under Sec. 67 of Co-operative Societies Act, 1925, Housing society and a company were two different entities which should function under their respective supervisory control of Registrar of Co-operative Society and Security and Exchange Commission of Pakistan respectively. Provisions of Co-operative Society Act, 1925 and companies Ordinance, 1984, were not applicable to each other. When housing society and a company could not merge under law and intention of legislature to run both entities separately under separate supervisory control of the Registrar and Security Exchange Commission of Pakistan,

exemption for merger could not be allowed. High Court in exercise of Constitutional jurisdiction, declared that the notification had no consequence and merger/amalgamation was illegal and the same was set aside.

6). 2012 CLC 1854 (C.P.C.)

Aftab A. Sheikh vs. Trust Modarba,

Mr. Justice Muhammad Khalid Mehmood Khan and Muhammad Ameer Bhatti, JJ

Where special statute provides application of CPC without debarring any provision thereof, then the whole CPC would become applicable thereto (p. 1860).

7). PLD 2012 Sindh 473 (C.P.C.)

Khalid Majeed vs. Sea Breeze Limited,

Mr. Justice Faisal Arbab and Irfan Saadat Khan, JJ

Two points were discussed in this judgment:

- (a) that when revisional court passes an order, the order of trial judge would merge in order of revisional court and only the order of revisional court can be challenged (at p. 475);
- (b) a decree passed by the High Court was challenged u/s 12(2) CPC. Due to enhancement of pecuniary jurisdiction of district Court, the case was transferred to the district court. It was argued that the order passed by the High Court could not be set aside by the district court. This argument was over-ruled and it was held that the High Court while hearing suit at its original side was using powers of district court and thus the transfer of case to district court was lawful and said transferee court can pass any appropriate order u/s 12(2) CPC (at p. 476).

8). 2012 MLD 1778 (C.P.C.)

Hayat Ahmad Khan vs. Sameena Muzzam,

Mr. Justice Nasir Saeed Sheikh, J

While relying on CPLA 48-L of 2005 decided by the august Supreme Court of Pakistan, it has been held that mere filing of

CPLA before the august Supreme Court of Pakistan is no ground for staying the execution petition.

9). 2012 MLD 1736 (C.P.C.)

Abdul Hameed vs. Muhammad Giyas Sajid,

Mr. Justice Nasir Saeed Sheikh, J

Limitation for setting aside ex-parte proceedings against judgment/decree passed under Order XXXVII CPC will be governed under Rule (4) of said Order and not under Order IX Rule 13 CPC (at pp. 1740-41). Further held on the authority of 2006 SCMR 631 that if defendant has absented himself after joining the proceedings, he has to make out a case of 'special circumstances' for setting aside ex-parte judgment/decree even if he moves application for setting aside the judgment/decree within prescribed period of limitation (at p. 1741).

10). 2012 SCMR 1912 (Cr.P.C.)

Muhammad Iqbal @ Lali Sarwar vs. Muhammad Iqbal,

Mr. Justice Asif Saeed Khan Khosa, Ejaz Afzal Khan, Ijaz Ahmed Chaudhry, Gulzar Ahmed and Muhammad Athar Saeed, JJ

Private complaint--- Summoning of accused---Leave to appeal was granted to consider the question as to whether upon summoning of accused by Trial Court in a case arising out of a private complaint accused person needed to apply for bail in terms of Ss.496, 497 & 498, Cr.P.C. or in such a situation he was to submit a bond for his appearance before the Trial Court under S.91, Cr.P.C.

11). 2012 MLD 1795 (Family Laws)

Shabnam Bibi vs. Khan Badshah,

Mr. Justice Mazhar Alam Khan Miankhel and Fazal-i-Haq Abbasi, JJ

It has been held that though the provisions of CPC are not applicable in family matters, but the procedure provided in CPC to achieve the ends of justice can well be adopted by the Courts (at p. 1798) and that if during pendency of appeal suit has been

withdrawn partly, a fresh suit will not be barred under the principles of res judicata (at p. 1798).

12). PLD 2012 Sindh 486 (Land/Building Laws)

Owais Iqbal Balouch vs. Raheel Rinch,

Mr. Justice Muneeb Akhtar, J.

The Karachi Building Control Authority has allowed and regularized a construction of town houses on a plot originally meant for construction of bungalow/house.

Relying on the rule laid down in Abdul Razzak's case (PLD 1994 SC 512), Multiline Associates' case (PLD 1995 SC 423) and Costa Livina's case (1999 SCMR 2883), it was held that the building authorities have no discretion to regularize any change or alteration in the complexion or character of a plot (at p. 497). The judgment also provides that 'independent' and 'separate' are two different connotations for building laws (at p. 496).

13).2012 MLD 1907 (Land/Building Laws)

Saleh Muhammad vs. Baz Muhammad,

Mr. Justice Qazi Faez Isa and Abdul Qadir Mengal, JJ

Mutation entries are not equal to title as they are only meant for fiscal purposes.

14).2012 CLD 1754 (Negotiable Instrument)

Rana Muhammad Ikram vs. Mehran Fertilizers,

Mr. Justice Nasir Saeed Sheikh, J

Plea raised by defendant was that plaintiff relied upon "Iqrarnama", which was not a "promissory note"

The term "Iqrarnama" is exactly the vernacular translation of the term "promissory note" as it refers to an unconditional assurance or undertaking to pay a specified amount at a fixed or determinable future time to the other side.

15). 2012 CLC 1829 (Rules Of Interpretation)

Jahangir Moghul vs. Karachi Gymkhana,

Mr. Justice Munib Akhtar, J.

The question of interpretation of a document such as Club Rules is a matter which cannot be ousted even by contract between the two parties. It has been held: "...the jurisdiction of the courts cannot be ousted in relation to authoritatively pronouncing upon the legal meaning and interpretation of a document such as the Rules." (at p. 1837). The judgment relies on *Lee v Showmen's Guild of Great Britain*, (2) ([1952] 1 All E.R. 1181) wherein Denning, L.J. has aptly remarked:

"If parties should seek, by agreement, to take the law out of the hands of the courts and into the hands of a private tribunal, without any recourse at all to the courts in case of error of law, then the agreement is to that extent contrary to public policy and void".

16).PTD 2012 Lhr.1815 (Tax Laws)

Messrs Chenone Stores Ltd etc. vs. Federal Board of Revenue etc.,

Mr. Justice Syed Mansoor Ali Shah, J

The weight of legislative history and judicial pronouncements support an audit system based upon objective criteria, unless legislature lays down specific power to select with a pre-fixed objective criteria, as in the past, the Commissioner has no power to select a taxpayer for audit under the present scheme of section 177.

DOCTRINE OF READING DOWN

".... Reading down meanings of words with loose lexical amplitude is permissible as part of the judicial process. To sustain a law by interpretation is the rule.... Courts can and must interpret words and read their meanings so that public good is promoted and power misuse is interdicted. As Lord Denning said: "A judge should not be a servant of the words used. He should not be a mere mechanic in the power house of semantics'...."

FOREIGN JUDGEMENTS

a).USA

The Supreme Court Allows Equal Copyright Treatment of Foreign Authors in Golan vs. Holder, 565 U.S. (2012).

Against the backdrop of legislative activity in the Congress aimed at curbing online piracy of copyrighted works, the Supreme Court has ruled in favor of an existing law that strengthens the protection of U.S. copyright works overseas by adherence to global treaties. In affirming the constitutionality of section 514 of the 1994 Uruguay Round Agreements, which codified the extension of copyright coverage to works still protected in their own countries but not in the United States, the Court ruled against the petitioners, including orchestra conductors, musicians, publishers and others who formerly enjoyed free access to works that section 514 removed from the public domain. The two main arguments against the application of the Act in the case were that restoring copyright violates the "limited time" language of the United States Constitution's Copyright Clause, and that restoring to copyright works that had passed into the public domain interferes with the peoples' First Amendment right to use, copy and otherwise exploit the works and to freely express themselves through these works, thus also violating the Constitution's Copyright Clause.

The US Supreme Court held that Section 514 of the Uruguay Round Agreements Act does not exceed Congress's authority under the Copyright Clause, and the court affirmed the judgment of the lower court by 6-2, with the opinion written by Justice Ginsburg. The practical effect of the decision is to confirm that works once free are no longer in the public domain and are subject to use only with the permission of the copyright holder, such as through paid licensing.

b).UK

i) Seldon vs. Clarkson Wright & Jakes [2012] UKSC 16

The Supreme Court has handed down an eagerly awaited judgment that considers when it is justified to require a person to retire. The case confirms that employers (or partnerships) can, in principle, justify a retirement age. In order to do so however, they must be able to identify an aim or aims that are not only about business issues such as increased competitiveness or reduced cost, but also point to broader 'social policy' considerations such as inter-generational fairness or preserving the dignity of older workers.

The retirement age must, in practice, achieve what the business has identified as its aims – this means that the age of 65 may not be the right one for all businesses, or all parts of the same business.

The nub of the case is when and in what circumstances an employer or partnership can require a person to retire without risking a finding that it has unlawfully discriminated because of age. Age discrimination law, which is contained in the Equality Act 2010, permits discrimination because of age where this is 'a proportionate means of achieving a legitimate aim'.

In a case involving the justification of direct age discrimination, such as retirement, an aim will only be legitimate if there is something in it that has a broad social policy objective. It is not enough to point to the specific objectives of the business such as increasing competitiveness or reducing cost. (In contrast, 'indirect discrimination' may be justified by particular business considerations that do not include these broader objectives.) The first two aims put forward by Clarkson Wright & Jakes, staff retention and workforce planning, were

related to the legitimate social policy aim of sharing out professional employment opportunities fairly between the generations. The third, limiting the need to expel partners by way of performance management, was related to 'dignity' aims accepted in some of the European cases.

The aims also could be related to the particular needs of the business; in effect, they made commercial sense in the context of a law firm partnership. The question of whether the age of 65 was the right age to choose should be looked at again by the tribunal. Whether a retirement age is justified is one question, whether this age is justified is another.

ii) *R (Guardian News and Media Limited) vs. City of Westminster Magistrates' Court* ([2012] EWCA Civ 420)

The case is a landmark decision for open justice and the media's ability to access court documents. Drawing on a broad survey of domestic, European and international materials, the Court of Appeal overturned the Administrative Court and upheld the existence of an inherent common law power to order disclosure of documents which have been placed before a judge and referred to in open proceedings.

In an era in which litigation has become increasingly document-heavy, the judgment provides an important fillip to investigative journalism and meaningful reporting of court proceedings. It also offers an interesting talking point in the ongoing debate about transparency and the legal process.

c).AUSTRALIA

ACCC v Google Inc [2012] FCAFC 49

The Federal Court of Australia held that Google Inc. was in breach of section 52 of the Trade Practices Act 1947 (TPA) by way of publishing misleading advertisements of third parties which were displayed as 'sponsored links' on the Google Australia website. Sponsored links are

advertisements created by, or at the direction of advertisers who are willing to pay Google for text which directs user traffic to their web pages. The principal issue on appeal was whether Google had engaged in misleading and deceptive conduct as a result of displaying an advertiser's web address, or URL, in the sponsored link which appeared in response to an enquiry made of the Google search engine by search terms which consisted of or included the name of a competitor of the advertiser.

The Australian Competition and Consumer Commission ("ACCC") argued that such conduct amounted to a misrepresentation of a commercial affiliation between the advertiser and its competitor by displaying the advertiser's web address in collocation with information concerning the competitor.

Google's primary position was that Google was not responsible for the misleading effect of the displayed response because it was apparent to the user that Google was no more than a conduit for the advertiser.

d).INDIA

(2012) 6 SCC 1

Society for Unaided Private Schools of Rajasthan vs. Union of India,

In a decision which is likely to have far-ranging consequences in the field of education, the Supreme Court upheld the constitutional validity of the Right of Children to Free and Compulsory Education Act, 2009 (RTE Act). The RTE Act is applicable to children between the age of six and fourteen. The SC Bench in its judgment, which is prospective in nature, has mandated all government and private unaided schools to reserve 25 per cent of their seats for economically backward students.