



MONTHLY CASE LAW UPDATE

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CONSTITUTION

- 1) Pakistan Defence Officers' Housing Authority etc. vs. Lt. Col. Syed Jawaid Ahmed
(2013 SCMR 1707)

Tassaduq Hussain Jillani, Nasir-ul-Mulk, Asif Saeed Khan Khosa, Sarmad Jalal Osmany and Amir Hani Muslim, JJ

In this judgment court, while dealing with cases of number of employees of different statutory corporations and autonomous bodies, applied "function test" to bring forth the real character of these organizations and after discussing relevant cases on the subject laid down following principles of general application:

The principles of law which can be deduced from the foregoing survey of the precedent case-law can be summarized as under:--

(i) Violation of Service Rules or Regulations framed by the Statutory bodies under the powers derived from Statutes in absence of any adequate or efficacious remedy can be enforced through writ jurisdiction.

(ii) Where conditions of service of employees of a statutory body are not regulated by Rules/Regulations framed under the Statute but only Rules or Instructions issued for its internal use, any violation thereof cannot normally be enforced through writ jurisdiction and they would be governed by the principle of 'Master and Servant'.

(iii) In all the public employments created by the Statutory bodies and governed by the Statutory Rules/Regulations and unless those appointments are purely contractual, the principles of natural justice cannot be dispensed with in disciplinary proceedings.

(iv) Where the action of a statutory authority in a service matter is in disregard of the procedural requirements and is violative of the principles of natural justice, it can be interfered with in writ jurisdiction.

(v) That the Removal from Service (Special Powers) Ordinance, 2000 has an overriding effect and after its promulgation (27th of May, 2000), all the disciplinary proceedings which had been initiated under the said Ordinance and any order passed or action taken in disregard to the said law would be amenable to writ jurisdiction of the High Court under Article 199 of the Constitution.

In this judgment august court has also laid down five rules for resolution of conflict of judicial opinion and has elaborated the role of judge in this regard as follow:

In an attempt to resolve a conflict of judicial opinion, this Court must keep in mind: first the purpose of law the Court is called upon to interpret; second that law is a living organism which adapts to societal change and sometimes change in law precedes the former; third the ambit of court's jurisdiction and its limitations as defined in the Constitution; fourth the Court must be consistent i.e. in similar situations/cases, the judicial opinion will be similar; fifth though the Supreme Court is not bound by the principle of stare decisis, but the departure from the precedent should be well reasoned, proper and in accordance with the established principles of law. A Judge's role is to interpret the law and to correct its mistakes. The twin role of a

developer in law and an earnest interpreter of legislation, though challenging, is in accord with the role the Supreme Court has in the constitutional scheme as also consistent with society's perceptions of the role of judiciary in a liberal democracy....

2) In Re: Contempt Proceedings Against Chief Secretary, Sindh etc.

(2013 SCMR 1752)

Tassaduq Hussain Jillani, Asif Saeed Khan Khosa and Amir Hani Muslim, JJ

Scope of the constitutional courts to examine vires of enactment suo moto:

...if this Court is of the view that impugned enactment is violative of fundamental rights guaranteed under the Constitution, it can examine the vires of such an enactment either on its own or on an application/petition filed by any party....

In above judgment while explaining the term "life" and "liberty" in Article 9 of the Constitution, court held as under:

...The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The term "life" includes 'reputation' 'status' and all other ancillary privileges which the law confers on the citizen. A civil servant is fully protected under Article 9 and cannot be deprived of his right of reputation and status...

The august Court further laid down the impact of unconstitutionality declared by the court and held:

...It goes without saying that a repugnancy to the Constitution declared by this Court or a High Court cannot be validated or condoned by a legislature unless the Constitution is itself amended...

3) Syed Feroze Shah Ghillani vs. Federation of Pakistan etc.

(PLD 2013 Lahore 659)

Before Umar Ata Bandial, C J

In this judgment court highlighted the constitutional importance of Council of Common Interest(CCI) and discussed direct impact of shortage of water and electricity on right to life and directed Federal Government in the light of decision of CCI to take necessary steps to implement the Kalabagh Dam Project:

The Constitution of Pakistan confers a pre-eminent position to the CCI to formulate and regulate policies for the Federation in relation to a number of subjects, including, Water and Power. A decision of the CCI has obligatory effect unless the same is modified by Parliament at the instance of the Federal Government under Article 154(7) of the Constitution. In the present day of shortage of available electric power in the national grid, scarcity and depletion of irrigation water resource for arable land in the country and the frequent occurrence of floods in the Indus riverine basin has adversely affected the quality and security of life of the citizen in the Province of Punjab and the country as a whole. The resulting degradation in the quality and conditions of life of the affected citizen violates their fundamental rights guaranteed under Articles 9 and 25 of the Constitution.

In the circumstances ...the Federal government is directed that in the performance of its duty under Article 154 of the Constitution, it shall in letter and spirit take steps to implement the decisions of the CCI dated 16-9-1991 and 9-5-1998 regarding Kalabagh Dam.

4) Landireno Pakistan (Pvt) Ltd. etc. vs. Federation of Pakistan etc.

(2013 P T D 658)

Mushir Alam, C.J. and Muhammad Shafi Siddiqui, J

While entertaining petition under Art 199 dilating upon the scope of interference in policy decisions by High Court in constitutional jurisdiction, it was held that in matter of policy decisions, the Government is the best judge and it is not for the High Court to sit on the policy matters, unless those appear to be violative of constitutional guarantees, arbitrary, mala fide or on account of colourable exercise of power.

ELECTION LAWS

5) Ch. Zahid Iqbal vs. Returning Officer NA-162 (Sahiwal--III) etc.

(2013 C L C 1856)

Ijaz ul Ahsan, Syed Mansoor Ali Shah and Sayyed Mazahar Ali Akbar Naqvi, JJ

In this case while dealing with pre-election disputes regarding qualification and disqualification on the basis of conviction a distinction was drawn between conviction and sentence as under:

We, therefore, hold that there is distinction between conviction and sentence. Suspension of sentence does not mean automatic suspension of conviction also. There is however no bar on the power of the Appellate Court under section 426 to suspend sentence and also suspend the conviction in appropriate cases where an application is moved before such court if the adverse consequences of maintaining such conviction are brought to the notice of the Appellate Court and a specific prayer in this regard.

6) Rao Naeem Sarfaraz vs. Election Commission of Pakistan etc.

(PLD 2013 Lahore 675)

Syed Mansoor Ali Shah, J

In this case court while interpreting Article 224(4) of the Constitution, laid down the minimum period before which by election can be held on a vacant seat of National assembly and provincial assembly:

What then is the wisdom and scheme of the Constitution in providing these timelines? Let us take a hypothetical situation where the seat of a member of Assembly falls vacant on 120th day from the date of expiry of the Assembly. Under Article 224(4) the Bye-Elections have to be held within 60 days from the occurrence of the vacancy. If "Election" is to cover the "entire process culminating in a candidate being elected" as per Javaid Hashmi's Case (PLD 1989 SC 396), the remaining period of 60 days is available for the returned candidate to sit in the Assembly and represent the constituency. However, closer look of sub-Articles 224(1) and 224(2) of the Constitution read with Section 42 of ROPA show that the term "election" does not include the time spent in the announcement of the result of the election for which an extra period of 14 days has been envisaged in the above sub-Articles. Therefore, a period of 74 days (60 days + 14 days) is spent on electing a candidate against a vacant seat and the remaining period for the returned candidate to sit in the Assembly and represent the constituency is reduced to 46 days (i.e., 120 days -74 days = 46 days). The constitutional mandate under Article 224 (4) of the Constitution appears to be that unless 46 days or more are available for a candidate to sit in the Assembly, Bye-Elections cannot be held.

SERVICE LAWS

7) M. Nazir Ahmad vs. Muhmmad Aslam

(NLR 2013 Revenue 81)

Mian Saqib Nisar and Muhammad Ather Saeed, JJ.

Appointment to a Post---

“--- if an applicant who does not cross a threshold of qualification or if there is an impediment in his way for the appointment on the date of application has applied in time, but while the matter is being processed and scrutinized and before the final decision is take by the first revenue forum, such applicant either crosses the threshold or removes the hurdle in his way, such person notwithstanding the ineligibility on the date of application should be considered by the revenue authorities for the assignment---

TRADE MARK LAWS

8) Messrs Golden Thread Industries etc. vs. J & P Coats Limited Company etc.

(2013 C L D 1945)

Mushir Alam, C.J. and Sadiq Hussain Bhatti, J

It was observed that in the circumstances where there is resemblance in packing of products an action for 'passing off' and not of "infringement" of the registered trade mark would be competent. There is no doubt that colour per se cannot be a trade mark. However, where colours have been formed into device or devices or where device or devices are used in a backdrop of any colour combination, mark as a whole may form a distinctive mark. A particular colour scheme played vital part in identification of a product and it was particularly so when such product was used mainly by illiterate persons as it might cause confusion in the mind of unwary purchaser.

ARBITRATION ACT

- 9) Fauji Foundation etc. vs. Messrs Chanan Din and Sons etc.

2013 C L D 2167

Ijaz Ahmad and Ali Baqar Najafi, JJ

The court commented that neither court nor arbitrator was competent to enlarge scope of contract or application made under S.20 of Arbitration Act, 1940. Further observing that Arbitrator's function was not to be influenced by his imagination and opinion, rather he was obliged to apply agreed clauses of contract between parties. Consequently, court while examining correctness and legality of award could neither act as a court of appeal nor undertake reappraisal of evidence recorded by Arbitrator in order to discern error or infirmity therein.

CRIMINAL PROCEDURE CODE

- 10) Faysal Bank vs. Justice of Peace

(2013 C L D 2133)

Abdus Sattar Asghar and Shujaat Ali Khan, JJ

It was observed by the Division bench that in case of special law and a general law on the same subject, the special law would prevail, since it evinced legislative intent more objectively and specifically than the general law. Further held that bank was debarred from getting criminal case registered under S.489-F, P.P.C. to redress its grievance through speedy remedy of its choice.

Not every defeat of authority is a gain for individual freedom, nor every judicial rescue of a convict a victory for liberty.

Jackson, Robert H., "The Task of Maintaining Our Liberties,"

COMPANY LAWS

- 11) COMPANIES ORDINANCE, 1984 FOR CONFIRMING THE REDUCTION IN CAPITAL: In the matter of

(2013 C L D 2156)

Muhammad Ali Mazhar, J

The court explained the principles to be observed while allowing reduction in share capital of company which comprise, inter alia, whether shareholders had been treated equitably, whether the reduction proposals had been properly explained, whether creditors or third party interests had been prejudiced and whether the reduction had a discernable purpose.

Further held that court generally required the company to use the words "and reduced" as part of its name after capital reduction and to publish the same in newspapers for the sake of public's knowledge of the reasons for the reduction in share capital but such condition may be dispensed with if reduction did not involve diminution of any liability in respect of unpaid share capital or payment to any shareholder of any paid-up capital.

- 12) Jahangir Siddiqui etc. vs. Azgard Nine Limited etc.

(2013 C L D 1953)

Muhammad Khalid Mehmood Khan, J

It was held that petition under S.160-A of the Companies Ordinance, 1984, envisaging the circumstances in which proceedings of general meeting may be declared invalid, will only be maintainable in the case of a concluded meeting. High Court held that after the conclusion of the Annual General Meeting of the company, two remedies could be availed, one under Ss.160-A and the other under 179, whereby one could challenge the legality of the Annual General Meeting as a whole or could challenge the election of the Directors.

BANKING LAWS

- 13) Meezan Bank Limited vs. Messrs Focus Apparels (Pvt.) Ltd. Etc.

(2013 CLD 2138)

Muhammad Ali Mazhar, J

It was held that contract of guarantee could not be enforced unless there was some consideration for the guarantee and the contract of guarantee must be based on consideration and if the consideration so specified was not brought on record, then court could not assume such consideration. It was observed inter alia, vast difference existed between a "guarantor" and a "mortgagor". Mere mentioning of the words in the guarantee that the same "would be binding on successors-in-interests" would have no significance and the legal heirs could not be held responsible unless they agreed to the covenant made in the guarantee by their predecessors-in-interest in their absence. Condition of S.131 of the Contract Act, 1872 "in absence of any contract" did not mean to hold responsible legal heirs of a deceased guarantor.

- 14) Bank of Punjab etc. vs. Messrs AMZ Ventures Limited etc.

(2013 CLD 2033)

Mushir Alam, C.J. and Sadiq Hussain Bhatti, J

It was stated that for assailing interlocutory orders passed under Banking laws, no right of appeal vests in litigant and is specifically barred. Although High Court has wide powers to treat appeal as petition under Art.199 of the Constitution and likewise a petition can be converted into appeal subject to limitation and jurisdiction but appeal against interlocutory order cannot be converted into constitutional petition because statute has excluded right of appeal from interim order and the same cannot be bypassed by bringing under attack such interim orders in constitutional jurisdiction.

Party affected has to wait till it matures into a final order and then to attack it in proper exclusive forum created for the purpose of examining such orders. Resort cannot be made to revisional and appellate jurisdiction of Civil Procedure Code, 1908, or to constitutional jurisdiction by filing petition under Art.199 of the Constitution to circumvent such specific bar under banking law.

FINANCIAL INSTITUTIONS (RECOVERY OF FINANCE) ORDINANCE

- 15) Gulistan Textile Mills Ltd. vs. Askari Bank Ltd.

(PLD 2013 Lahore 716)

Syed Mansoor Ali Shah, J

In this case court while laying down the standard of plaint and cause of action in suit under Section 9 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 held as under:

Any such narration of facts also fails to muster the cause of action required under the Ordinance. A non-actionable plaint is a non-starter. In the interest of administration of justice and good judicial governance, it is best if such a plaint, which does not disclose a cause of action is removed from the docket of the Court at the earliest....

Man contrives machines that turn out countless duplicates; but nature is not a machine, Change is the one constant in this living word, the essential element of life.

Editorial, "Change," The New York Times, May 7, 1967.