

HCJDA-38

JUDGMENT SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

ICA No. 13108 of 2023

Mrs. Shehla Tariq Saigol

Vs.

Federation of Pakistan and 03 Others.

JUDGMENT

<i>Date of hearing</i>	<i>13.05.2024</i>
<i>Appellant by</i>	<i>Raja Hamza Anwar, Mr. Ali Talib, Mr. Hammad Amin, Mr. Muhammad Shabbir Hussain, Malik Ahsan Mahmood, Mr. Faisal Rasheed Ghouri, Mr. Ahsan Bashir, Mr. Shehraz Alam Mannoo, Mehwish Alam Elahi, Khalid Bashir, Mr. Danish K. Mannoo, Mr. Jahangir Khan Mannoo, Mr. Omer Iqbal Khawaja, Mr. Ibrahim Haroon, Mr. Muhammad Muqaddam Sukhera, Mr. Muhammad Mansha Sukhera, Mr. Zeeshan Asif, Mr. Ali Sibtain Fazli, Mr.</i>

	<i>Hasham Ahmad Khan, Mr. Abad-ur-Rehman, Mr. Muhammad Umer Tariq Gill, Mr. Isa Ahmad Jalil, Mr. Kairan Hussain Mir, Barrister Saif ul Hassan, Barrister Muhammad Abubakar, Ch. Wasim Akram, Malik Nadir Ali Sherazi, Muhammad Usman, Mr. Wasim Ahmad Malik, Mr. Iftikhar Nawaz Gujjar, Hafiz Tanveer Nasir, Syed Nawazish Hussain, Barrister Shehryar Kasuri, Mr. Jamshid Alam, Muhammad Usama, Mr. Ghias Ahmad, Mr. Tariq Rashid, Malik Tanvir Ahmad Awan, Mr. Shahbaz Butt, Mr. Asif Imran Awan, Malik Bashir Ahmad Khalid, Mr. M. A. Rizwan Kamboh, Syed Naveed A. Andrabi and Mr. Sharjeel Tareef, learned Advocates.</i>
<i>Respondent No. 1 by</i>	<i>Mr. Asad Ali Bajwa, learned Deputy Attorney General, Mr. Haroon-ul-Rasheed Mir, Mr. Muhammad Nasim Saqlain, Mr. Muhammad Mansoor Ali</i>

	<i>Sial, learned Assistant Attorney Generals.</i>
<i>Respondents No. 2 and 3</i>	<i>Barrister Ahmad Pervaiz, Syed Muhammad Ijaz, Mr. Muhmmad Imran Khan, Mr. Fahim Khadim, Mr. Qaisar Mahmood Sra, Mr. Shahraiz Khan Gill, Mr. Naeem Khan, Mr. Muhammad Danish Zuberi, Barrister Ali Umrao, Barrister Scheherozade Sheeryar. Mr. Jawad H. Tarar, Mr. Asif Ahad, Mr. Mohsin Majeed, Ch. Muhammad Yasin Zahid, Ch. Muhammad Ashfaq Bhullar, Rana Muhammad Afzal, Syed Muhammad Baqir Ali, Mr. Ikhlq Ahmad, Mr. Anas Irtiza Awan, Ms. Humaira Bashir, Malik Abdullah Raza, Mr. Shahzad Ahmad Cheema, Mr. Ibrar Ahmed, Mr. Muhammad Bilal Munir and Mr. Omer Habib Khan, Mr. Falak Sher Khan and Mr. Shahzad Ahmad Cheema, learned Advocates.</i>
<i>Respondent No. 4 by</i>	<i>Mr. Salman Asif Warraich, learned Assistant Advocate General.</i>

SULTAN TANVIR AHMAD, J:- The captioned intra court appeal, under section 3 of the Law Reforms Ordinance-1972 as well as the appeals as detailed in *schedule 'A'* to this judgment, have been filed against judgment dated 22.12.2022 passed by the learned Judge-in-Chamber. Upon hearing the appeals the learned Judges of the Division Bench reached to different conclusions on certain issues. As a result thereof, the cases have been referred with the following:-

Terms of reference:-

- *Can power under Order XLI, Rule 33 CPC be exercised without notice to the parties and without opportunity of hearing and whether the judgment of the learned Single Judge could be upset by exercise of these powers?*
- *Can the power under O.XLI, R. 33 CPC be exercised unilaterally by one member of a Division Bench hearing the appeal.*
- *If the answer to the above is in the affirmative, can the constitutionality of S.8(2)(b) of the 2022 Act be upheld by invoking Art. 141 of the Constitution in ignorance of entry 50 of the Fourth Schedule to the Constitution.*
- *Has the levy under S.8(2)(b) been imposed on*

a resident individual or a foreign asset.

2. The first two terms of reference relate to power of Court of Appeal under Order XLI, Rule 33 of the Code of Civil Procedure, 1908 (the '**Code**'). The relevant portion of the rule, which was introduced in the *Code* by Amendment Act IX of 1922¹, reads:-

*“33. Power of Court of Appeal.--The appellate Court shall have power to pass any decree and **make any order which ought to have been passed** or made and to pass or make **such further** or other decree or order **as the case may be require**, and this power may be exercised by the Court **notwithstanding** that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, **although such respondents or parties may not have filed any appeal or objection.**”*

(Emphasis supplied)

3. Prior to above amendment, under Rule 22 of Order XLI of the *Code*, it was incumbent for the non-appealing party to file cross-objection in manners prescribed therein. The above reproduced rule permits the Court of Appeal to make an order which ought to have been passed by the Court of first instance but not passed and to make such further order as the case may require. The words used “*the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection*” start with “*notwithstanding*”.

¹ Civil Procedure (Amendment) Act, 1922

The legislature has also used affirmative wording enabling the Courts of Appeal to pass order that should have been passed and also vitalized it by using *non-obstante* clause.

4. The language used is indicative of the intention of legislature to confer extensive power upon Court of Appeal to make order as the case may require, irrespective of filing appeal by a respondent or cross objection. Reading of Order XLI Rule 33 of the *Code* itself is convincing enough as to wide powers of Court of Appeal permitting to make orders that may be necessary for doing complete justice in a particular case. The Supreme Court of Pakistan in “Messrs S. M. Yusuf & Bros Versus (1) Mirza Muhammad Mehdi Pooya, and (2) Amanullah Kirmani”² has already ruled:-

"We have accordingly referred to earlier judgment of the same Court in the earlier case of Bakhsh Illahi & Sons to examine the arguments there set out. Four precedent judgments are cited. From three of them, which are mentioned without reference to their particular facts, general propositions are extracted to the effect that the power given by the rule is widely expressed and must be applied with discretion, where interference is required "to adjust the right of the parties in accordance with justice, equity and good conscience" or where the failure to exercise the power "would lead to impossible, contradictory and unworkable orders". These particular considerations un-doubtedly are circumstances which would justify the exercise of the discretion conferred by the rule, but it is right that we should say that if these propositions are to be understood as limiting

² PLD 1965 Supreme Court 15

the exercise of the power within the circumstances specified, they would be in excess of the power given to the Courts to interpret and apply a rule express in such wide terms as is rule 33. The rule confers unfettered discretion, and anything expressed in negative or restrictive terms, affecting its application, must be accepted as applying only to the particular facts of the case to which the rule is being applied by interpretation. Such an interpretation cannot be extended to all or any other cases, for, in each one, the application of the rule must be made beneficially, and in accordance with the relevant facts.”

(Emphasis supplied)

5. In “Ranjana Prakash and Ors Versus The Divisional Manager And Anr”³ it is observed that Order XLI Rule 33 of the Code can also be pressed into service to make an award more effective or maintain an award on grounds other than invoked by a learned Court in the order under appeal. Paragraph No. 7 of the said judgment reads as under:-

“7. This principle also flows from Order 41 Rule 33 of the Code of Civil Procedure which enables an appellate court to pass any order which ought to have been passed by the trial court and to make such further or other order as the case may require, even if the respondent had not filed any appeal or cross-objections. This power is entrusted to the appellate court to enable it to do complete justice between the parties. Order 41 Rule 33 of the Code can however be pressed into service to make the award more effective or maintain the award on other grounds or to make the other parties to litigation to share the

³ 2012 AIR SCW 848

benefits or the liability, but cannot be invoked to get a larger or higher relief. For example, where the claimants seeks compensation against the owner and the insurer of the vehicle and the Tribunal makes the award only against the owner, on an appeal by the owner challenging the quantum, the appellate court can make the insurer jointly and severally liable to pay the compensation, along with the owner, even though the claimants had not challenged the non-grant of relief against the Insurer"

(Underlining is added)

6. In “Mst. Bibi Fatima Versus Muhammad Sarwar”⁴, while discussing powers of Court of Appeal to grant relief to non-appealing parties, the Honourable Supreme Court has held that *the appellate court is empowered, in the interest of justice, to allow appropriate relief to non-appealing parties where the appeal is with regard to whole of the decree in terms of Order XLI, Rule 33, CPC. The Court has also inherent powers under section 151, CPC, to make such orders, as may be necessary for the ends of justice and to prevent the abuse of the process of the Court. These are all enabling provisions; the powers thereunder can be exercised by the Court to cover ostensibly impossible situations, for complete dispensation of justice, for which C.P.C. has been designed, but despite the best efforts of the draftsman, to cater for all possible situations, if it is found lacking in meeting some eventualities, the Court can act ex delicto justitiae, supply the omission in the procedure, adopt methodology, for effectually carrying out the purpose.*

⁴ 2022 SCMR 870

7. Now I would like to engage in remaining aspects of the first two terms of reference regarding notice to the parties or opportunity of hearing before utilizing powers under Order XLI, Rule 33 of the *Code* as well as unilateral exercise of power under the said rule. Report and para-wise comments filed by respondent No. 2 / Federal Board of Revenue, before the learned Judge-in-Chamber, more specifically paragraphs No. (ii), (iii) and (vi), reflect that the said respondent has raised plea as to the deficiency of powers of the Provinces to make laws having extra-territorial operation as well as prayed to uphold constitutionality of section 8(2)(b) of the Finance Act, 2022 (the '*Act of 2022*') on the basis of powers confers upon the Parliament under Article 141 of the Constitution of the Islamic Republic of Pakistan, 1973 (the '*Constitution*'). Careful reading of the report and para-wise comments, indeed, reveals that this remained the main focus of the said respondents before the learned Judge-in-Chamber.

8. The above submissions made by the learned counsel for the respondents are also captured by the learned Judge-in-Chamber as reflected from paragraph No. 8 of the judgment questioned before the learned Division Bench. The arguments to this effect are also addressed in the operative part of the judgment. The entire material, including the discussed part of the report and para-wise comments, was before the Honourable Division Bench. Paragraph No. 7 in one of the judgments, given by one of my learned brothers (*Anwaar Hussain, J*), confirms that the question as to not filing cross-objections or challenging the

judgment passed by the learned Judge-in-chamber was raised, considered and then dealt with. It cannot be said that the appellants were not having notice as to the ground set-up in defense to the petitions or the appellants were not afforded hearing *vis-à-vis* the points that remained under discussion, which clearly include Article 141 of the *Constitution* and its potential effect on the relevant provisions of the *Act of 2022*.

9. It is already discussed in material detail that Order XLI Rule 33 of the *Code*, notable falling under the sub-topic / heading of the “Judgment-in-Appeal”, effectively empowers the Court of Appeal with wide powers to make orders which ought to have been passed or make such further order as the case may require for doing complete justice, notwithstanding that appeal is directed against a part of decree, in favour of all or any of the parties and even if such parties or respondents have not filed appeal or cross-objection. The power, bestowed upon Courts of Appeal, so strongly worded and using *non-obstante* clause prior to “....*although such respondents or parties may not have filed any appeal or objection*”, cannot be visualized so narrowly; and when the defense set-up by the respondents as well as their arguments on the particular issue are duly documented by the learned Judges, no question to exercise of any unilateral power by one member of worthy Division Bench arises, either. Even, the learned counsel for the parties, while assisting this Court, have not shown disagreement as to this precise proposition.

10. Now it is proper to examine sub-sections (1), (2)(b), (4)(g) and (13)(c) and (f) of section 8 of the Act of 2022, which read as under:-

8. Capital value tax 2022. –

1. *A tax shall be levied, charged, collected and paid on the value of assets at the rates specified in the First Schedule to this section for tax year 2022 and onwards;*

Provided that the tax shall be charged from the 1st day of July, 2022 in case of motor vehicles held in Pakistan.

2. ***Capital Value Tax shall be charged on the following assets-***

*(b) **foreign assets of a resident individual** where the value of such assets on the last day of the tax year in aggregate exceeds **Rupees one hundred million**; and*

4. *The Tax shall be collected or paid in following manner, namely:-*

*(g) in case of assets mentioned in clauses (b) of sub-section (2), **the person holding the assets shall be liable to pay tax** at the time the income tax return for the tax year is due in the manner prescribed; and*

13. *In this section-*

*(c) “foreign assets” means any **movable or immovable assets held outside Pakistan, whether directly or indirectly, and includes but not limited to real estate**, mortgaged assets, stock and shares, bank accounts, bullion, cash, jewels, jewelry, paintings, accounts and loan receivables, assets held in*

dependents' name, beneficial ownership or beneficial interests or contribution in offshore entities or trusts; ...

(f) "resident individual" shall have the same meanings as defined in the Income Tax Ordinance, 2001 (XLIX of 2001);

(Emphasis is added)

Even plain reading of the reproduced provisions of the *Act of 2022* makes it profusely clear that the legislature has envisaged this tax to be paid by ***resident individual(s)*** on the ***foreign assets***, which are defined in sub-section 13(c), when such assets have aggregate ***value exceeding rupees one hundred million***. Sub-section 13(f) of the *Act of 2022* provides that resident individual shall have same meaning as given in Income Tax Ordinance, 2001. Now, approaching the constitutionality of section 8(2)(b) the *Act of 2022* and the question if it can be upheld by invoking Article 141 of the *Constitution*. It is apt to reproduce articles 141 and 142 of the *Constitution*, which read as under:-

"141. Subject to the Constitution, Majlis-e- Shoora (Parliament) may make laws including laws having extra-territorial operation for the whole or any part of Pakistan, and a Provincial Assembly may make laws for the Province or any part thereof.

142. Subject to the Constitution---

(a) [Majlis-e-Shoora (Parliament)] shall have exclusive power to make laws with respect to any matter in the Federal

Legislative List;

- (b) *Majlis-e-Shoora (Parliament) and a Provincial Assembly shall have power to make laws with respect to criminal law, criminal law, criminal procedure and evidence;]*
- (c) *subject to paragraph (b), a Provincial Assembly shall, and Majlis-e-Shoora (Parliament) shall not, have power to make laws with respect to any matter not enumerated in the Federal Legislative List;]*
- (d) ***Majlis-e-Shoora (Parliament) shall have exclusive power to make laws with respect to all matters pertaining to such areas in the Federation as are not included in any Province.***

(Emphasis supplied)

11. It is already a settled field by the Supreme Court of Pakistan that when body / provisions of the *Constitution* identify any particular power to legislate, as if it vests with the Parliament or Provincial Assemblies, then reference to legislative entries in the fourth schedule to the *Constitution* is hardly of any consequence. In case titled “Province of Sindh through Chief Secretary and Others Versus M.Q.M. through Deputy Convener and Others”⁵ the Court repelled contentions made at the bar that Parliament can make laws only as mandated under the Federal Legislative List given in the fourth schedule to the *Constitution*, in view of the fact that those powers, on the relevant area in the said case, are given in the body of the *Constitution*. It is ruled that Constitutional intent has to be gathered from the body of the *Constitution* as well and not

⁵ PLD 2014 SC 531

merely the Legislative List. Paragraph No. 62 of the said judgment reads as follows:-

*"62. Since Article 222(b) does not exclude the delimitation of constituencies for local government, and as the body of the Constitution specifies the appropriate legislature which should pass the law, any reference to the provisions of the legislative entries contained in Item 4 of the Fourth Schedule are of no consequence. There are similar provisions in the Constitution qua which there is no corresponding entry in the Federal Legislative List. For example, Article 6 clearly provides that the Majlis-e-Shoora (Parliament) will pass the law for high treason. But there is no corresponding entry in the 4th Schedule prescribing the subject of high treason in the Federal Legislative List. Article 142(c) could not be pressed into service to say that since the 4th Schedule is silent, in terms of Article 142(c), the Provincial Legislature would legislate in respect of high treason. **When the main body of the Constitution provides for the competent legislature it is not necessary to look into the legislative list.** Under Article 87(2), the Majlis-e-Shoora (Parliament) may enact law for condition of service of secretarial staff, whereas in this regard there is no corresponding entry in the Federal Legislative List; that Article 237 empowers the Majlis-e-Shoora (Parliament) to make laws for indemnity; against there is no entry to that effect in the Federal Legislative List; that under Article 253 the Majlis-e-Shoora (Parliament) may make laws pertaining to maximum limits as to property etc; however, there is no corresponding entry in the Federal Legislative List; Article 146(2) states that the Majlis-e-Shoora (Parliament) may enact laws to confer powers of Provinces or their officers, but there is no entry in this regard in the Federal Legislative List; that under proviso to*

clause (2) of Article 212, the Majlis-e-Shoora (Parliament) may make laws in relation to administrative tribunals, however, there is no corresponding entry in the Federal Legislative List; that even though electricity" falls under entry 4 of the Part II of the Federal Legislative List, under Article 157(2)(b) the Provincial Government is empowered to levy tax on consumption of electricity within the Province and that Entry 58 of the Part 1 of the Federal Legislative List, clearly provides that the matters which under the Constitution are within the legislative competence of Majlis-e-Shoora (Parliament) or relate to the Federation, would fall under the domain of the Federal Legislature. In the instant case, as explained above, under the relevant Articles of the Constitution, the subject matters of delimitation and conduct of Local Government Elections fall under the domain of Parliament / Federal Legislature”

(Emphasis supplied)

12. In “Messrs Sui Southern Gas Company Ltd. and Others Versus Federation of Pakistan and Others”⁶ it was observed that from the provisions of the *Constitution* it is clear that the Federal Legislature has extra-territorial authority to legislate but no such extra-territorial authority is assigned to the Provincial Legislature. In this case the Honourable Supreme Court relied on Article 141 of the *Constitution* and reached to the conclusion that Provincial Legislature has no legislative competence to legislate law regulating the trade unions functioning at trans-provincial level. Reproducing a relevant extract from the said judgment will be beneficial:-

⁶ 2018 SCMR 802

".... This interpretation also finds support from the fact that in terms of Article 141 of the Constitution, a Provincial Legislature does not possess extra- territorial legislative competence and therefore, cannot legislate with regard to a subject which in its application has to transcend the provincial boundaries. It is to be noted that as clarified by the learned High Court the resort to Entry No. 58 ibid could only be made to deal with an extra-ordinary situation i.e. when a matter may fall within the legislative competence of the Province but when it comes to its application it has to travel beyond the territorial boundaries of the Province, bringing it into the domain of the Federal Legislation. Thus, it is held that the federal legislature has the competence to legislate relating to the Establishments/Trade Unions functioning at the Federal as well as trans-provincial level."

(Underlining is added)

13. The above judgments were later on relied by the Supreme Court of Pakistan in case titled "Government of Sindh through Secretary Health Department and Others Versus Dr. Nadeem Rizvi and Others"⁷ and it has been observed that it is not necessary to look into legislative list when the main body of the *Constitution* provides the requisite powers. The Supreme Court of Pakistan has recently reiterated the same in case titled "Muslim Commercial Bank Limited Versus Muhammad Anwar Mandokhel and Others"⁸, whereby, while referring to Article 141 of the *Constitution*, following has been observed:-

⁷ 2020 SCMR 1

⁸ 2024 SCMR 298

“....From the above provision of the Constitution, it is abundantly clear that the Parliament has extra-territorial authority to legislate, but the Provincial Legislature has no legislative competence to legislate a law regulating the establishments and industries functioning at the trans-provincial level. Keeping in mind the afore-noted legal position, we have carefully examined the BIRO 2010 and the BIRA 2010 and have found that they do invest the Provincial Labour Court with the authority to adjudicate upon the matters relating to the trans-provincial establishments even if they provide so, it could not sustain under the law.....”

(Underlining is added)

14. The categories or fields falling in the Federal Legislative List, in terms of Article 142(a) of the *Constitution*, are within the exclusive domain of Parliament. The Provincial Assemblies have power to make laws with respect to any matter not enumerated in the Federal Legislative List. Then Article 142(d) of the *Constitution* again gives exclusive powers to Parliament with respect to all matters pertaining to such areas in the Federation as are not included in territorial limits of any of the Province. Meaning thereby, the Parliament has power to make laws given in Federal Legislative List as well as the matters pertaining to such areas which are not included in any Province. Article 141 of the *Constitution* embodies that Parliament has power to make laws having extra-territorial operation for whole or any part of Pakistan and the Provinces can make laws within their territorial limits.

15. The above leaves no ambiguity with regard to

intent of the *Constitution* makers that when it is not within the competence of any of the Province to impose tax in connection with a subject-matter, on account of its restriction of territorial limits, then the Parliament has competence in this regard. The Provincial Legislature can tax immovable property which is located within its territories. Suitable laws exist or have been made by the relevant Provincial Legislative authorities in this regard. However, the tax in question is to be paid by resident individual(s) on their foreign assets, as already defined in sub-section 13(c) of the *Act of 2022*, when such assets have aggregate value exceeding rupees one hundred million. Undisputedly, section 8(2)(b) of the *Act of 2022* refers to assets, which do fall within the territorial limits of the Provinces. It seems that the appellants are attempting to seek complete escape from the tax, by adopting incorrect approach towards Articles 141 and 142 of the *Constitution* and also by misinterpreting entry 50 as to competence of the Parliament to legislate. The interpretation put-forth by the appellants, even otherwise, infringes the settled principle in “M/s Ellahi Cotton Mills LTD and Others Versus Federation of Pakistan through Secretary M/o Finance, Islamabad and 06 Others”⁹ that *the Courts must lean in favour of upholding the constitutionality of a legislation keeping in view that the rule of Constitutional interpretation is that there is a presumption in favour of the constitutionality of legislative enactment unless ex-facie it is violative of Constitutional Provision.*

⁹ PLD 1997 Supreme Court 582

16. I have carefully gone through the judgments of the two Honourable Judges and I am in consonance with the view adopted by my learned brother *Anwaar Hussain J.* Therefore, I am of the opinion that the captioned Intra Court Appeal along-with connected matters are liable to be dismissed. The matter shall now be placed before the Honourable Division Bench for announcement of final decision.

(Sultan Tanvir Ahmad)
Judge

Announced in open Court on 21.06.2024.
Approved for Reporting

Judge

J.A. Hashmi/-