Writ Petitions

VOLUME-III

Pages 897-1402

Peshawar High Court

Islamic Investment Bank --- Appellant/Petitioner (s)

Versus

Security & Exchange --- Respondent (s)

JUDGMENT

WP. No. 732/2004 Date of hearing 02.06.2004

EJAZ AFZAL KHAN J.- Islamic Investment Bank Limited, a Public Limited Company, petitioner herein through the instant petition has questioned the show-cause notice dated 24.10.2001 issued by the Executive Director, respondent No.3 herein and the order dated 23.4.2004 issued by the Commissioner, Securities and Exchange Commission of Pakistan under section 282-D of the Companies Ordinance, 1984. In the former the petitioner has been directed to show-cause as to why a petition may not be filed before this Court for winding up of the Bank under sections 309-(c) and 305 (f) (iii) of the Ordinance while in the latter the petitioner has been restrained to do the following:-

1. I.I.B.L. shall not redeem any loans/disposals on pre-mature basis;
2. I.I.B.L. shall not redeem overdue loans/disposals;
3. I.I.B.L. shall not enter into real estate sale/purchase transactions;
4. I.I.B.L. shall not enter into sale/purchase transactions of securities without prior approval of the Commission;
5. I.I.B.L. shall not issue debentures or any instrument in the nature of redeemable capital;
6. I.I.B.L. shall not make loans and advances;
7. I.I.B.L. shall not issue bonus to its employees;

8. I.I.B.L. shall not incur capital expenditure exceeding twenty thousand rupees on any single item or dispose of a fixed asset of the value exceeding ten thousand rupees;

9. I.I.B.L. shall strictly adhere to internal audit procedures for all its transactions.

Though yet another show-cause notice dated 23.4.2004 has been issued under section 282 (F) of the Ordinance but that will not be of any relevance to the controversy in hand.

2. It was argued by the learned counsel for the petitioner that the impugned notice and the order were issued against the Bank without giving it an option of hearing, therefore, they for being issued in violation of the principle of natural justice enshrined in the maxim of Audi alteram partem, are of no effect whatever especially when it is also the requirement of section 22 (3) of the Securities and Exchange Commission of Pakistan Act, 1997 (Act No.XLII of 1997), hereinafter called the Act. The learned counsel by referring to the letter dated 12.4.2004 issued by the Karachi Stock Exchange Guarantee Ltd., argued that where the petitioner's name has been deleted from the defaulter's counter, the assessment made by the respondents as to the performance of the Bank seems to have been made in a void without considering the grave ground realities and as such is unfounded on the face of it. He next argued that where an order has been made by the Commission as defined in section 11 of the Ordinance,; it cannot be appealed against under section 33 of the Act as according to the aforesaid provision the appeal will lie only when an order has been made by one Commissioner, therefore, a constitutional petition shall only be an adequate as well as efficacious remedy in the circumstances of the case.

3. As against that, the learned counsel appearing on behalf of the respondents argued that even a Commissioner in view of section 10 of the Act read with S.R.O. No.712 (1) /2003 dated 18.7.2003 can exercise delegated powers of the Commission but

such order despite being passed by a Commissioner in the exercise of delegated powers of the Commission can be appealed against in the appellate Bench of the Commission under section 33 of the Act, therefore, the constitutional petition will not be an adequate remedy in the circumstances of the case that too when an appeal against an order passed by the appellate Bench of the Commission lies in the High Court. The learned counsel, however, seriously disputed the other two assertions of the learned counsel for the petitioner.

4. We have gone through the record carefully and considered the submissions of the learned counsel for the parties.

5. Before we proceed ahead, it is worth while to refer to the relevant provisions of the ordinance which read as under:-

> "11. Constitution of Corporate Law (Commission).- (1) The Federal Government shall, by notification in the official Gazette, constitute a Corporate Law (Commission).
>
> (2)The (Commission) shall consist of such number of members not being less than three, as the Federal Government deems fit, to be appointed by that Government by notification in the official Gazette.
>
> (3)One of the members shall be appointed by the Federal Government to be the Ch airman of the (Commission).
>
> (4)No act or proceeding of the (Commission) shall be invalid by reason only of the existence of a vacancy in or direct in the constitution of, the (Commission).

6. Another relevant provisions of the Ordinance is section 282-D which is also reproduced for the facility of reference and thus reads as under:-

"282D.Power to issue directions.- (1) Notwithstanding anything contained in any other provision of this Ordinance, where the Commission is satisfied that it is necessary and expedient so to do-

(a) in the public interest; or

(b) to prevent the affairs of any NBFC being conducted in a manner detrimental to the interests of shareholders or persons whose interests are likely to be affected or in a manner prejudicial to the interests of the NBFC; or

(c) to secure the proper management of any NBFC generally, issue directions to NBFCs generally or to any NBFC in particular to carry out such changes as are necessary to rectify the situation and the NBFCs shall be bound to comply with such directions.

(2) The Commission may, on representation made to it or on its own motion, modify or cancel any direction issued under sub-section (1), land in so modifying or canceling any direction may impose such conditions as lit thinks fit.

7. The provisions of the Securities and Exchange Commission of Pakistan Act, 1997 dealing with the delegation of the Commission's functions or powers and appeal to the appellate Bench of the Commission and to the High Court against an order of the Commission comprising of two or more Commissioners or the appellate Bench are also relevant for the purpose of the case in hand which also merit a reference and thus read as under:-

"10. Delegation of the Commission's functions or powers.-(1) The Commission may, subject to such conditions and limitations as it may deem fit to impose, delegate any of its functions or powers to one

or more Commissioners or any officer of the Commission.

(2) A delegation under this section shall not prevent the concurrent performance or exercise by the Commission of the functions or powers so delegated.

"33. Appeal to the Appellate Bench of the Commission.- (1) An appeal shall lie to an Appellate Bench of the Commission in respect of an order of the Commission made by one Commissioner. The person aggrieved by such order may within thirty days of the passing of the order prefer an appeal to the Appellate Bench of the Commission.

(2) The Commission shall constitute an Appellate Bench of the Commission comprising not less than two Commissioners to hear appeals under sub-section (1).

(3) If any Commissioner who is included in the Appellate Bench has participated or been concerned in the decision being appealed against the Chairman shall nominate an other Commissioner to sit in the Bench to hear that appeal.

(4) The form in which an appeal is to be filed and the fees to be paid therefor and other related matters shall be prescribed by rules.

"34. Appeal to the Court.- (1) An appeal shall lie to the Court referred to in Part II of the Ordinance in respect of an order of the Commission comprising tow or more Commissioners or the Appellate Bench.

(2) The appeal under sub-section (1) shall be filed within sixty days of the date of the decision and shall by accompanied by a fee of one hundred rupees.

8. The relevant S.R.O. shall also be relevant which reads as follows:-

S.R.O. 712 (1)/2003 dated 18.7.2003. In exercise of the powers conferred by section 10 of the Securities and Exchange Commission of Pakistan Act, 1997 (the Act) read with section 20 (4) (o) thereof, and in supersession of its notification No..S.R.O. 413 (1)/2003 dated 14th May, 2003, the Securities and Exchange Commission of Pakistan (the Commission), subject to such conditions and limitations as it may from time to time impose, hereby delegates the following powers and functions of the Commission to its Commissioners and officers, namely:-

4. Commissioner (Specialized Companies Division)

S.No.	Relevant section of the Companies Ordinance, 1984	Nature of power/function
1	***	***
2	***	***
3	***	***
4	***	***
5	***	***
6	***	***
7	282D	To issue directions or to modify or canc the directions so issued.

9. A perusal of the above quoted provisions and the S.R.O. will reveal that even a Commissioner can exercise delegated powers of the Commission but it does not mean that such order will be come final once for all and as such will be amenable to constitutional jurisdiction. As such order despite being passed by a Commissioner in the exercise of the delegated powers of the Commission can be appealed against before the appellate Bench of the Commission under section 33 of the Act, the

contention of the learned counsel for the petitioner shall be wholly without any force.

10. The argument that the assessment made by the respondents as to the performance of the Bank seems to have been made in a void without considering the grave ground realities being factual cannot be appreciated by this Court in the exercise of its constitutional jurisdiction.

11. The argument that the impugned notice and order have been issued in violation of the principle of natural justice enshrined in the maxim audi alteram partem again appears to be factual when it has been seriously disputed by the learned counsel for the respondent.

12. As the impugned order and the matters ancillary thereto can well be appealed against before an appellate Bench of the Commission, we will not like to short-circuit the matter in our writ jurisdiction when an appeal against an order of the appellate Bench of the Commission also lies in this Court under section 34 of the Act. Needless to say that a writ cannot be made a substitute for an appeal when the latter by all means provides an adequate as well as efficacious remedy.

13. For the reasons discussed above, this petition being without merit is dismissed in limine alongwith the C.M.

Dated:2.6.2004. J U D G E

J U D G E

Peshawar High Court

Habibullah --- Appellant/Petitioner (s)

Versus

Abdul Shakoor Paracha --- Respondent (s)

JUDGMENT

WP. No. 773/2004 Date of hearing 04.06.2004

EJAZ AFZAL KHAN J.- The petitioner through the instant petition has questioned the order dated 16.8.2001 of the learned Senior Member Board of Revenue whereby he dismissed the petition filed by him and thus upheld the order dated 23.11.2000 of the learned Addl Commissioner Peshawar.

2. It was argued by the learned counsel for the petitioner that Mst. Hazrat Begum died before her son Muhammad Sharif, therefore, the inheritance mutation No.1053 was rightly attested in favor of the petitioner and others and that the order dated 14.6.2000 of the District Collector Nowshera reviewing the mutation being illegal was liable to be set aside and that the learned Addl Commissioner as well as Senior Member Board of Revenue acted without jurisdiction and lawful authority by upholding it.

3. We have gone through the record carefully and considered the submissions of the learned counsel for the petitioner.

4. Whether Mst.Hazrat Begum died first or her son Muhammad Sharif died first and who is to inherit consequent upon their sequence of death are the questions which cannot be agitated in a constitutional petition. As a civil suit in the circumstances of the case is by all means an adequate remedy, we do not feel inclined to interfere with the impugned order in the exercise of our extra ordinary equitable discretionary constitutional jurisdiction.

Peshawar High Court

5. For the reasons discussed above, this petition being without substance is dismissed in limine. However, the petitioner would be at liberty to seek his remedy in the appropriate forum.

Dated:4.6.2004. J U D G E .

J U D G E .

Peshawar High Court

Muhammad Fateh --- Appellant/Petitioner (s)

Versus

SMBR --- Respondent (s)

JUDGMENT

WP. No. 781/2004 Date of hearing 04.06.2004

EJAZ AFZAL KHAN J.- The petitioners through the instant petition have impugned the order dated 7.4.2004 of the learned Senior Member Board of Revenue, whereby he set aside the order dated 22.3.2004 of the Presiding Officer, Revenue Appellate Court-II Mardan who proceeded to decide the appeal in spite of the fact that an application for transfer of the case from his Court was pending before the Member Board of Revenue.

2. It was argued by the learned counsel for the petitioners that when an application for transfer of the case was pending before the Senior Member Board of Revenue, he had no power whatever to set aside the order passed by the Presiding Officer, Revenue Appellate Court-II. He next argued that when there was nothing on the record to show that the Presiding Officer of the learned appellate Court had knowledge about the pendency of the transfer application, his order could not have been set aside when it was decided strictrly in accordance with law.

3. We have gone through the record carefully and considered the submissions of the learned counsel for the petitioners.

4. The record reveals that the respondents on apprehending that their case pending in the Court of the Presiding Officer, appellate Court-II Mardan, will not receive a fair hearing moved an application before the Senior Member Board of Revenue for transfer of their case to some other Court of equivalent jurisdiction. The learned Senior Member Board of Revenue on receipt of such application asked for the comments of the said

Presiding Officer but strangely enough, the learned Presiding Officer proceeded to decide the case notwithstanding that he was informed by the respondents not to proceed with the matter in view of pendency of their application for transfer of the case.

5. When against this background of the case, the learned Presiding Officer decided the appeal against the respondents, we do not think, that the learned Senior Member Board of Revenue has committed any illegality or jurisdictional error by setting aside such order when even otherwise he has the supervisory jurisdiction to revise or review an order defying probity and propriety.

6. Since by setting aside the order of the Presiding Officer, the Senior Member Board of Revenue has sent the case to another Court of equivalent jurisdiction for decision afresh on merits, no prejudice can be said to have been caused to the petitioners by the impugned order, thus no exception can be taken thereto.

7. For the reasons discussed above, this petition being without substance is dismissed in limine.

Dated:4.6.2004. J U D G E

J U D G E.

Peshawar High Court

Amir Nawab --- Appellant/Petitioner (s)

Versus

Mashal --- Respondent (s)

JUDGMENT

WP. No. 596/2004 Date of hearing 07.06.2004

EJAZ AFZAL KHAN J.- The petitioners through the instant Constitutional petition have questioned the order dated 31.3.2004 of the learned Izafi Zilla Qazi Swat, whereby he dismissed their revision petition and thus upheld the order dated 25/2/204.

2. The main thrust of the arguments of the learned counsel for the petitioners was that once it has been directed by this Court in W.P.No.1418/2000 decided on 27/5/2003 that the case being ripe be decided as early as possible, the learned trial Court could not have prolonged it by allowing an application moved by some of the co-owners for being impleaded as defendants, especially when in a petition for special leave to appeal against the aforesaid judgment , notice to the respondents has been issued by the Honourable Supreme Court. The learned counsel, in the alternative, asked for the stay of the proceeding in the trial Court till the decision of the CPLA.

3. We have gone through the record carefully and considered the submissions of the learned counsel for the petitioners.

4. No doubt this Court while dismissing the above mentioned writ petition directed to decide the case as early as possible strictly in accordance with law, but it does not, however, mean that the persons who are necessary or proper parties should not be impleaded as party, or in case they have been impleaded as such, the matter be stayed till the decision of the CPLA. As the

learned Trial or for that matter the Revisional Court has committed no illegality or jurisdictional error by allowing the application of some of the co-owners for being impleaded as party, we do not feel persuaded to interfere with the impugned order in exercise of our extra ordinary equitable discretionary Constitutional jurisdiction.

5. For the reasons discussed above, this petition being without merit is dismissed in-limine.

ANNLOUNCED JUDGE
7.6.2004.

JUDGE

Peshawar High Court

Mst. Noor Jehan --- Appellant/Petitioner (s)

Versus

IGP --- Respondent (s)

JUDGMENT

WP. No. 1500/2003 Date of hearing 09.06.2004

EJAZ AFZAL KHAN J.- Nasrullah, respondent No.8 herein through an application before the local police, Khawajwas claimed the recovery of Rs.50,000/- from one Shafiullah in connection with a sale of motor- cycle. Hameediullah Khan, A.S.I. respondent No.6 herein by taking cognizance of the matters struck a settlement and forced Hidayatullah, a brother of Shafiullah, to hand over his buffaloes to respondent No.8 in lieu of the amount. Mst. Noor Jehan, the widow of the said Hidayatullah since dead, to question the aforesaid settlement has filed the instant constitutional petition.

2. It was argued by the learned counsel for the petitioner that the dispute between the parties being of civil nature could not have been enquired into by respondent No.6 and, if at all, he was hell-bent to embark on its inquiry, he could not have forced a settlement on her husband when he was not a party to the transaction between respondent No.8 and Shafiullah.

3. As against that, the learned A.A.G. does not dispute the factual as well as legal position canvassed at the bar by the learned counsel for the petitioner. Respondent No.8 who is present in person also does not dispute the above stated position.

4. We have gone through the record carefully and considered the submissions of the learned counsel for the parties.

5. The record reveals that a dispute cropped up between respondent No.8 and Shafiullah on account of a motor-cycle, the former sold to the latter. Though the dispute was

essentially of a civil nature, none-the-less, respondent No.6 by over-stepping his jurisdiction took cognizance of the matters. Not only he over-stepped his jurisdiction but also defied all the principles of law and justice by giving the buffaloes of Hidayatullah to respondent No.8 in the discharge of the amount outstanding against Shafiullah. It is not only a unique but daring and glaring example of abuse of power and excess of jurisdiction which cannot be justified under any circumstances.

6. We, therefore, allow this petition and direct the S.H.O. of the concerned Police Station to restore the buffaloes of the petitioner within 3 days. We are, however, constrained to observe, that the local Police must be careful in future and thus stay their hand from interfering with the matters where the law of the land has fully provided for settlement.

Dated: 9.6.2004. J U D G E.

J U D G E

Peshawar High Court

Emorald Mining Company --- Appellant/Petitioner (s)

Versus

Director Industry --- Respondent (s)

JUDGMENT

WP. No. 181/2004 Date of hearing 16.06.2004

EJAZ AFZAL KHAN J.- M/S Emerald Company (Pvt.) Ltd., petitioner herein, in the wake of cancellation of its lease after facing various ups and down in different forums including this Court, ultimately filed a petition for leave to appeal which on being converted into appeal was disposed of as under:-

a) Order dated 1.12.199 passed by the Secretary as regards cancellation of the lease on account of default in payment of 3rd and 4th installments and surface rent payable up to the time is hereby set aside.
b) The order dated 2.12.1999 is also set aside and the case is remanded to the Secretary Industries, Commerce, Mineral Development Labour and Transport Department, Government of N.W.F.P. for fresh decision as regards default of installments due on 1.9.1998, 1.12.1998, 1.3.1999, 1.12.1999 and surface rent total amounting to Rs.14.25 million in accordance with law. There will be no order as to costs."

2. When the Secretary, Industries, Commerce & Mineral Development Labour and Transport Department, NWFP Peshawar, respondent No.2 herein, again dismissed the appeal filed by the petitioner, vide his order dated 19.12.2003, the petitioner invoked the constitutional jurisdiction of this Court under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973.

3. The main thrust of the argument of the learned counsel for the petitioner was that once a commission was assigned, a fact finding mission by respondent No.2 with regard to actual mining and the value of emerald extracted by the petitioner's Company during the period of lease and a report was submitted in this behalf by the Director (Exploration/Minerals) DGMM Peshawar, he could not have dismissed the appeal without giving the petitioner an option of hearing and a chance to voice his reservation against such report. The learned counsel to support his contention placed reliance on the case of Mst. Maryam Yunus.. Vs.. Director of Education, Cantonment, GHQ, Rawalpindi and 2 others (PLD 1990 Supreme Court 666).

4. As against that, the learned D.A.G. appearing on behalf of respondents No.2 and 3 and the learned counsel appearing on behalf of respondent No.1 could not convincingly dispute the proposition as alleged and canvassed at the bar by the learned counsel for the petitioner.

5. We have gone through the record carefully and considered the submissions of the learned counsel for the parties.

6. It is not disputed that respondent No.2, vide his order dated 20.5.2003 appointed a Director (Exploration/Mineral DGMM Peshawar as Commissioner for verification of actual mining and the value of the emerald so extracted by the petitioner's Company during the period of its lease. It is also not disputed that the Commissioner pursuant to the aforesaid order submitted a detailed report. It is also not disputed that before the petitioner could be given a chance to voice his reservation against such report, his appeal was dismissed without giving an option of hearing. When this is the state of affairs, we do not think, the impugned order passed in violation of the principle of natural justice enshrined in audi alteram partem can be vested with any sanctity. It would rather be void if seen in the light of the dictum laid by the Hon'ble Supreme Court in the case of Mst. Maryam Yunus.. Vs.. Director of Education, Cantonment, GHQ, Rawalpindi and 2 others (supra).

Peshawar High Court

7. For the reasons discussed above, we allow this petition, set aside the impugned order and send the case back to respondent No.2 for decision afresh in accordance with law after giving the petitioner a chance to raise objection, if any, against the report and after hearing it on merits of the case.

Dated:16.6.2004. J U D G E

J U D G E

Peshawar High Court

Zafar Ali Khan --- Appellant/Petitioner (s)

Versus

Government of NWFP --- Respondent (s)

JUDGMENT

WP No. 361/1998 Date of hearing 17.06.2004
(PLD 2004 Peshawar 263)

EJAZ AFZAL KHAN J.- The N.W.F.P. Finance Act, 1997 (NWFPACT No. III of 1997) was promulgated on 7th July, 1997, whereby sections 2,3,4 and 7 of the West Pakistan Urban Immovable Property Tax Act, 1958 (W.P. Act No. V of 1958) were amended with the addition of the schedule which not only classified the Urban and rating areas, buildings therein but also prescribed the amount of property tax levied thereon. As the amendments alongwith the schedule brought about a radical change in the mode and method of assessment of the property tax and envisioned manifold increase therein, its vires was questioned through constitutional petitions No.361/98, 1677/97, 896, 976, 1184, 1255, 1277, 1353, 1480, 1505, 1741/99, 33, 34, 35, 36, 37, 38, 44, 45/2000, 563, 90, 4/2001, 733, 782/2002, 1423/2003, 1805/99, 1809/99, 435/2002, 530, 478, 737, 781/2003, 322/2001, 112/2003 and 32/2004. Since a common question of law is involved in all these petitions, they are disposed of by this single judgment.

2. Barrister Zahurul Haq, learned counsel appearing on behalf of the petitioners took the lead and argued that when section 5 of the West Pakistan Urban Immovable Property Tax, 1958, according to which the annual value of a land or building estimated on the gross annual rent at which such land or building might or be reasonably be expected to be let afforded rational and reasonable basis for the assessment of property tax, it was a balanced law for all legal land practical purposes and thus needed no amendment. He next argued that rates prescribed in the

schedule being in conflict with the provisions of section 5 of the Act are not maintainable. He next argued that since according to the latest dispensation the annual value of the property is estimated on the basis of its measurement regardless altogether of its annual rental value its enforcement, besides being violative of the constitutional provisions has given rise to gross and glaring discrimination as such it is liable to be struck down. The learned counsel concluded his arguments by arguing that where a plot of one kanal having a covered area of one marla is treated alike with a similar plot having a covered area of 10 marlas with utter disregard of its annual rental value, such classification can never be rational or reasonable. The learned counsel to support his contention placed reliance on the cases of Messers Elahi Cotton Mills Ltd and others..Vs..Federation of Pakistan through Secretary M/O Finance, Islamabad and 6 others (PLD 1997 Supreme Court 582), J.C. Shah..V. Ramaswa, and A.N. Grover (AIR 1969 Supreme Court 378) and Mst.Amilna Jabeen..Vs.. Government of Punjab etc. (NLR 2001 Tax 189).

3. Mr. Abdul Sattar Khan, learned counsel appearing on behalf of one of the petitioners by adopting the arguments of Barrister Zahurul Haq, added that where law aims at assessing a property to property tax in utter disregard of its annual rental value, it being expropriatory is liable to be struck down. If this amendment, he further urged, is allowed to be a part of the Act, sections 2,5,6,7,8,9 and 10 together with rules 3,5 to 11 will be come redundant. The learned counsel also placed reliance on the case of Messers Elahi Cotton Mills Ltd and others..Vs.. Federation of Pakistan through Secretary M/O Finance Islamabad and 6k others (supra).

4. Mr. Nazir Hussain, learned counsel appearing on behalf of some of the petitioners argued that the tax is presumptive on the face of it, therefore, it cannot be justified by any cannons of law when no measurement record is available with the Assessing Authority and no notice in terms of section 8 (2) of the Act has been given to the person whose property has been entered in the draft valuation list. He next argued that where a property having

similar nature and character situated in the cantt: area is subjected to a different treatment, the amendment in the Act being inconsistent with the equality clause shall, to the extent of such inconsistency, be void. The learned counsel by winding up his arguments argued that none of the amendments promulgated through Act No. III of 1997, Act No. V of 1999, Ordinance II of 2000 and Ordinance No. XV of 2001 can be retrospective in its operation as classification of the property was made after the expiry of valuation period. The learned counsel in this behalf referred to the case of West Punjab Province..Vs..K.B. Amiruddin and others (PLD 1953 Lahore 433).

5. Mr. Abdul Rauf Rohaila, learned counsel appearing on behalf of other petitioners argued that the classification by the Statute regarding the buildings residential as well as commercial is not based on reasonable basis as two buildings having similar nature and location may fetch different income, therefore, they cannot be grouped together for the purposes of assessment of property tax with utter disregard to their annual rental value. The learned counsel also placed reliance on the case of Messers Elahi Cotton Mills Ltrd. And others..Vs.. Federation of Pakistan through Secretary M/O Filnance Islamabadl and 6 others (supra).

6. Mr. Mir Adam Khan, learned counsel appearing on behalf of one of the petitioners argued that where a property has not been notified to be an urban property, it cannot be treated as such for the purpose of the Act. The learned counsel to support his contention placed reliance on the case of Muhammad Aslam..Vs.. Secretary Excise and others (PLD 2000 Lahore 589). The learned counsel representing the petitioners in other petitions adopted the arguments of Barrister Zahurul Haq without making any addition.

7. As against that, Barrister Jehanzeb Rahim, the learned Advocate General while highlighting the earst-while mode and method of charging and assessing the property tax, argued that there was a lot of corruption at various levels which resulted in huge and massive loss to the Government, therefore, the legislature to curb it has rightly introduced the amendments in the law. There

is, he elaborated his argument, a marked increase in the tax collection because of these amendments as the figures have risen from 66 millions to 140 millions. He next urged that the meager number of petitions questioning the vires of the amendments shows that people by and large have not only accepted this law but have also started making payment in accordance therewith, therefore, no challenge can be flung against its constitutionality as every law reflects the will of majority of the people. The learned Advocate General next argued that if all the amendments in the Statute ranging from 1997 upto 2001 are considered in their proper perspective, they clearly show that the law has not remained as stringent as it was at the time when the Ist amendment was promulgated. The learned Advocate General also defended the classification given in the schedule by arguing that it is based on rational and reasonable differentia and has nexus with the object sought to be achieved, therefore, it cannot be held violative of equality clause when there is no discrimination within the classified buildings. The learned Advocate General to support his submissions also placed reliance on the case of Messers Elahi Cotton Ltd. and others..Vs.. Federation of Pakistan through Secretary M/O Finance Islamabad and 6 others (supra). The learned Advocate General next argued that while applying the principle of equal protection of law mathematical precision or exactitude is not possible, therefore, slight differences here or there will not be of much importance. The learned Advocate General placed reliance on the case of Pakistan Muslim League (Q) and others..Vs..Chief Executive of Islamic Republic of Pakistan and others (PLD 2002 Supreme Court 994) and Dr.Tariq Nawaz and another..Vs..Government of Pakistan through the Secretary, Milnistry of Health, Government of Pakistan Islamabad and another (2000 SCMR 1956). He argued that there is no conflict between the old and the new law and in case there is any, that is to be harmonized in such a way that every part thereof becomes effective as the Courts always lean in favour of constitutionality of the Act and even go to the extent of exploring it, if it is not apparent. He referred to the cases of Syed Muhammad Ali Shah Bukhari..Vs..Chief Administrator of Auqaf Punjab Lahhore and 3 others (PLD 1972 Lahore 416), Commissioner of Sales

Tax..Vs..Messers Zelin Ltd. Karachi (PLD 1967 Karachi 3341), Emmanual Masih..Vs..The Punjab Local Councils Election Authority and others (1985 SCMR 729) and Messers Mehboob Industries Ltd..Vs..Pakistan Industrial Credit and Investment Corporation Ltd. (1988 CLC 866). The learned Advocate General further argued that equity and tax are alien to each other, therefore, the enforcement of a fiscal law cannot be obstructed on equitable considerations. He also argued that a fiscal law can be retrospective in its operation if its language unequivocally indicates it. He in this connection referred to the case of Star Textile Mills Ltd and others..Vs..Government of Silndh and others (2002 MLD 1608).

8. We have gone through the record the relevant Statutes alongwith amendments and considered the judgments cited at the bar.

9. Before we appreciate the controversy sprouting from the petitions before us,; it is worthwhile to refer to the relevant provisions of the Act as it stood before the amendment:-

> "Section 3. Levy of tax. (1) Government may by notification specify urban areas where tax shall be levied under this Act:
>
> Provided that one urban area may be divided into two or more rating areas of several urban areas may be grouped as one rating area.
>
> (2) There shall be charged, levied and paid a tax on the annual value of building and lands in a rating area at the rate of 10 per cent of such annual value:
>
> Provided that where a building is occupied (for residential purposes) by the owner himself, the tax shall be levied at the said rate of one-half of the annual value of such building if the owner or any member of his does not own any other property in that rating area:

Provided further that Government may, by notification, remit for reasons to be recorded in whole or in part, the payment of the tax by any class of persons in respect of any category of property.

Explanation. The annual value for the purposes of this section shall be the aggregate annual value of all buildings and lands owned by the same person in a rating area.

((3) The tax shall be due from the owner of buildings and lands.)

Section 4. Exemptions. The tax shall not be leviable in respect of the following properties, namely:-

(a) buildings and lands other than those leased in perpetuity, vesting in the Federal Government:)

(b) buildings and lands other than those leased in perpetuity.)

(i)vesting in Government of West Pakistan) and not administered by a local authority;

(ii) owned or administered by a local authority when used exclusively for public purposes and not used or intended to be used for purposes of profit;

(c) (i) buildings and lands the annual value of which does not exceed two hundred and sixteen rupees; or

(ii)one building occupied by a owner for his residence, the annual value of which:-

(1) does not exceed four hundred and eighty six rupees in the rating areas of a municipality of the first class; or

(2) does not exceed three hundred and seventy eight rupees in other rating areas, subject to the condition that the owner or any member of his family does not own any other property in that rating area and such other conditions as may be described.)

Provided that if such building or land is in the ownership of a person who owns any other building or land in the same rating area, the annual value of such building or land shall, for the purposes of this clause, be deemed to be the aggregate annual value of all buildings or lands owned by him in that area;

(d)buildings and lands or portions thereof used exclusively for educational purposes including schools, boarding houses, hostels and libraries;

(e) public parks and playgrounds;

(f) buildings and lands or portions thereof used exclusively for public worship or public charityincludingmosques, churches, haramsalas, gurdwaras, hospitals, dispensaries, orphanages, alms houses, drinking water fountains, infirmaries for the treatment and care of animals and public burial or burning grounds or other places for the disposal of the dead:

Provided that the following buildings and lands or portions thereof shall not be deemed to be used exclusively for public worship or for public charity within the meaning of this section, namely:-

(i) buildings in or lands on which any trade or bulsiness is carried on unless the rent derived from such buildings or lands is applied exclulsively to religious purposes or such public charitable institutions as may be prescribed;

(ii) buildings or lands in respect of which rent is derived and such rent is not applied exclusively to religious purposes or to public charitable institutions; and

(g) buildings and lands the annual value of which does not exceed one thousand rupees, belonging to widows and minor orphans.

Section 5. Ascertainment of annual value. The annual value of any land or building shall be ascertained by estimating the gross annual rent at which such land or building together with its appurtenances and any furniture that may be let for use or enjoyment with such building might reasonably be expected to be let from year to year, less:-

(a) any allowance not exceeding twenty per centum of the gross annual rent as the assessing authority in each particular case may consider reasonable rent for

the furniture let with any such building;

(b) an allowance of ten per centum for the cost of repairs and for all other expenses necessary to maintain such building in a state to command with gross annual rent. Such deduction shall be calculated on the balance of the gross annual rent after the deduction, if any, under clause (a); and

(c) any land revenue actually paid in respect of such building or land;

Provided that in calculating the annual value of any building or land under this section the value of any machinery in such building or on such land shall be excluded.

Section 7. Making and operation of valuation lists. (1) A valuation list shall be made by the prescribed authority in accordance with the rules framed under this Act for every rating area so as to come into force either on the first day of (July), or the first day of (January), and thereafter a new valuation list shall be made from time to time so that the interval between the dates on which one valuation list and the next succeeding valuation list

respectively come into force shall be a period of five years:-

Provided that Government may be order:-

(a) reduce by a period not exceeding one year or extend by a period not exceeding three years the interval which would otherwise elapse between the coming into force of any two successive valuation lists for any rating area, or, where a valuation list has been lost or destroyed by operation of circumstances beyond control, cancel the list, direct the preparation of a new list and order recovery of pending tax to be made on the basis either of the last preceding valuation list of the new list prepared under this proviso; and

(b) divide any rating area into parts for the purposes of a new valuation list and determine the years in which the next following valuation list for each of such parts respectively shall be made and come into force.

(2) Subject to the provisions of any such order as aforesaid, every valuation list shall come into force on the first day of (July) or the first day of (January) as the case may be,

next following the date on which it is finally approved by the assessing authority and shall, subject to the provisions of this Act and the rules made thereunder (including the provisions with respect to the alteration of and the making of additions to the valuation list) remain in force until lit is superseded by a new valuation list.

Section 8. Draft valuation list (1) where the assessing authority for any area has issued notices requiring returns in connection with the making of a new valuation list, the said authority shall, as soon as may be after the expiration of the period allowed for the delivery of the returns, cause a draft valuation list to be, prepared for the area and published in such manner as may be prescribed.

(2) Any person aggrieved by any entry in the draft valuation list, or by the insertion therein or omission therefrom of any matter, or otherwise with respect to the list, may, in accordance with the rules made under this Act lodge an objection with the assessing authority at any time before the expiration of thirty days from the date on which the draft valuation list is published;

(Provided that in special circumstances the Commissioner may, by notification, extend the period to a maximum of sixty days.)

Section 9. Amendment of current valuation list. Subject to such rules, if any, as the Government may think fit to make in this behalf, the assessing authority may at any time make such amendments in a valuation list as appear to it to be necessary in order to bring

the list into accord with existing circumstances and in particular may:-

(a) correct any clerical or arithmetical error in the list;

(b) correct any erroneous insertion or omission or any mis-description;

(c) make such additions to or correction in the list as appear to the authority to be necessary by reason of:-

(i) a new building being erected after the completion of the valuation list;

(ii) a building included in the valuation list being destroyed or substantially damaged or altered since its value was last previously determined;

(iii) any change in the ownership or use of any building or land:

Provided that not less than fourteen days before making any such amendment in the valuation list for the time being in force, other than the correction of a clerical or arithmetical error, or the correction of an erroneous insertion, omission or mis-description, the assessing authority shall send notice of the proposed amendment to the owner of the building or land and shall also consider any objection thereto which may be made by him.

> Section 10. Appeal and a revision (1) Any person aggrieved by an order of the appropriate authority upon an objection made before that authority under sections 8o,9, (14) or 15 may appeal against such order, at any time before the expiration of thirty days from the date of such order, to the Collector of the district in which the building or land to which the objection related is situate, or to such other officer as the Government may, by notification, appoint in this behalf.
>
> (IA) Any person aggrieved by any entry in the valuation list prepared under section 7, or by the insertion therein or omission therefrom of any matter, or otherwise with respect to the list may, within sixty days of the date on which the list is to come into force, prefer an appeal in respect of such entry or matter, to the Collector or to such other officer as the Government may, by notification, appoint in this behalf.)
>
> (2) The Commissioner or such other officer as may be appointed by the Government by notification in this behalf, may of his own motion at any time, or on application made within a period of one year from the date of the taking of any proceedings or passing of any order by an authority subordinate to the Commissioner call for and examine the record of the proceedings or the order for the purpose of satisfying himself as to the legality or propriety of the same and may pass such order in reference thereto as he may consider fit."

10. The amendments introduced by Act No. III of 1997 are also relevant and thus read as follows:-

"4.Amendment of W.P. Act V of 1958. In the West Pakistan Urban Immovable Property Tax Act, 1958 (W.P.Act V of 1958).-

(1)in section 2, after clause (g), the following new clause shall be inserted, namely:

"(ga) "Schedule" means the Schedule to this Act;";

(2) in section 3, for sub-section (2) the following shall be substituted, namely;

"(2) There shall be levied, charged and paid a tax on the buildings and lands in rating areas at such rates and in respect of such buildings and lands as prescribed in the Schedule:

Provided that different rates may be prescribed for different categories of buildings and lands including building and lands located in different areas:

Provided further that Government may, by notification, for reasons to be recorded, remit in whole or in part, the payment of the tax by any class of person in respect of any category of property.";

(3) for section 4 the following shall be substituted, namely:

"4. Exemptions.- The tax shall not be leviable in respect of the following properties, namely:

(a) buildings and lands, other than those leased in perpetuity, vesting in the Federal Government;

(b) buildings and lands, other than those leased in perpetuity, vesting in Government and not administered by a local authority, or owned or administered by a local authority when used exclusively for public purposes and not used or intended to be used for purposes of profit;

(c) buildings and lands the area whereof does not exceed three marlas;

(d) public parks, playgrounds and libraries;

(e) buildings and lands or portions thereof used exclusively for public worship or public charity including mosques, churches, dharamsalas, gurdwaras, orphanages, alms houses, drinking water fountains, infirmaries for the treatment and care of animals and public burial or burning grounds or other places for the disposal of the dead:

Provided that the following buildings and lands or portions thereof shall not be deemed to be used exclusively for public worship or for public charity within the meaning of this section, namely:-

(i) buildings in or land on which any trade or business is carried on unless the rent derived from such buildings or land is applied exclusively to religious purposes or such public charitable institutions as may be prescribed;

(ii) buildings or land in respect of which rent is derived, and such rent is not applied exclusively to religious purposes or to public charitable institutions; and

(f) buildings and lands belonging to widows and minor orphans who are not assessed to income tax.";

(4) in section 7.-

(a) in sub-section (1), for the words "five years" the words "three years" shall be substituted; and

(b) after sub-section (2) the following new sub-section shall be added, namely:

"(3) after every three years the tax shall be increased at the rate of fifteen ,per cent of the tax last assessed and a new valuation list shall accordingly be prepared." and

(5) the Schedule specified in Schedule I shall be added at the end.

schedule-I
(See Section 4(2))
"SCHEDULE
(See section 3(2))

PART-I
RESIDENTIAL BUILDINGS

.No.	Category	Rate of tax at Provincial and Divisional Head-quarters for old city and new extended area.	Rate of tax in suburban areas (other than areas covered by column 3) of the Provincial and divisional Headquarters	Rate of tax at District Headquarters for old city and extended area not covered by column No.4	Rate of tax at District Headquarters)other than areas covered by column 5) of the District Headquarters.
	2	3	4	5	6
.	Exceeding 3 marlas but not exceeding 5 marls	Rs.750 Per Annum	Rs.325 Per Annum	Rs.300 Per Annum	Rs.150 Per Annum
.	Exceeding 5 Marlas	Rs.1500 Per Annum	Rs.750 Per Annum	Rs.750 Per Annum	Rs.500 Per Annum

	but not exceeding 10 Marlas.				
.	Exceeding 10 Marlas but not exceeding 20 Marlas.	Rs.2000 Per Annum	Rs.1000 Per Annum	Rs.1000 Per Annum	Rs.500 Per Annum
.	Exceeding 15 marlas but not exceeding 20 marlas	Rs.3000 Per Annum	Rs.1500 Per Annum	Rs.1500 Per Annukm	Rs.750 Per Annum
.	Exceeding 20 Marlas	Rs.3000 Per Annum for the first 20 marlas plus Rs.200 Per additional Marlas.	Rs.1500 Per Annum for the first 20 Marlas plus Rs.100 Per additional Marlas.	Rs.1500 Per Annum for the first 20 Marlas plus Rs.50 Per additional Marlas	Rs.750 Per Annum for the first 20 Marlas plus Rs.50 Per additional Marlas.

Part-II

COMMERCILAL BUILDINGS

S.No.	Category	Rate of Tax for Provincial Headquarters	Rate of Tax for Divisional Headquarters (other than Peshawar)	Rate of Tax for District Headquarters (other than these covered by column 4)

1	2	3	4	5
1.	Ground/First Floor	Rs.7 Per Sqft	Rs.4 Per Sqft	Rs.2 Per Sqft
2.	Basement/Up per Stories	Rs.3 Per Sqft	Rs.2 Per Sqft	Rs.1l Per Sqft

PAART-III
OFFICES

Building acquired for use as offices by Government or Semi-Government Organizations or By Banks and Development Financial Institutions and lands shall be assessed for the purpose of tax on the basis of 20 percent of the annual value of such buildings or lands.

PART-IV
PETROL PUMPS

(i) Petrol Pumps with Convenience Stores Rs.10000 Per Annum
(ii)Petrol Pumps without Convenience Stores Rs.5000 Per Annum

PART-V
INDUSTRIAL BUILDILNGS

Industrial Buildings within the limits of Urban areas shall be assessed for the purpose of this tax at the rate of one rupee per square foot."

11. The amendment which was introduced by Act No.V of 1999 reads as under:-

Insertion 3…

In sub-section (2), the full-stop appearing at the end of second proviso shall be replaced by a colon and thereafter, the following new proviso shall be added, namely;

"Provided also that a surcharge at the rate of 10% of the tax shall be levied in addition to the tax in respect of each commercial building the annual tax whereof, has been assessed to one lac rupees or more"; and

After sub-section (2), as so amended, the following new sub-section (2a) shall be inserted, namely:

"(2a) A rebate at the rate of 10 % of the tax assessed under sub-section (2) shall be admissible to those assesses who pay the tax in advance for the whole y ear by the 31st day of August of the y ear to which it relates.'

And

"In section 4, in clause ©, between the words "buildings and lands" commercial buildings," shall be inserted; and.

12. The amendment which was introduced by the " North West Frontier Province Finance Ordinance, 2000" (ORDINANCE II OF 2000), is also reproduced and thus reads as under:-

3.Amendment of W.P. Act V of 1958.---In the West Pakistan Urban Immovable Property Tax Act, 1958 (W.P. Act V of 1958), in the Schedule,---

(i)For Part II the following shall be substituted, namely:---

PART-II

COMMERCIAL BUILDINGS AT PROVINCIAL HEADQUARTER

S.No.	Category of locality where the property is situated.	Rate of tax per square feet of covered area. Ground Floor	Ist Floor and Basement	Upper Stores
1	2	3	4	5
1.	A	Rs.10	Rs.7	Rs.5
2.	B	Rs.7	Rs.5	Rs.3
3.	C	Rs.5	Rs.3	Rs.2
4.	D	Rs.3	Rs.2	Rs.1

Note.- For the purpose of column 2, the categories 'A' 'B' 'C' and 'D' shall be such as respectively notified by Government in the Official Gazette,;

(ii) after Part II, as so substituted, the following new part shall be inserted, namely;

PART-II-A
COMMERCIAL BUILDINGS LOCATED AT THE PLACES OTHER THAN THE PROVINCIAL HEADQUARTER.

S.No.	Category	Rate of tax per square feet of covered areas at Divisional Headquarters	Rate of tax per square feet of covered areas in the Districts other than the District of Provincial and Divisional Headquarters
1	2	3	4
1.	Ground/First Floor	Rs.4	Rs.2
2	Basement/Upper stories	Rs.2	Rs.1" and

(iii) for Part V the following shall be substituted namely;

PART-V
INDUSTRIAL BUILDINGS

Industrial buildings within the limits of rating areas shall, for the purposes of this tax, be assessed at the rate of Rs.2.50 per square feet of the covered areas of such buildings."

13. The amendment which was introduced through Ordinance No. XV of 2001 is also reproduced as under:-

"In section 3, for sub-section (2) the following shall be substituted, namely:…

"(2) Subject to the provisions of section 4, there shall be levied, charged and paid a tax, on the basis of annual rental value of buildings and lands in the rating areas (hereto fore notified or as may hereafter be notified under this Act).

(a) at the rate specified in Schedule I in respect of residential buildings;

(b) at the rate specified in Schedule II in respect of commercial buildings, to be calculated in accordance with the factors and formula given in the respective Schedule.

Provided that.---

(i)a residential building owned and occupied by a widow whose annual tax, excluding the possible rebates, is up to two thousand and five hundred rupees, shall be exempt from payment of any tax under this Act, l but if the annual tax of such building excluding rebate, exceeds the said amount, the entire tax as amended l under clause (a) shall be payable in respect of such building.

(ii) Where a residential building owned and occupied by the owner himself, he shall be entitled to a rebate of fifty per cent, if he or any members of his family does not own any other residential building in the same rating area; and

(iii) All residential buildings shall be admissible to the maintenance/age rebates at the following rates.

(a) building exceeding ten years but not exceeding twenty years old;…….10%.

(b) building exceeding twenty years but not exceeding thirty years old, and …….20%.

(c) building exceeding thirty years old….30%.

In section 4, in clause (1) the words "widows and" shall be deleted; and

14. A look at the above quoted provisions of the Act and the amendments introduced therein will indicate that a significant change has been brought about by the legislature in the mode and method of charging and assessing the property tax. Before the amendments it was the sole discretion of the E.T.O. and the other officials in the hierarchy to fix any amount as annual rental value of a land or building for assessing the property tax. But this mode not only resulted in heavy tax evasion but also defeated the very purpose of taxation as it instead of enriching the State, enriched those who resorted to its evasion and those who helped it. A fool proof system for charging and assessing the property tax was thus imperative to curb corruption and ensure transparency in the process. The law, in force, before the amendments, had many holes and as such was at the verge of becoming a dead letter. The legislature after collecting the requisite data having bearing on the matters of taxation rose to the occasion and introduced the amendments which not only classified the urban and rating areas, lands and buildings therein but also prescribed the property tax levied thereon.

15. The purpose behind this classification was to provide a uniform basis for taxing the lands and buildings

essentially equal with reference to their nature and location, the purpose they are used for, their earning capacity and other factors having bearing on the matters of taxation. Though this equality may not have mathematical precision or exactitude, none-the-less, nothing has been canvassed at the bar by the learned counsel for the petitioners as could even remotely suggest that the classification reflected in the schedule is irrational or unreasonable. Not even a single syllable has been uttered at the bar as could show that the rate prescribed of a given building with a given measurement in a given urban or rating area is excessive, unreasonably high or expropriatory by any attribute. Therefore, we do not feel persuaded to agree with the argument that the classification is not based on intelligible differentia or that the tax is in any way expropriatory.

16. The argument that when a plot of one kanal having covered area of 5 marlas is treated at par with a similar plot having covered area of 10 marlas in utter disregard of its annual rental value, such classification can never be rational or reasonable, being hypothetical will not affect the constitutionality of the amendments as no facts and figures indicating such disparity have been brought on the record. Even if it be so, it will not cloud their constitutionality because, as observed earlier, the equality amongst the objects grouped together may not be mathematically precise, scientifically perfect and logically complete. The judgments rendered in the case of Pakistan Muslim League (Q) and others..Vs.. Chief Executive of Islamic Republic of Pakistan and others and Dr.Tariq Nawaz and another..Vs..Government of Pakistan through the Secretary, Ministry of Health, Government of Pakistan Islamabad and another (supra) may well be referred with advantage.

17. The case of State of Kerala..Vs.. Haji K.Kutty (supra) will not advance the case of the petitioners as in that case while imposing the tax, class of buildings, their nature of construction, the purpose they are used for, their location, their capacity of profitable user and other relevant circumstances having bearing on the matters of taxation were not considered whereas the

impugned amendments in general and schedule in particular clearly show that all these factors were taken stock of by the legislature before imposing the tax.

18. The judgment rendered in the case of Mst. Amina Jabeen..Vs.. Government of Punjab etc. (NLR 2001 Tax 189) (supra) is also not relevant to the instant case as in that case valuation table prepared for the purpose of Stamp and Registration Act was held inapplicable for the purposes of the property tax, whereas no such question is involved in this case.

19. The judgment rendered in the case of Messers Elahi Cotton Mills Ltd and others..Vs.. Federation of Pakistan through Secretary M/O Finance Islamabad and 6 others (supra) will not support the contentions of the learned counsel for the petitioners when the Hon'ble Supreme Court after extensively quoting from the case law and treatises held that the legislature enjoys a wide latitude in the matters of selection of persons, subject-matters and events etc. for taxing and there is presumption in favour of the constitutionality of the legislative enactments unless, of course, it is ex-facie violative of the constitutional provisions ensuring equality before law which is not the case here. The relevant paragraph of the aforesaid judgment is reproduced for the facility of the reference which reads as under:-

"44. Adverting to the above first reason, it may be observed that it is true that the power to tax cannot be used to embarrass and destroy the business/occupations which are since qua non for the propriety of the people and the country. The object of the levy and recovery of taxes as pointed out hereinabove is to run the State and to make efforts for creation of an agalitarian society. If the rates of taxes are so high and disproportionate to the actual earnings or earning capacities that they destroy the tax-payers, the very object of their levy and recovery is defeat ed. It has, therefore, been held by the superior Courts of the foreign jurisdiction as well as of Pakistani jurisdiction including this Court that the taxes should not be expropriatory and confiscatory in nature and that the same should not be imposed in such a way so as

to result in acquiring properties of those to whom the incidence of taxation fell and if that is so, then such legislation would be violative of fundamental rights to carry on business or to hold properties as guaranteed by the Constitution. The learned counsel for the appellants have heavily relied upon the judgment of this Court in the case of Government of Pakistan v. Muhammad Ashraf (supra), in which this Court accepted the above legal proposition that a tax, which is confiscatory in its nature, would be violative of the fundamental rights relating to carrying on business and holding properties, but remanded the case to the High Court to examine the question, as to whether the rate of regulatory duty on Soyabean Oil imposed was of confiscatory nature. We are inclined to reiterate the principle of law enunciated in the above report.; However, we are unable to agree with the learned counsel for the appellant that the rates of taxes imposed under the impugned sections 80-C,80-CC and 80-D of the Ordinance are confiscatory and expropriatory in nature. Since there is a presumption in favour of legislative competence as held in a number of judgments referred to hereinabove, the burden to show that the impugned taxes are confiscatory or expropriatory, was on the appellants. In our view, they have failed to bring on record any reliable material on the basis of which it can be concluded that the same are confiscatory or expropriatory. Messrs Dr. Ilyas Zafar and Iqbal Naim Pasha, while arguing Civil Appeal No.478 of 1995, submitted that the appellants in the above appeal declared Rs.6,47,243 as the net pro9fit for the assessment year involved but they were made to pay presumptive tax amounting to Rs.66,00,282. Whereas Mr.Sikandar Hayat, who argued for the appellant (National Construction Company) in Civil Appeal No.1496 of 1995, contended that the appellant suffered loss of Rs.24,88, 18,613 in the assessment year 1992-93 but they were made to pay presumptive tax under section 80-C Rs.1,35,29,726. The above two instances cannot be treated as sufficient for rebutting the presumption in favour of the competency of the Legislature. The question, as to whether al particular tax is confiscatory or expropriatory, is to be determined with reference to the actual earning or earning capacity of an average prudent successful entrepreneur in a particular trade or business. The fact that a particular assessee has suffered loss/losses

during certain assessment years, is not germane to the above question. In this regard reference may again be made to the case of the Madurai District Cooperative Bank Ltd. v. Third Income Tax Officer, Madurai (supra) referred to hereinabove in para.28 (x), wherein taxable income of the assessee declared was Rs.51,763; whereas the tax imposed was Rs.76,674,07 including surcharge. Indian Supreme Court sustained the above levy and inter alia held that what is not income under the Income Tax Act can be made income under the Finance Act or exemption granted by the Income Tax Act can be withdrawn by the Finance Act or its efficacy can be reduced."

20. The argument that the rates prescribed in the schedule being in conflict with the provisions of section 5 are not maintainable, is also without force as there is absolutely no conflict between the section and the schedule, when despite amendments in the Act, the conditions for charging and assessing the property tax have remained much the same. Needless to say that even in case of conflict as held in the judgments rendered in the cases of Syed Muhammad Ali Shah Bukhari..Vs.. Chief Admilnistrator of Auqaf Punjab Lahore and 3 others, Commissioner of Sales Tax..Vs.. Messers Zelin Ltd. Karachi, Emmanual Masih..Vs..The Punjab Local Councils Election Authority and others and Messers Mehboob Industries Ltd..Vs..Pakistan Industrial Credit and Investment Corporation Ltd. (supra), the Courts are required to harmonize the provisions of a Statute in such a way that every part thereof becomes effective.

21. The argument that the tax being presumptive cannot be justified by any cannons of law is also without force as it was more or less presumptive even before the amendment when annual value of a land or building was estimated at which it could or reasonably be expected to be let out.

22. The argument that no record regarding the measurement of the property taxed is available with the Assessing Authority and no notice in terms of section 8 (2) has been given to the person whose property has been entered in the draft valuation

list being relatable to the question of fact should better be agitated before the forum of the concerned hierarchy when the provisions providing redresses of such nature are intact.

23. The argument that none of the amendments promulgated through the Acts or Ordinances could be retrospective in its operation as classification was made after the expiry of valuation period is also without force as the amendments have not been given retrospective effect.

24. The argument that the property having similar nature and character situated in the Cantonment area is subjected to a different treatment, therefore, the amendments being inconsistent with the equality clause shall, to the extent of such inconsistency, be void, is more or less conjectural when nothing has been brought before us to prove that the property situated in the Cantonment area is of similar nature and character and that its capacity of profitable user is equal or alike.

25. The argument that where a property has not been specifically notified to be an urban property, it cannot be treated as such for the purpose of the Act is not a question relating to the vires or otherwise of the Statute, therefore, it being a question of fact can well be agitated in the forum provided under the law.

26. The upshot of the above discussion is that all these petitions fail which are accordingly dismissed.

Announced on:
17.06.2004

J U D G E

J U D G E

Peshawar High Court

Muhammad Nisar --- Appellant/Petitioner (s)

Versus

Central Board of Revenue --- Respondent (s)

JUDGMENT

WP. No. 747/1996 Date of hearing 13.07.2004

EJAZ AFZAL KHAN J.- The petitioners who are working as senior Income Tax Inspectors have asked for the issuance of a writ against the respondents directing them to consider the petitioners for promotion to the posts of Income Tax Officers.

2. It was argued by the learned counsel for the petitioners that the petitioners by virtue of Notification No.SR 905(1)/81 dated 13.8.1981 have acquired a vested right to promotion to the next higher rank and that they cannot be deprived of it when the Notification No.674 (1)/95 dated 5.7.1995 amending the earlier was not given retrospective effect. The learned counsel to support his contention placed reliance on the case of Mukhtar Ahmed, Senior Inspector Income Tax and others..Vs.. Central Board of Revenue through its Chairman, Islamabad rendered in Writ Petition No.1952 of 1997, decided on 13.10.1999 and the short order of the Hon'ble Supreme Court in Civil Petition No.1799 of 1999 decided on 28.2.2001.

3. The learned Deputy Attorney General and Eid Muhammad Khattak, learned counsel appearing on behalf of the respondents did not resist any of the arguments advanced by the learned counsel for the petitioners and thus requested for the disposal of this writ petition in terms of the judgments cited abaove.

4. We have gone through the record carefully and considered the submissions of the learned counsel for the parties.

Peshawar High Court

5. As in view of the judgments cited at the bar a similar prayer of the Inspectors Income Tax similarly placed has been countenanced by the Hon'ble Lahore High Court which has been upheld by the Hon'ble Supreme Court, we cannot afford to take a different view.

6. For the reasons discussed above, this petition is allowed and the respondents are directed to consider the petitioners for promotion under the erstwhile rules of 1981.

Dated:13.7.2004. J U D G E

J U D G E

Peshawar High Court

Akbar Khan --- Appellant/Petitioner (s)

Versus

Mst. Bakht Jahana --- Respondent (s)

JUDGMENT

WP. No. 961/2004 Date of hearing 13.07.2004

EJAZ AFZAL KHAN J.- The petitioner through the instant petition has questioned the order dated 19.6.2004of the learned Zila Qazi Shangla whereby he accepted the revision petition filed by the respondents and thus set aside the order dated 22.1.2003 of the learned Judge Executing Court.

2. It was argued by the learned counsel for the petitioner that where the decree was satisfied , there was absolutely no need to send the case back to the Executing Court for further proceedings, therefore, the order being nullity in the eye of law, is liable to be set aside.

3. We have gone through the record carefully and considered the submissions of the learned counsel for the petitioner.

4. The record reveals that the decree passed in favour of the respondents has not been satisfied so far, therefore, the learned Zila Qazi has committed no illegality by sending the case to the Court executing the decree for further proceeding. If, however, at any stage the decree stands satisfied, the petitioner would be at liberty to ask the Court for the consignment of the application for execution of decree.

5. For the reasons discussed above, this petition being mis-conceived is dismissed in limine alongwith the C.M.

Dated: 13.7.2004. J U D G E

J U D G E

Peshawar High Court

Saeedullah --- Appellant/Petitioner (s)

Versus

The State --- Respondent (s)

JUDGMENT

WP. No. 189/2001 Date of hearing 21.09.2004

EJAZ AFZAL KHAN J.- On receipt of spy information that a huge quantity of narcotic is likely to be smuggled in a Bus bearing No. N.W.FP. 5544 to Punjab, Inspector Haji Bahadur Khan, S.H.O. Police Station Aaza Khel alongwith other Police officials fenced the road across the Police Station. On the arrival of the desired bus, it was stopped for search which led to the recovery of one K.G. chars, 300 cycle chains , 250 packets of steal nails, weights, locks, cassette players and many other articles of foreign origin and consequent upon that registered a case against the petitioner and one another under sections 156(1) (89),178, 2(S), Customs Act, 1969 and articles 3/4 of the Prohibition (Enforcement of Hadd) Order, 1979, vide FIR No.151 dated 17.4.1999, Police Station Aza Khel.

2. On completion of investigation, they were sent to Special Judge (Central) Customs, Taxation and Anti-smuggling, N.W.F.P. Peshawar for trial who on conclusion thereof sentenced them as under:-

> i) Saeedullah: i) for one year imprisonment and a fine of Rs.20,000/-(Rs.Twenty thousand), in default of payment of fine he has to suffer three months imprisonment and
>
> ii) Samar Gul: for six months imprisonment and a fine of Rs.15,000/- in default of payment of fine he has to suffer two months imprisonment

Benefit u/s 382-B Cr.P.C. is given to both the accused),

Vide her judgment dated 30.11.2000.

3. When on appeal the conviction and sentence awarded by the trial Court were maintained by the learned Special Appellate Court, (Customs) Peshawar, vide its judgment dated 5.1.2001, the petitioner invoked the extra ordinary constitutional jurisdiction of this Court by filing the instant constitutional petition.

4. The learned counsel appearing on behalf of the petitioner contended that when the narcotic was recovered from beneath a seat occupied by a passenger, it could not be debited to the account of the petitioner simply because he was driver of the bus. Similarly, he next urged, that where none of the articles recovered from the Bus was proved to be of foreign origin, the petitioner could not have been convicted and sentenced under section 156 (1) (89) 178 2(S) of the Customs Act, 1969.

5. As against that, the learned counsel appearing on behalf of the State argued that where recovery was effected from beneath a seat across the seat of the driver, it will clearly prove that it was he who kept it. He next urged that where the petitioner failed to prove that the articles of foreign origin recovered from the bus driven by him have been lawfully imported and that all the duties and taxes levied thereon have been paid by him, he has rightly been convicted and sentenced by the learned trial Court.

6. We have gone through the record carefully and considered the submissions of the learned counsel for the parties.

7. As for as the recovery of chars is concerned, even if it is assumed for a while that it was recovered from the bus, it cannot be debited to the account of the petitioner in view of the contradictory statements of P.W.1 and 2 as according to the former, it was recovered from beneath the seat across the seat of

the driver while according to the latter, it was recovered from beneath one of the rear seats of the bus.

8. The recovery of other articles from the bus will also do little to link the petitioner with the crime and justify his conviction therefor when P.W.4 admitted in his cross-examination that the cassette players and many others articles are Pakistani and cannot be confirmed by him to be of foreign origin.

9. The conclusion that every item including those of foreign origin was smuggled by the petitioner is untenable on the face of it, when admittedly many passengers were traveling in the bus at the relevant time which came from Peshawar rather than an area close to the boarder.

10. Apart from this, where the statements of the witnesses suffer from serious and paralytic infirmities as highlighted above and almost all of them waver as to the foreign origin of the articles recovered from the bus, we do not think, the case has been proved against them beyond any shadow of reasonable doubt.

11. We are aware of the scope of writ jurisdiction which being limited can neither be a substitute for appeal nor can be exercised to substitute the finding of the forums below on a question of fact but where it is based on non-reading or mis-reading of evidence or erroneous assumption of fact, the decision can well be quashed because the very condition for the conferment of jurisdiction on a Court of law is to reach and render a finding on a proper appraisal of evidence. A similar view was taken by Lord Dening in the case of Bald Ven and Fracis Ltd..Vs.. Parents Appeal Tribunal (1959 AC 633) which reads as under:-

> " Is that an error of law? I have no doubt that it is; and it is an error of such kind as to entitle the Queen Bench to interfere. There are many cases in the books which show that if a Tribunal bases his decision on extraneous consideration which it ought not to have taken into account or fails to take into account, a vital

consideration which it ought to have taken it into account, thus its decision may be quashed."

12. In the case of Utility Stores Corporation of Pakistan Limited..Vs..Punjab Labour Appellate Tribunal and others (PLD 1987 SC 447), the Hon'ble Supreme Court held as under:-

> " I cannot agree with the learned Judge in the High Court. The view of the learned Judge that this Court has ruled that even if the order of a Tribunal is wrong in law, the High Court still cannot intervene in exercise of its constitutional jurisdiction is not justified and I feel that the judgments of this Court in the cases of Muhammad Hussain Munir (PLD 1974 SC 139) and Zulfiqar Khan Awan (1974 SCMR 530) have not been read in their proper context. It is not right to say that the Tribunal, which is invested with the jurisdiction to decide a particular matter, has the jurisdiction to decide it " rightly or wrongly" because the condition of the grant of jurisdiction is that it should decide the matter in accordance with law. When the Tribunal goes wrong in law, it goes outside the jurisdiction conferred on it because the Tribunal has the jurisdiction to decide rightly but not the jurisdiction to decide wrongly. Accordingly, when the tribunal makes an error of law in deciding the matter before it, it goes outside its jurisdiction and, therefore, a determination of the Tribunal which is shown to be erroneous on a point of law can be quashed under the writ jurisdiction on the ground that it is in excess of its jurisdiction".

13. In the case of Muhammad Lehrasab Khan..Versus Mst.Aqeel Un Nisa and 5 others (2001 SCMR 338), the Hon,ble Supreme Court re-affirmed the view in the following words:-

> "4. There is no cavil with the proposition that ordinarily the High Court in its Constitutional

> jurisdiction would not undertake to reappraise the evidence in rent matters to disturb the finding of facts but it would certainly interfere if such findings are found to be based on non-reading or misreading of evidence, erroneous assumptions of facts, misapplication of law, excess or abuse of jurisdiction and arbitrary exercise of powers. In appropriate cases of special jurisdictional, where the District Court is the final Appellate Court, if it reverses the finding of the trial Court on the grounds not supported by material on record, the High Court can interfere with it by issuing writ of certiorari to correct the wrong committed by the Appellate Authority".

14. When seen in the light of the aforesaid dictums, we have no hesitation to hold that the finding of guilt has not been reached in accordance with law, therefore, it cannot be sustained.

15. For the reasons discussed above, we allow this petition, set aside the conviction and sentence recorded by the learned trial Court and acquit the petitioner of the charge.

16. Though Samar Gul has not filed any petition, we also set aside the conviction and sentence awarded to him as his case is not distinguishable from that of the petitioner on any count.

Dated:21.9.2004 J U D G E

J U D G E

Peshawar High Court

Mst. ULFAT SHAHEEN---Petitioner

Versus

AKRAM KHAN and 2 others---Respondents

JUDGMENT

W.P No. 82/2004 Decided on 30th September, 2004
(2006 CLC 51 Peshawar)

(a) West Pakistan Family Courts Act (XXXV of 1964)---

Ijaz-ul-Hassan Khan and Ejaz Afzal Khan, JJ ----Ss. 5, Sched., & 14---Guardians and Wards Act (VIII of 1890), Ss.47 & 48---Constitution of Pakistan (1973), Art.199---Constitutional petition---Maintainability---Custody of minor---Guardian Judge granted custody of minor to petitioner, but District Judge in appeal reversed judgment of. Guardian Judge---Petitioner had filed constitutional petition against judgment of District Judge passed in appeal---Respondents raised a preliminary objection to the effect that in view of 5.48 of Guardians and Wards Act, 1890, a revision could have been filed which was adequate remedy and that constitutional petition filed by petitioner was not competent---Validity---Family Court would not only have exclusive jurisdiction to decide matters relating to custody of children and guardianship etc., but would also be deemed to be a District Court for the purposes of Guardians and Wards Act, 1890 and that an appeal against an order passed by a Family Court would lie to District Judge under 5.14 of West Pakistan Family Courts Act, 1964 when Family Court was presided over by a Judge subordinate to a District Judge and that would be an end of the matter---Aggrieved person could file constitutional petition in the High Court, and that too when finding of District Judge was based on misreading, non-reading of evidence, erroneous assumption of law and fact or was founded on considerations which were extraneous to the record---Although in view of S.48 of Guardians and Wards Act, 1890 a revision

was competent .against an order passed by a District Judge, but that provision could not be read in isolation and in disregard of 5:14 of West Pakistan Muslim Family Courts Act, 1964 which being subsequent Legislation would have an overriding effect on all other laws for the time being in force, especially when it was prefaced by a non obstante clause---Only constitutional petition, would be competent in that state of law.

Niaz Ahmad v. Mst. Nasim Akhtar and 2 others 1983 CLC 183; Mst. Zubeda Naz v. Asif Rashid Minhas and another PLD 1999 Quetta 29 and Ihsan-ur-Rahman v. Mst. Najma Parveen PLD 1986 SC 14 ref.

(b) West Pakistan Family Courts Act (XXXV of 1964)---

----Ss. 5, Sched. & 14---Guardians and Wards Act (VIII of 1890), Ss.25, 47 & 48---Constitution of Pakistan (1973), Art.199--- Constitutional petition---Custody of minor---Guardian Judge granted custody of minor to petitioner, but District Judge in appeal reversed judgment of Guardian Judge, against which petitioner had filed constitutional petition---District Judge while deciding case was influenced by prescriptions of a Psychiatrist and drew inferences therefrom without realizing that said prescriptions were neither produced in original nor their author was examined to prove them in accordance with provisions of law of evidence---District Judge could not have taken into consideration any of those prescriptions without proper proof and it was an error of law which would entitle High Court to interfere in exercise of its constitutional jurisdiction, if a finding of fact was based on no evidence or was contrary to evidence on record or inferences drawn therefrom were not in accordance with law---Finding of District Judge being tarred with error of law and jurisdiction, could not be maintained---Impugned judgment and order were set aside and case was sent back for decision afresh in accordance with law within specified period after examining Psychiatrist as a Court witness.

Peshawar High Court

Baldwin and Francis Ltd. v. Parents Appeal Tribunal 1959 AC 663; Rahim Shah v. Chief Election Commissioner PLD 1973 SC 24; Assistant Collector v. Al-Razak Synthetic (Pvt.) Ltd. 1998 SCMR 2514 and Muhammad Lehrasab Khan v. Mst. Ageel-un-Nisa and 5 others 2001 SCMR 338 ref.

S. Zafar Abbas Zaidi for Petitioner.
Rustam Khan Kundi -for Respondents.
Date of hearing: 30th September, 2004.

JUDGMENT

EJAZ AFZAL KHAN, J.--- The petitioner, Mst. Ulfat Shaheen, who was granted the custody of minors by the learned Guardian Judge, Bannu vide his judgment, dated 12-4-2004 filed the instant constitutional petition when it was reversed by the learned District Judge in appeal vide his judgment, dated 11-5-2004.

2. Before we could take up the case for hearing, the learned counsel for the respondents raised a preliminary objection by submitting that in view of section 48 of the Guardians and Wards Act, a revision could well be filed which is by all means an adequate remedy, therefore, this constitutional petition is incompetent. The learned counsel to support his contention placed reliance on the case of Niaz Ahmad v. Mst. Nasim Akhtar and 2 others 1983 CLC 183.

3. As against that, the learned counsel appearing on behalf of the petitioner contended that in view of section 5 of the West Pakistan Family Courts Act, it is exclusive jurisdiction of the

Family Court to adjudicate upon the matters specified in the Schedule, therefore, no other Court is competent to entertain, hear and adjudicate upon a lis relating to custody of children and guardianship, and that any order passed by such Court subject to the result of appeal under section 14 of the Act shall be final, as such, constitutional petition is the only remedy in this state of affairs. The learned counsel referred to the case of Mst. Zubeda Naz v. Asif Rashid Minhas and another PLD 1999 Quetta 29.

4. On merits of the case, the learned counsel for the petitioner argued that the entire finding of the learned Additional District Judge is based on photostat prescriptions of the Psychiatrist which have not been proved on the record in accordance with the requirements of law of evidence, therefore, it being unsustainable is liable to be set aside.

5. The learned counsel for the respondents defended the impugned judgment by arguing that when the petitioner admitted that she was examined by a Psychiatrist and that his prescriptions are with her father-in-law, even photostat could be considered by the learned Additional District Judge while deciding the case.

6. Before we answer the objection raised by the learned counsel for the respondents, we would like to refer to sections 47 and 48 of the Guardians and Wards Act, which is reproduced hereinbelow:--

Orders appealable.--- An appeal shall lie to the High Court from an order made by a Court---

(a) under section 7, appointing or declaring or refusing to appoint or declare a guardian or

(b) under section 9, subsection (3), returning an application, or

(c)under section 25, making or refusing to make an order for the return of a ward to the custody of his guardian, or

(e)under section 26, refusing leave for the removal of a ward from the limits of the jurisdiction of the Court, or imposing conditions with respect thereto, or

(f) under section 28 or section 29, refusing permission to a guardian to do an act referred to in the section, or

(g) under section 32, defining, restricting or extending the powers of a guardian, or

(h) under section 39, removing a guardian, or

(i)under section 40, refusing to discharge a guardian, or under section 43, regulating the conduct or proceedings of a guardian or settling a matter in difference between joint guardians or enforcing the order, or

(j) under section 44 or section 45, imposing a penalty:

Provided that where the order from which an appeal is preferred is passed by an officer subordinate to a District Court, the appeal shall lie to the District Court. "

7. A perusal of the above quoted provision reveals that an appeal against an order passed under the Guardians and Wards Act will lie to the High Court, but it may be noted that the said provision was amended by Guardians and Wards (Amendment) Ordinance (IX of 1980), whereby it was provided that where the order from which an appeal is preferred is passed by an Officer subordinate to a District Court, appeal shall lie to the District Court. But who is to try such cases, where appeals are to be preferred under the latest dispensation, what would be the status of such decision and how far shall it be final are the propositions in controversy, which too cannot be attended to without referring to the relevant provisions of the West Pakistan Family Courts Act, 1964 (XXXV of 1964), which are thus, reproduced as under:--

"Section 5 Jurisdiction.--- Subject to the provisions of the Muslim Family Laws Ordinance, 1961 and the

Conciliation Courts Ordinance, 1961, the Family Courts shall have exclusive jurisdiction to entertain, hear and adjudicate upon matters specified in the Schedule.

Schedule

(1)Dissolution of marriage.

(2)Dower.

(3)Maintenance.

(4)Restitution of conjugal rights.

(5)Custody of children.

(6)Guardianship.

(7)Jactitation of marriage.

(8)Dowery.

Section 14 (1) Notwithstanding anything provided in any other law for the time being in force, a decision given or a decree passed by a Family Court shall be appealable.---

(a) to the High Court where the Family Court is presided over by a District Judge, an Additional District Judge or a person Notified by Government to be of the rank and status of a District Judge or an Additional District Judge, and

(b) to the District Court, in any other case.

(2) No appeal shall lie from a decree passed by a Family Court---

(a) for dissolution of marriage, except in the case of dissolution for reasons specified in clause (d) of item (vii) of section 2 of the Dissolution of Muslim Marriage Act, 1939.

(b) for dower not exceeding rupees fifteen thousands';

(c) for maintenance of rupees five hundred or less per month.

(3) The appellate Court referred to in subsection (1) shall dispose of the appeals filed under this section within a period of four months.

Section 25. Family Court deemed to be a District Court for purposes of Guardians and Wards Act, 1890.--- A Family Court shall be deemed to be a District Court for the purposes of the Guardians and Wards Act, 1890, and notwithstanding anything contained in this Act shall in dealing with matters specified in that Act, follow the procedure prescribed in that Act."

Peshawar High Court

8. A look at the above quoted provisions would reveal that a Family Court shall not only have exclusive jurisdiction to decide matters relating to the custody of children and guardianships etc. but shall also be deemed to be a District Court for the purposes of the Guardians and Wards Act and that an appeal against an order passed by a Family Court will lie to the District Judge under section 14 of the Act when the Family Court is presided over by a Judge subordinate to a District Judge and that would be an end of the matter. An aggrieved person can file a writ petition in the High Court, that too when the finding of the learned District Judge is based on misreading, non-reading of evidence, erroneous assumption of law and fact, or is founded on considerations which are extraneous to the record.

9. It is true that in view of section 48 of the Guardians and Wards Act, a revision is competent against an order passed by a District Judge, but this provision cannot be read in isolation and in disregard of section 14 which being subsequent legislation would have an overriding effect on all other laws for the time being in force, especially when it is prefaced by a non obstante clause. This controversy was set at rest by the Honourable Supreme Court in the case of Ihsan-ur-Rehman v. Mst. Najma Parveen PLD 1986 SC 14 in the following words:--

> "Section 47 in its purview enacted that all appeals from orders referred therein passed under the Guardians and Wards Act by the Court (as defined in the Guardians and Wards Act) would lie to the High Court (before the amendment). The decision of the Court (defined in section 4(5)(a) of the Guardians and Wards Act as the "District Court" even if it was presided over by a Civil Judge subordinate to a District Court, by virtue of enabling provision contained in section 4-A of the Guardians and Wards Act, was appealable under section

47 only to the High Court. The amendment made in 1980 provided that when `the Court' was presided over by a Civil Judge subordinate to the District Court, the appeal shall lie to the District Court and not to the High Court. The argument advanced in the case of Muhammad Din Malik was that if an appeal under section 47 was not competent in a case decided by a Family Judge, then there was no need for the Legislature to have made the amendment at all. Prima facie the argument is attractive that is why leave to appeal was granted. But on deeper scrutiny, it seems that the amendment was made by the Legislature under some misapprehension. It seems that the law declared by the Lahore High Court in the case of Parveen and Manzoor Hussain (decided in 1975 and 1977) was treated to have concluded the controversy and the contrary view taken in the earlier cases decided in 1971, 1972 and 1973 (Karachi), it was assumed to have been superseded by the Lahore cases. If so, it was wrong assumption because the two different views were expressed by separate High Courts and although the view of one has persuasive value for the other, they were not as such binding on each other. Be that as it may be overruled view expressed in the Lahore cases was, it has been noted earlier, made the basis of bringing, amendment, the proviso in section 47, on the assumption that the appeal (as held in the Lahore cases) was competent under section 47 of the Guardians and Wards Act and not under section 14 of the Family Courts Act. This incorrect assumption led to the enactment of the proviso."

10. Having thus, considered in the light of the foregoing discussion and the above quoted dictum of the apex Court, we have no hesitation to hold that only a constitutional petition shall be competent in this state of law.

Peshawar High Court

11. Now we are to see whether the learned Additional District Judge has based his finding on an evidence as could be looked into under the law. A perusal of the impugned judgment would reveal that the learned Judge while deciding this case was influenced by the prescriptions of Psychiatrist and drew inferences therefrom without realizing that the prescriptions were neither produced in original nor their author was examined to prove them in accordance with the provisions of the law of evidence. He could not have taken into account any of those prescriptions without proper proof. Now the question is whether it is an error of law? We have no doubt in our mind that it is; and it is an error of law which will entitle this Court to interfere in the exercise of its constitutional jurisdiction if a finding of fact is based on no evidence or is contrary to evidence on record, or the inferences drawn therefrom are not in accordance with law.

12. The first celebrated judgment was given by Lord Denning in 1959 in the case of Baldwin and Francis Ltd. v. Parents Appeal Tribunal 1959 AC 663 wherein it was held as under:--

> "There are many cases in the books which show that if a Tribunal bases its decision on extraneous considerations which it ought not to have taken into account or fails to take into account a vital consideration which it ought to have taken into account, thus, its decision may be quashed on certiorari and a mandamus issued for it to hear the case afresh. The cases on mandamus are clear enough; and if mandamus will go to a Tribunal for such a cause, then it must follow that certiorari will go also; for when a mandamus is issued to the Tribunal, it must hear and determine the case afresh, and it cannot well do this

> if its previous order is still standing. The previous order must either be quashed on certiorari or ignored; and it is better for it to be quashed."

13. In his book, the Discipline of Law, while giving a fascinating account of his personal contributions to the changing face of English Law, Lord Denning highlighted the concept of error of law and jurisdiction on page 74, in the following words:--

> "This brings me to the latest case. In it I ventured to suggest that whenever a Tribunal goes wrong in law, it goes outside the jurisdiction conferred on it and its decision is void, because Parliament only conferred jurisdiction on the Tribunal on condition that it decided in accordance with the law."

14. In the case of Rahim Shah v. Chief Election Commissioner PLD 1973 SC 24, the Honourable Supreme Court elucidated this principle in the following words:--

> "The scope of interference in the High Court is, therefore, limited to the inquiry whether the Tribunal has in doing the act or undertaking the proceedings acted in accordance with law. If the answer be in the affirmative the High Court will stay its hands and will not substitute its own findings for the findings recorded by the Tribunal. Cases of no evidence, bad faith, misdirection or failure to follow judicial procedure, etc. are treated as acts done without lawful authority and vitiate the act

> done or proceedings undertaken by the Tribunal on this ground. Where the High Court is of opinion that there is no evidence proper to be considered by the inferior Tribunal in support of some point material to the conviction or order, certiorari will be granted."

15. To the same effect is the case of Assistant Collector v. Al Razak Synthetic (Pvt.) Ltd. 1998 SCMR 2514, wherein it was held that:--

> "In our view, it was not proper on the part of the learned Judges of the Division Bench of the High Court to have decided the above technical questions without getting first the decision of the Central Board of Revenue on the basis of the material which the parties might have produced before it in support of their claims. The High Court generally does not investigate disputed questions of fact in exercise of its constitutional jurisdiction. However, it can interfere with a finding of fact if it is founded on no evidence or is contrary to the evidence on record or the inferences drawn therefrom are not in accordance with law."

16. In the case of Muhaimnad Lehrasab Khan v. Mst. Ageel-un-Nisa and 5 others 2001 SCMR 338, the Honourable Supreme Court after taking stock of a series of its judgments held as under:--

> "There is no cavil with the proposition that ordinarily the High Court in its constitutional jurisdiction would not

undertake to reappraise the evidence in rent hatters to disturb the finding of facts but it would certainly interfere if such findings are found to be based on non-reading or misreading of evidence, erroneous assumptions of jurisdiction, misapplication of law, excess or abuse of jurisdiction and arbitrary exercise of powers. In appropriate cases of special jurisdiction, where the District Court is the final Appellate Court, if it reverses the finding of the trial Court on the grounds not supported by material on record, the High Court can interfere with it by issuing writ of certiorari to correct the wrong committed by the Appellate Authority. "

17. When viewed in this context, we are convinced that the finding of the learned Additional District Judge being tarred by the error of law and jurisdiction cannot be maintained.

18. For the reasons discussed above, this writ petition is allowed, the impugned judgment and order are set-aside and the case is sent back to the learned Additional District Judge-IV, Bannu for decision afresh in accordance with law within a period of two months after examining the Psychiatrist as a C.W. The parties are directed to appear before the said Court on 5-10-2004. A copy of this judgment be also sent to the learned Additional District Judge wherever he is posted at the moment.

H.B.T./553/P
Case remanded.

Peshawar High Court

Feroz Shah --- Appellant/Petitioner (s)

Versus

Marat Shah --- Respondent (s)

JUDGMENT

WP. No. 1414/2004 Date of hearing 12.10.2004

EJAZ AFZAL KHAN J.- The petitioners through the instant petition have questioned the order dated 11.6.2004 of the Additional District Judge-II Peshawar whereby he accepted the revision filed by the respondents and by setting aside the impugned order also allowed the respondents to cross-examine the P.Ws. whose examination-in-chief was recorded in their absence.

2. It was argued by the learned counsel for the petitioners that once an order was passed by the learned trial Court under Rule-3 of Order-XVII, C.P.C. after taking into account the conduct of respondents, there was no irregularity or illegality therein to furnish a justification for the exercise of revisional jurisdiction by the learned Additional District Judge under section 115 of the C.P.C., therefore, the impugned order having been passed without jurisdiction and lawful authority is liable to be set aside.

3. We have gone through the record carefully and considered the submissions of the learned counsel for the petitioners.

4. Be all that as it may, as it is a well established principle of law that decision on merits rather than on technicalities is the most cherished goal of law, the revisional Court by providing an opportunity to the respondents to cross-examine the witnesses has not done any thing which can be termed an error muchless jurisdictional so as to justify interference therewith in the exercise of extra ordinary equitable discretionary constitutional

jurisdiction of this Court, therefore, this petition being without merit is dismissed.

Dated:12.10.2004. J U D G E

J U D G E

Peshawar High Court

M/S Fortier Industry --- Appellant/Petitioner (s)

Versus

Banking Court-II --- Respondent (s)

JUDGMENT

WP. No. 816/2004 Date of hearing 27.10.2004

EJAZ AFZAL KHAN J.- The petitioners through the instant constitutional petition has questioned the order dated 13.4.2004 of the learned Judge Banking Court-II N.W.F.P. Peshawar, whereby he allowed the application filed by the respondents for restoration of their suit.

2. It was argued by the learned for the petitioners that where application for restoration of the suit was filed by a person who was not authorized in black and white, the learned trial Court should not have restored it without adverting to his authority, moreso when this was the only objection raised by the petitioners in their replication.

3. As against that, the learned counsel appearing on behalf of the respondents argued that it was too known that the person moving an application for restoration of suit had been representing the Bank in many cases and that the defect pointed out by the petitioners was not the one which was incapable of being remedied , therefore, the learned trial Court has committed no illegality by not adverting to his authority in this behalf. The learned counsel next argued that as the appeal under section 22 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 was by all means an adequate remedy, the constitutional petition in view of the provision contained under Article 199 of the Constitution of Islamic Republic of Pakistan,1973 will not lie.

4. We have gone through the record carefully and considered the submissions of the learned counsel for the parties.

Peshawar High Court

5. Be all that as it may, whether it was a defect capable of being remedied or otherwise the learned trial Court should not have disposed of the application for restoration of the suit without attending and adverting to this aspect of the case.

6. The argument that it was too known that the person moving an application for restoration had been representing the Bank in may other cases is nothing but an assumption particularly when there is nothing on the record of this case to substantiate it.

7. The argument that the appeal under section 22 of the Ordinance mentioned above, was the only adequate remedy is also without substance as the said provision of law provides for an appeal against a final order and not against the one which is interlocutory as in this case, therefore, the writ is maintainable.

8. In this view of the matter, we allow this writ petition, set aside the impugned order and send the case back to the learned trial Court for decision a fresh as hinted to above.

Dated:27.10.2004 CHIEF JUSTICE

J U D G E

Peshawar High Court

Naseer Ahmad --- Appellant/Petitioner (s)

Versus

Muhammad Ayub --- Respondent (s)

JUDGMENT

WP. No. 1548/2004 Date of hearing 04.11.2004

EJAZ AFZAL KHAN J.- The petitioner after being hauled up under sections55/110 Cr.P.C. by the S.H.O. Khuram and discharged under section 119 Cr.P.C. by the Judicial Magistrate requested the D.I.G. Police to take action against the concerned S.H.O. on the ground that the entire proceeding against him was motivated by malice and mala fide. When the D.I.G. did not take any action in this behalf, the petitioner through the instant petition asked for the issuance of a writ in the nature of mandamus to do the needful.

2. We have gone through the record carefully and considered the submissions of the learned counsel for the petitioner.

3. As a suit for damages is, by all means, an adequate remedy, we would not like to step in when the averments made in the petition as to malice and mala fide on the part of the S.H.O. concerned cannot be inquired into without entering into a factual controversy, which is decidedly not the domain of this Court while exercising its constitutional jurisdiction.

4. For the reasons discussed above, this petition being without substance is dismissed in limine.

Dated:4.11.2004 J U D G E

J U D G E

Peshawar High Court

_____Appellant/Petitioner (s)

Versus

_____Respondent (s)

JUDGMENT

WP. No. 1296/1996 Date of hearing 18.11.2004

NASIR UL MULK J.- The land known "Soqandor" measuring 60 Chakorams situated in Oveer Tehsil Mulkhow, District Chitral which in a way is the subject matter of dispute in this case was originally owned and possessed by the predecessor-in-interest of respondents No.2 and 3. Some where in 1895, it was taken from him by the then Ruler of Chitral and given to late Mubarak Shah, the predecessor of respondent No.1. On the demise of the Ruler, the land was resorted to the predecessor-in-interest of respondents No.2 and 3. The predecessor of respondent No.1 somewhere in 1947 submitted an application to the then Mehtar, Late H.H. Muzaffar-ul-Mulk that the land be given back to him but it was turned down with the remarks that he should lay hand on some other property instead. After the death of H.H. Muzaffar-ul-Mulk, the predecessor of respondent No.1 once again asserted his claim in respect of the property and insisted that the matter be decided by Mizan-e-Shariat. The matter on being referred was decided by Mazan-e-Shariat in favour of respondents Nos. 2 and 3 which was also concurred by Political Agent Chitral in his capacity as 'Wazir-e-azam'. The predecessor of respondent No.1 assailed it before the Commissioner Peshawar exercising the powers of Regent Chitral who too upheld the same, vide his order dated 4.1.1969. Not content with the aforesaid decisions, the petitioner once again claimed the property or in the alternative compensation therefor by moving an application before the Assistant Commissioner chitral on the strength of Notification No.10/31/Sota/II/HD/72-A dated 8.7.1975 which was allowed, vide order dated 20.3.1976. On appeal before the SMBR, it was reversed, vide order dated 27.7.1976 and the case was remanded to

the Deputy Commissioner Chitral for decision afresh in the presence of the parties in accordance with law. The learned Deputy Commissioner Chitral, vide his order dated 23.8.1982 dismissed the petition of respondent No.1. On revision the order dated 23.8.1982 was reversed by the Additional Secretary Home and Tribal Affairs Department and again the case was sent back to the Deputy Commissioner for decision afresh on all the aspects of the case, after affording opportunity of hearing to the parties in support of their claims, vide his order dated 5.9.1991. The learned Deputy Commissioner on hearing the parties, allowed the application by holding that since the predecessor of respondent No.1 was deprived of the property without compensation, he is entitled to be compensated, vide his order dated 8.11.1992. A revision against the order of the Deputy Commissioner was dismissed by the Additional Secretary Home and Tribal Affairs Department, vide his order dated 17.11.1993.

2. When the aforesaid orders were put to execution by the respondents, the petitioner filed the instant constitutional petition alleging therein that all the orders in favour of respondent No.1 have been passed at his back without giving him the option of hearing as neither he was served nor was ever represented by his counsel in any of the proceedings culminating in such orders. Another ground urged by the learned counsel for the petitioner was that once the dispute was settled by Mizan-e-Shariat concurred by the Deputy Commissioner in his capacity as 'Wazir-e-azam' and the Commissioner in his capacity as Regent, it was a transaction past and closed, therefore, it could not have been re-opened under any cannons of law and jurisprudence. It was also urged that when the predecessor of respondent No.1 despite offer declined to lay hand on any other property, he could not have turned round even to ask for compensation therefor as it would be a case of estoppel clear and simple. It was finally urged that where the Assistant Commissioner had no jurisdiction to re-open a matter past and closed not only his order but the entire superstructure raised thereon will collapse , therefore, the entire proceeding being curum-non-judice will have no effect altogether. The learned counsel to support his contention placed reliance on

the cases of Yousaf Ali..Vs..MulhammadAslam Zia and 2 others (PLD 1958 Supreme Court (Pak) 104), Muhammad Swaleh and another..Vs..Messrs United Grain and Fooder Agencies (PLD 1964 Supreme Court 97), Syed Mahmud Alam..Vs.. Syed Mehdi Hussain and 2 others (PLD 1970 Lahore 6), Ali Muhammad..Vs..Hussain Bakhsh and others (PLD 1976 Supreme Court 37) and The Chairman, District Screening Committee, Lahore and another..Vs..Sharif Ahmad Hashmi (PLD 1976 Supreme Court 258).

3. The learned counsel appearing on behalf of respondents Nos. 2 and 3 owned the arguments addressed by the learned counsel for the petitioner. However, the learned counsel appearing on behalf of respondent No.1 argued that the petitioners were served as is apparent from the relevant orders, therefore, the petitioners cannot say with their chin up that they were never served. The learned counsel next contended that when the property was taken from the predecessor of respondent No.1, his right to ask for another property or its compensation could not be extinguished notwithstanding the decision by 'Mazan-e-Shariat and concurrence therewith by the next higher forums in the hierarchy. The learned counsel by referring to the Notification mentioned above, contended that the Assistant Commissioner had the jurisdiction to entertain the claim of respondent No.1 and that the orders passed by him and the other forums in the hierarchy being within the para meters of law cannot be termed as corum-non-judice by any stretch of imagination.

4. We have gone through the record carefully and considered the submissions of the learned counsel for the parties.

5. There is nothing on the record in black and white to show that the petitioner was served or was ever represented by his counsel or recognized agent in the proceeding culminating in the impugned orders. Even the learned counsel for the respondents could not refer to any document as could prove that the petitioner was either served or was ever represented by his counsel or recognized agent in any of the forums. When that being the case,

we do not feel inclined to maintain the orders which have been passed in violation of the principle of natural justice enshrined in the maxim "audi alteram partem."

6. However, as the claim of respondent No.1 for compensation in lieu of the property so taken from his predecessor involving factual controversy cannot be decided without recording evidence, remand of the case would be indispensable , therefore, we need not advert to the learned arguments of the learned counsel for the petitioner and the judgments cited in support there of.

6. For the reasons discussed above, we allow this petition, set aside all the impugned orders and send the case back to the learned Senior Civil Judge Chitral for decision a fresh as no other forum under any of the Regulations is in existence. The application filed by respondent No.1 shall be treated as plaint. However, he would be at liberty to suitably amend it and implead all those who can be necessary and proper party in the circumstances of the case. The parties are directed to appear in the Court of the learned Senior Civil Judge Chitral on 30.11.2004.

9. As it is an old case, it be disposed of within a period of six months.

Announced on:
18.11.2004

J U D G E

J U D G E

Peshawar High Court

Messrs PEARL CONTINENTAL HOTEL, through Executive Manager, Khyber, Peshawar --- Petitioner

Versus

GOVERNMENT OF N.-W.F.P. through Secretary Excise and Taxation of N.-W.F.P. Peshawar and 3 others --- Respondents

JUDGMENT

W.P No.650/2003 Decided on 3.11.2004
(P L D 2005 Peshawar 25)

(a) North West Frontier Province Hotel Tax Rules, 2003---

Ejaz Afzal Khan and Dost Muhammad Khan, JJ---R.4---North-West Frontier Province Finance Ordinance (XXIII of 2002), Ss.4 & 5 [as inserted by North-West Frontier Province Finance (Amendment) Ordinance (VII of 2003)]---West Pakistan Finance Act (I of 1965), S.12---Constitution of Pakistan (1973), Arts. 199 & 163--Constitutional petition---Vires of North-West Frontier Province Hotel Tax Rules, 2003 insofar as the Rules allegedly, were inconsistent with S.4, N.W.F.P. Finance Act, 2003 and the authority of the Department to initiate the process of assessment and orders passed thereagainst pursuant thereto---Held, there was no conflict between the two provisions and in case there was any, that was capable of being reconciled---Mode suggested by R.4, N.-W.F.P. Hotel Tax Rules, 2002 was also the same except that the expression "total number of lodging unit available" used in S.4, N.-W.F.P. Finance Ordinance, 2002 had been phrased as "maximum number of lodging units" in the rule with the addition of the words "maximum charges made for a lodging unit on any day during the year for which the tax was assessed"---Perusal of both Rule and section would reveal that there was no such conflict between the two, as a matter of fact the latter explained and qualified the expression "total number of lodging units "available" and the expression "room rent" used in the former---Principles.

Peshawar High Court

According to section 4 of the N.-W.F.P. Finance Act, 2002, a mode has been prescribed for the levy and collection of tax on hotels payable by the owners or management thereof at the rate of 5% of the room rent per lodging unit per day on the basis of 50% of the total number of lodging units available therein. The mode suggested by R.4, N.-W.F.P. Hotel Tax Rules, 2002 is also the same except that the expression 'total number of lodging units available' used in the section has been phrased as "maximum number of lodging units" in the rule with the addition of the words "maximum charges made for a lodging unit on any day, during the year for which the tax is assessed".

The question in the present case is whether the difference in the phrase with the addition of the words mentioned above, will ever constitute a conflict which is not capable of being reconciled? A careful perusal of the section and the rule would reveal that there is no such conflict between them. As a matter of fact, the latter explains and qualifies the expression 'total number of lodging units available' and the expression 'room rent' used in the former. Similarly a mountain cannot be made out of a mole hill when even according to the ordinary dictionary meaning, the word "available" means present or at hand and thus cannot be stretched to exclude a unit under repair when there is nothing either express or implied in the statute to justify any such inference, moreso when the' formula of taxing 50% the total lodging units is primarily meant to obviate such needs and eventualities. The Courts of law are not supposed to wrest the language of a statute to create causes omissus by assuming that the legislature intended to include it but omitted to do so and thus read what is not there.

It is true that the rules being a product of subordinate legislation can neither, override nor over-reach a provision of the substantive statute but if they explain the latter and provide aid to facilitate its understanding, it shall, in certain cases, be quite legitimate to read and refer to them especially when they, on all counts, conform to and are subordinate to the substantive statute. In this view of the matter, there is no conflict between the two and in case there is any, that is capable of being reconciled.

Peshawar High Court

The contention that after deletion of section 12 of the West Pakistan Finance Act, 1965, the Deportment is left with no authority to assess or collect hotel tax, notwithstanding being ingenious, is not legally respectable when the rules under the N.-W.F.P. Finance Ordinance, 2002 have since been framed and the officials of the Department have been empowered and authorized to do the needful.

The contention that when despite fixed rates the classes of occupants enumerated in the segment are charged differently, the Assessing Authority could not levy tax on fixed rates in derogation of what is actually charged by the owner/Management, is also without force, firstly because it has never been averred anywhere in the petition muchless specifically that the rates shown in the Hotels Guide or displayed in the hotel itself are not the ones which are actually charged, secondly because such construction is not warranted by the statute or the rules made thereunder, thirdly because it opens room for discretionary powers of the officials of the Department which almost invariably tend to open floodgates for corruption and fourthly because the taxing statute in the third world countries are now so enacted and enforced as would ensure transparency irk the process of assessment and collection of tax and thus eliminate such powers which tend to facilitate its evasion, therefore, the room rent mentioned in the Hotels Guide or displayed in the hotel itself shall be considered to be the one as charged unless of course it is altered or modified.

The contention that where a provision of taxing Statute being vague and ambiguous is susceptible to two interpretations, the one which is in favour of the person taxed is to be adopted is also devoid of force as there is nothing vague or ambiguous in the Statute.

Messrs Firdous Spinning and Weaving Mills Ltd and others v. Federation of Pakistan and 2 others PLD 1984 Kar. 522; B.P. Biscuit Factory Ltd., Karachi v. Wealth Tax Officer and another 1996 SCMR 1470; Messrs Micropak (Pvt.) Ltd. Lahore v. Income

Tax Appellate Tribunal Lahore and 2 others 2001 PTD 1180. Lt.-Col. Nawabzada Muhammad Amir Khan v. The Controller of Estate Duty and others PLD 1961 SC 119 and Province of West Pakistan and another v. Mahboob Ali and another PLD 1976 Supreme Court 483 distinguished.

Zafar Ali Khan and another v. Government of N.-W.F.P. through Chief Secretary and 3 others PLD 2004 Pesh. 263 ref.

(b) Interpretation of Statutes---

---- Rules being a product of subordinate legislation, can neither override nor overreach a provision of the substantive Statute, but if the Rules explain the latter and provide aid to facilitate its understanding, it shall, in certain cases, be quite legitimate to read and refer to them, especially when they, on all counts, conform to and are subordinate to the substantive statute.

Dated 21.10.2004

JUDGMENT

EJAZ AFZAL KHAN, J.---Messrs Pearl Continental Hotel through its Executive Manager, has filed the instant Constitutional petition and thereby questioned the vires of N.-W.F.P. Hotel Tax Rules, 2003 in so for as they are inconsistent with section 4 of the N.-W.F.P. Finance ordinance, 2002 (Finance Ordinance No.XXIII 2002) and the authority of the respondents to initiate the process of assessment and orders passed there-against pursuant thereto.

2. It was argued by the learned counsel for the petitioner that after deletion of section 12 of the West Pakistan Finance Act, 1965 (Act I of 1965) from the West Pakistan Hotels Tax Rules, 1966 by virtue of N.-W. F. P. Finance Ordinance, 2000 (Ordinance No. II of 2000), the Excise and Taxation Department is left with no authority to assess or collect tax, therefore, the very assessment is ab initio void. He by referring to the Pearl Continental Hotel Peshawar Room Segment for 2002-2003, argued that when despite

fixed rates the classes of occupants enumerated therein are charged differently, the Assessing Authority could not levy tax on fixed rates in derogation of what is actually charged by the petitioner. The learned counsel by referring to the expression "total number of lodging units available" used in section 4 of N.-W.F.P. Finance Ordinance, 2002, (Ordinance No.XXIII of 2002), argued that it excludes a room from being taxed which is under repair, therefore, rule 4 of the N.-W.F.P. Hotels Tax rules, 2003, providing "maximum number of lodging units" which tends to increase the magnitude of tax being in conflict with the charging provision of the substantive statute and ultra vires is liable to be struck down, moreso when, in view of Article 163 of the Constitution of Islamic Republic of Pakistan, 1973, the power to impose or increase tax is vested in the Provincial Assembly and not in the Government. The learned counsel by concluding his arguments, stressed that where a provision of law being vague or ambiguous is susceptible to two interpretations, the one which is in favour of the person taxed is to, be adopted. The learned counsel to support his contention placed reliance on the cases of Messrs Firdous Spinning and Weaving Mills Ltd. and others v. Federation of Pakistan and 2 others (PLD 1984 Karachi 522), B.P. Biscuit Factory Ltd, Karachi v. Wealth Tax Officer and another (1996 SCMR 1470), Messers Micropak (Pvt.) Ltd. Lahore v. Income Tax Appellate Tribunal Lahore and 2 others (2001 PTD 1180), L.T. Col. Nawabzada Muhammad Amir Khan v. The Controller of Estate Duty and others (PLD 1961 Supreme Court 119) and Province of West Pakistan and another v. Mahboob Ali and another (PLD 1976 Supreme Court 483).

3. As against that, Barrister Jehanzeb Rahim, learned Advocate General, appearing on behalf of the respondents argued that despite deletion of section 12 of the Finance Act No. I of 1965, the rules framed thereunder will continue to be operative unless repealed, therefore, the authority of the respondents to assess and collect tax cannot be said to have been marred by the aforesaid deletion. He while controverting the argument with regard to a conflict between the substantive statute and the rules made thereunder submitted that there is absolutely no conflict between the two and in case there is' any, that is capable of being reconciled. He by referring to

the sates as given in the Pakistan Hotels Guide submitted that the petitioner has rightly been charged according to the rates mentioned therein, therefore, the segment referred to by the learned counsel for the petitioner, is nothing but a disguise to evade tax. While commenting on the expression 'available' used in section 4 of, the Ordinance, 2002, the learned Advocate-General contended that it has no nexus with the room under repair as it clearly refers to the number of lodging units present in the Hotel.

4. We have gone through the record carefully and considered the submissions of the learned counsel for the parties.

5. Before we discuss the arguments of the learned counsel for the parties, it is worthwhile to refer to section 4 of Ordinance No.XXIII of 2002: -

> "(4) **Tax on hotels**.--- These shall be levied and collected every year a tax on hotels, payable by the owner or management thereof at the rate of five per cent of the room rent per lodging unit per day on the basis of fifty per cent of the total number of lodging units available in the hotel concerned:
>
> Provided that assessment in relation to a hotel at a hill station shall be made at the aforesaid rate for four months only in a year, that if from Ist day of May to 31st day of August (both days inclusive).
>
> **Explanation**.--- In this section, unless there is anything repugnant in the subject or context.-
>
> (a) "hotel" means an establishment where lodging with board or other service is provided for a monetary consideration, but shall not include.
>
> (i) any home or hostel maintained exclusively for aged or sick persons or as the case may be, for students, by or under

the control of a charitable, medical or educational institution;

(ii) any rest house, mess or other premises belonging to or in the possession of the Federal or a Provincial Government,' where lodging, board or other service is provided for Government officials or members of the Defence Forces;

(b) "lodging unit" means a bed or other sleeping accommodation which is, or is intended to be provided to a person staying over night in a room for lodging; and

(c) "room rent" includes fans, air-conditioning, light, heat, telephone, bedding and all other payments connected with lodging unit, except the portion, if any, directly attributable to supply of foodstuff."

6. Another provision of the Ordinance though inserted subsequently by virtue of N.-W.F.P. Finance Amendment Ordinance, 2003 (Amendment Ordinance No. 7 of 2003), which also runs as under:-

"5. **Power to make rules**.--- Government may make rules to carry out the purposes of section 4 of this Ordinance."

7. Rule 4 of the N.-W.F.P. Hotels Tax Rules 2003, being germane also merits a reference as the whole controversy devolves around that and is thus reproduced as under:--

"4. Maximum charges for lodging units in a hotel.---

(1) The lodging units in a hotel on which the tax is worked out for the year shall be maximum number of lodging units or the maximum charges made for a lodging unit on any day during the year for which the tax is assessed.

(2) Subject to such general or special instructions as may be issued by the Government, the District Excise and Taxation Officer, himself or through any subordinate officer not below the rank of an Inspector of the Excise and Taxation Department may make physical or no the spot verification, of the number of lodging units or of the maximum daily charges for a single lodging unit in a hotel, on any day during the year, keeping, however, in view the convenience of the person occupying the lodging units.

(3) If it is found at any time during the year that actually the number of lodging units in a hotel is more or the maximum daily charges on the basis of which the tax for the year was assessed are lesser than the daily charges being charged from the customer, the District Excise and Taxation Officer shall, after giving an opportunity to the owner of being heard, enhance the amount of the tax already assessed on the hotel and shall determine the additional tax for the year accordingly. "

8. According to the above quoted section of the Ordinance, a mode has been prescribed for the levy and collection of tax on hotels payable by the owners or management thereof at the rate of 5% of the room rent per lodging unit per day on the basis of 50% of the total number of lodging units available therein. The mode suggested by the above quoted rule is also the same except this that the expression 'total number of lodging units available' used in the section has been phrased as "maximum number of lodging units" in the rule with the addition of the words " maximum charges made for a lodging units on any day during the year for which the tax is assessed".

9. The question which arises for our decision is whether the difference in the phrase with the addition of the words mentioned above, will ever constitute a conflict which is not capable of being reconciled? A careful perusal of the section and the rule would reveal that there is no such conflict between them. As a matter of fact, the latter explains and qualifies the expression `total number

of lodging units available' and the expression `room rent' used in the former. Similarly a mountain cannot be made out of a mole hill when event according to the ordinary dictionary meaning, the word "available" means present or at hand and thus cannot be stretched to exclude a unit under repair when there is nothing either express or implied in the statute to justify and such inference, moreso when the formula of taxing 50% the total lodging units is primarily meant to obviate such needs and eventualities. Needless to say that the Courts of law are not supposed to wrest the language of a statute to create causus omisus by assuming that the legislature intended to include it but omitted to do so and thus read what is not there.

10. It is true that the rules being a product of subordinate legislation can neither override nor over-reach a provision of the substantive statute but if they explain the latter and provide aid to facilitate its understanding, it shall in certain cases be quite legitimate to read and refer to them especially when they on all counts conform to and are subordinate to the substantive statute. In this view of the matter, we have no doubt in our mind that there is no conflict between the two and in case there is any, that is capable of being reconciled.

11. The argument that after deletion of section 12 of the Act, 1965, the respondents are left with no authority to assess or collect hotels tax notwithstanding being ingenious is not legally respectable when the rules under the Ordinance have since been framed and the officials of the Department have been empowered and authorized to do the needful.

12. The argument that when despite fixed rates the classes of occupants enumerated in the segment are charged differently, the Assessing Authority could not levy tax on fixed rates in derogation of what is actually charged by the petitioner is also without force, firstly because it has never been averred anywhere in the writ petition muchless specifically that the rates shown in the Hotels Guide or displayed in the hotel itself are not the ones which are actually charged, secondly because such construction is not

warranted by the statute or the rules made there under, thirdly because it opens room for discretionary powers of the officials of the Department which almost invariably tend to open flood gates for corruption and fourthly because the taxing statute in the third world countries are now so enacted and enforced as would ensure transparency in the process of a assessment and collection of tax and thus eliminate such powers which tend to the facilitate its evasion, therefore, the room rent mentioned in the Hotels Guide or displayed in the hotel itself shall be considered to be the one as charged unless of course it is altered or modified. We have already highlighted this aspect of the case in the case of Zafar Ali Khan and another v. Government of N.-W.F.P. through Chief Secretary and 3 others (PLD 2004 Peshawar 263) in the following words:-

> "14. A look at the above quoted provisions of the Act and the amendments introduced therein will indicate that a significant change has been brought about by the legislature in the mode and method of charging and assessing the property tax. Before the amendments it was the sole discretion of the E.T.O and the other officials in the hierarchy to fix any amount as annual rental value of a land or building for assessing the property tax. But this mode not only resulted in heavy tax evasion but also defeated the very purpose of taxation as it, instead of enriching the State, enriched those who resorted to its evasion and those who helped it. A fool proof system for charging and assessing the property tax was thus imperative to curb corruption and ensure transparency in the process. The law in force, before the amendments, had many holes and as such was at the verge of becoming a dead letter. The legislature after collecting the requisite data having bearing on the matters of taxation rose to the occasion and introduced; the amendments which not only classified the urban and rating areas, lands and buildings therein but also prescribed the property tax levied there. "

13. The argument that where a provision of taxing Statute being ague and ambiguous is susceptible to two interpretations, the one

which is in favour of the person taxed is to be adopted is also devoid of force then, as discussed above, there is nothing vague or ambiguous in the mature, therefore, the judgments cited at the bar by the learned counsel for the petitioner will not have any perceptible relevance to the case in hand.

14. Having thus considered against this backdrop, we do not find any merit in this petition which is, therefore, dismissed.

M.B.A./256/P
Petition dismissed.

Peshawar High Court

Shahzada Saiful Mulk --- Appellant/Petitioner (s)

Versus

Hafiz Muhammad Amir --- Respondent (s)

JUDGMENT

WP. No. 1274/1996 Date of hearing 18.11.2004

EJAZ AFZAL KHAN J.- The land known "Soqandor" measuring 60 Chakorams situated in Oveer Tehsil Mulkhow, District Chitral which in a way is the subject matter of dispute in this case was originally owned and possessed by the predecessor-in-interest of respondents No.2 and 3. Some where in 1895, it was taken from him by the then Ruler of Chitral and given to late Mubarak Shah, the predecessor of respondent No.1. On the demise of the Ruler, the land was resorted to the predecessor-in-interest of respondents No.2 and 3. The predecessor of respondent No.1 somewhere in 1947 submitted an application to the then Mehtar, Late H.H. Muzaffar-ul-Mulk that the land be given back to him but it was turned down with the remarks that he should lay hand on some other property instead. After the death of H.H. Muzaffar-ul-Mulk, the predecessor of respondent No.1 once again asserted his claim in respect of the property and insisted that the matter be decided by Mizan-e-Shariat. The matter on being referred was decided by Mazan-e-Shariat in favour of respondents Nos. 2 and 3 which was also concurred by Political Agent Chitral in his capacity as 'Wazir-e-azam'. The predecessor of respondent No.1 assailed it before the Commissioner Peshawar exercising the powers of Regent Chitral who too upheld the same, vide his order dated 30.12.1968. Not content with the aforesaid decisions, the petitioner once again claimed the property or in the alternative compensation therefor by moving an application before the Assistant Commissioner chitral on the strength of Notification No.10/31/Sota/II/HD/72-A dated 8.7.1975 which was allowed, vide order dated 20.3.1976. On appeal before the SMBR, it was reversed, vide order dated 27.7.1976 and the case was remanded to the Deputy Commissioner Chitral for decision afresh in the

presence of the parties in accordance with law. The learned Deputy Commissioner Chitral, vide his order dated 23.8.1982 dismissed the petition of respondent No.1. On revision the order dated 23.8.1982 was reversed by the Additional Secretary Home and Tribal Affairs Department and again the case was sent back to the Deputy Commissioner for decision afresh on all the aspects of the case, after affording opportunity of hearing to the parties in support of their claims, vide his order dated 5.9.1991. The learned Deputy Commissioner on hearing the parties, allowed the application by holding that since the predecessor of respondent No.1 was deprived of the property without compensation, he is entitled to be compensated, vide his order dated 7.9.1992. A revision against the order of the Deputy Commissioner was dismissed by the Additional Secretary Home and Tribal Affairs Department, vide his order dated 17.11.1993.

2. When the aforesaid orders were put to execution by the respondents, the petitioner filed the instant constitutional petition alleging therein that all the orders in favour of respondent No.1 have been passed at his back without giving him the option of hearing as neither he was served nor was ever represented by his counsel in any of the proceedings culminating in such orders. Another ground urged by the learned counsel for the petitioner was that once the dispute was settled by Mizan-e-Shariat concurred by the Deputy Commissioner in his capacity as 'Wazir-e-azam' and the Commissioner in his capacity as Regent, it was a transaction past and closed, therefore, it could not have been re-opened under any cannons of law and jurisprudence. It was also urged that when the predecessor of respondent No.1 despite offer declined to lay hand on any other property, he could not have turned round even to ask for compensation therefor as it would be a case of estoppel clear and simple. It was finally urged that where the Assistant Commissioner had no jurisdiction to re-open a matter past and closed not only his order but the entire superstructure raised thereon will collapse , therefore, the entire proceeding being curum-non-judice will have no effect altogether. The learned counsel to support his contention placed reliance on the cases of Yousaf Ali..Vs..MulhammadAslam Zia and 2 others (

PLD 1958 Supreme Court (Pak) 104), Muhammad Swaleh and another..Vs..Messrs United Grain and Fooder Agencies (PLD 1964 Supreme Court 97), Syed Mahmud Alam..Vs.. Syed Mehdi Hussain and 2 others (PLD 1970 Lahore 6), Ali Muhammad..Vs..Hussain Bakhsh and others (PLD 1976 Supreme Court 37) and The Chairman, District Screening Committee, Lahore and another..Vs..Sharif Ahmad Hashmi (PLD 1976 Supreme Court 258).

3. The learned counsel appearing on behalf of respondents Nos. 2 and 3 owned the arguments addressed by the learned counsel for the petitioner. However, the learned counsel appearing on behalf of respondent No.1 argued that the petitioners were served as is apparent from the relevant orders, therefore, the petitioners cannot say with their chin up that they were never served. The learned counsel next contended that when the property was taken from the predecessor of respondent No.1, his right to ask for another property or its compensation could not be extinguished notwithstanding the decision by 'Mazan-e-Shariat and concurrence therewith by the next higher forums in the hierarchy. The learned counsel by referring to the Notification mentioned above, contended that the Assistant Commissioner had the jurisdiction to entertain the claim of respondent No.1 and that the orders passed by him and the other forums in the hierarchy being within the para meters of law cannot be termed as corum-non-judice by any stretch of imagination.

4. We have gone through the record carefully and considered the submissions of the learned counsel for the parties.

5. There is nothing on the record in black and white to show that the petitioner was served or was ever represented by his counsel or recognized agent in the proceeding culminating in the impugned orders. Even the learned counsel for the respondents could not refer to any document as could prove that the petitioner was either served or was ever represented by his counsel or recognized agent in any of the forums. When that being the case, we do not feel inclined to maintain the orders which have been

passed in violation of the principle of natural justice enshrined in the maxim "audi alteram partem."

6. However, as the claim of respondent No.1 for compensation in lieu of the property so taken from his predecessor involving factual controversy cannot be decided without recording evidence, remand of the case would be indispensable , therefore, we need not advert to the learned arguments of the learned counsel for the petitioner and the judgments cited in support there of.

6. For the reasons discussed above, we allow this petition, set aside all the impugned orders and send the case back to the learned Senior Civil Judge Chitral for decision a fresh as no other forum under any of the Regulations is in existence. The application filed by respondent No.1 shall be treated as plaint. However, he would be at liberty to suitably amend it and implead all those who can be necessary and proper party in the circumstances of the case. The parties are directed to appear in the Court of the learned Senior Civil Judge Chitral on 30.11.2004.

9. As it is an old case, it be disposed of within a period of six months.

Announced on:
18.11.2004

J U D G E

J U D G E

Peshawar High Court

Nasir Khan --- Appellant/Petitioner (s)

Versus

Akhtar Zaman --- Respondent (s)

JUDGMENT

WP. No. 1634/2004 Date of hearing 30.11.2004

EJAZ AFZAL KHAN J.- The petitioners through the instant petition have questioned the order dated 22.10.2004 of the learned Addl District Judge Kohat, whereby he set aside the order dated 13.5,.2004 of the learned Civil Judge dismissing the application for rejection of plaint.

2. The learned counsel appearing on behalf of the petitioners by referring to the case of Jannat-ul- Haq and 2 others..Vs..Abbas Khan and 8 others (2001 SCMR 1073) argued that when the expression 'cease to have effect' used in Article 203 D cannot be held synonymous with the expression 'repealed' or deemed to have 'repealed' used in Article 264 of the Constitution of Pakistan or section 6 of the General Clauses Act, any law declared repugnant to the tenets and injunction of Islam shall have effect with retrospectivity, therefore, the learned Addl District Judge committed serious jurisdictional error and acted against the declared law of the land by rejecting plaint seeking annulment of inheritance mutation sanctioned on 21.3.1990 on the ground that section 4 of the Family Law Ordinance, 1961 has been declared against the tenets and injunction of Islam.

3. We have gone through the record carefully and considered the submissions of the learned counsel for the petitioners.

4. It is not disputed that the respondents inherited the property of their propositus under section 4 of the Ordinance. It is also not disputed that the aforesaid provision adorned the statute at the relevant time and was declared repugnant to the injunctions of

Islam by the Federeal Shariat Court in its judgment dated 5.1.2000 rendered in the case of Allah Rakha and others..Vs.. Federation of Pakistan and others (2000 F.C.1) which was to take effect from 31.3.2000, therefore, it cannot be held to have retrospective effect by any stretch of imagination.

5. The argument addressed on the strength of the judgment in the case of Jannatul Haq and 2 others..Vs..Abbas Khan and 8 others (supra) that the expression cease to have effect cannot be held synonymous with the expression 'repealed' or deemed to have 'repealed' is no doubt correct but this does not mean that a law declared by the Federal Shariat Court as repugnant to the injunctions of Islam will have retrospective effect when Article 203 D itself provides that it will cease to have effect on a date so specified by the Court. In the case of Muhammad Ali and others..Vs..Muhammad Ramzan and others (2002 SCMR 426), the Hon'ble Supreme Court while dealing with a similar aspect held as under:-

> "5. The other ground that section 4 of the Ordinance has been declared violative of the Injunctions of Holy Qur'an as such, the respondents cannot get any share out of the property of their predecessor-in-interest, Nizam Din, is devoid of any force in the present case. While going through the judgment of the Federal Shariat Court in the above referred case, it is specifically mentioned in para-63 thereof that the said provision of the Ordinance which has been held repugnant to the Injunctions of Islam shall case to have effect from 31.3.2000. In the case in hand the disputed mutation was sanctioned on 12.1.1978 after the death of predecessor-in-interest of the parties, Nizam Din, as such, this would not be applicable to the instant case. Even otherwise, the learned Judges of the Federal Shariat Court while declaring section 4 of the Ordinance as repugnant to the Holy Qur'an have taken care of the rights of orphan grandchildren. It would be appropriate to reproduce paras-55 and 57 of the said judgment, which read as under:-

"55. The next question to be examined is as to what would be the solution for the socio-economic problem with which the orphan grandchildren may be confronted with on the demise of a grandparent, who may have left estate from which uncles and aunts would inherit; but they would not, and thus, may have sense of deprivation or for that matter confronted with economic problems.

56……..

57. The Islamic Ideological Council in one of its report on the subject of inheritance has recommended that the uncles and aunts of orphan grandchildren are duty bound to take care of their orphan nephews and nieces and provide for them. It has also been recommended that in the case of non-performance of this duty by aunts and uncles a legal obligation be cast upon them to abide by their duty. Probably the above recommendation is derived from Ayat 8 of Sura-e-Nisa which lays down that at the time of distribution of assets those next of kins and orphans and others, who are present, be also dealt with kindly. This is a direction for general application to all next of kins who are present at the time of distribution to be taken care of and not specifically for orphan grandchildren."

6. There is another aspect of the case that the decision of the Federal Shariat Court in the above referred case declaring section 4 of the Ordinance as repugnant to the Injunctions of Islam would take effect, if any, after the appeal pending before this Court is disposed of. In this regard, it would be appropriate to reproduce sub-Article (2) of Article 203 D of the Constitution of the Islamic Republic of Pakistan, 1973, which is in the following terms:-

"(2) If the Court decides that any law or provision of law is repugnant to the Injunctions of Islam, ;it shall set out in its decision---

(a) the reason for its holding that opinion; and

(b) the extent to which such law or provision is so repugnant; and specify the day on which the decision shall take effect;

Provided that no such decision shall be deemed to take effect before the expiration of the period within which an appeal there from may be preferred to the Supreme Court or, where an appeal has been so preferred, before the disposal of such appeal" (Underlining is for emphasis)

5. When considered in this background, we are of the firm and considered view that the impugned order being perfectly in tune with the letter and spirit of Article 203 D of the Constitution and the dictums of the apex Court of the country and being free from any legal or jurisdictional infirmity, merits no interference.

6. For the reasons discussed above, this writ petition being without substance is dismissed in limine.

Dated:30.11.2004 J U D G E

J U D G E

Peshawar High Court

Muhammad Roshan --- Appellant/Petitioner (s)

Versus

Mst. Zohra --- Respondent (s)

JUDGMENT

WP. No. 1126/2004 Date of hearing 01.12.2004

EJAZ AFZAL KHAN J.- The petitioner through the instant petition has questioned the judgment and decree dated 3.6.2004 of the learned Izafi Zila Qazi Swat, whereby he maintained the judgment and decree dated 6.3.2004 of the learned Family Judge with regard to the claim of dower.

2. The crux of the arguments of the learned counsel for the petitioner was that where the respondent admitted in her evidence that she received dower amount in the form of golden ornaments, her suit could not have been decreed and that the finding of both the Courts below being based on mis-reading and non-reading of evidence was liable to be quashed in the exercise of constitutional jurisdiction of this Court.

3. We have gone through the record carefully and considered the submissions of the learned counsel for the petitioner

4. A perusal of the evidence of the respondent would reveal that she denied the receipt of dower amount from the very inception as is evident from the averments of her plaint. Similarly her stance in her statement recorded in the Court also remained much the same, when even a scattering cross-examination could not shake it to the least. The fact is that even the evidence of the petitioner led in rebuttal being contradictory did little to shake it as according to one D.W., the golden ornaments were given to her two days before her marriage somewhere in May, 1999 while according to the other, they were given somewhere in August, 1999. When this is the state of evidence, we do not think, the

finding of the Courts below suffers from any error of fact, law or jurisdiction, therefore, we are not inclined to interfere therewith.

5. For the reasons discussed above, this petition being without merit is dismissed in limine alongwith the C.M.

Dated:1.12.2004 J U D G E

J U D G E

Peshawar High Court

Rasool Khan --- Appellant/Petitioner (s)

Versus

Bakht Bibi --- Respondent (s)

JUDGMENT

WP. No. 1749/2004 Date of hearing 23.12.2004

EJAZ AFZAL KHAN J.- The petitioner through the instant petition has questioned the order dated 19.11.2004 of the learned Judge Family Court Peshawar, whereby she proceeded to decree the suit of the contesting respondent for dissolution of marriage and fixed the case for recording evidence regarding rest of the controversies between the parties after framing issues thereon.

2. It was argued by the learned counsel for the petitioner that the learned Family Judge should not have demonstrated indecent haste by granting a decree for dissolution of marriage without recording evidence when it is apt to have bearing on other issues.

3. We have gone through the record carefully and considered the submissions of the learned counsel for the petitioner.

4. As by virtue of the proviso inserted by Ordinance LV of 2002, the Family Court has been vested with the power to pass a decree for dissolution of marriage if and when efforts for reconciliation fail, we do not think, the learned Family Judge has committed any error much less jurisdictional by proceeding to dissolve the marriage between he parties and adjourning the case for evidence on rest of the issues.

5. The apprehension of the learned counsel for the petitioner as voiced in his argument is also unfounded when it has

not been decided so far as to what is to be returned by the respondent to the petitioner in lieu of dissolution.

6. For the reasons discussed above, this petition being without substance is dismissed in limine.

Dated:23.12.2004 J U D G E

J U D G E

Peshawar High Court

Khair Wali Khan --- Appellant/Petitioner (s)

Versus

Government of N-W.F.P --- Respondent (s)

JUDGMENT

WP. No. 251/2004 Date of hearing 09.02.2005

EJAZ AFZAL KHAN J.- Khair Wali Khan, petitioner herein, served in Pakistan Army Supply Corp as M.T. driver and on retirement from service, received his Army pension. In 1984, on his re-employment as a driver in the Health Department, he showed his date of birth as 1942. On reaching the age of superannuation, he again retired from service on 30.6.2002. While finalizing his pension case, when it transpired to respondents Nos.3 and 4 that his actual date of birth as recorded in the Army Discharge Slip was 9.6.1938, he was served with a notice for recovery of an amount to the tune of Rs.1,85,402/- on the ground that he reached the age of superannuation on 9.6.1998 and thus was neither entitled to serve thereafter nor to pensionary benefits on the strength of the service after such date. When despite efforts the petitioner failed to get the desired relief, he filed the instant constitutional petition in this Court.

2. It was argued by the learned counsel for the petitioner that when the petitioner worked upto 30.6.2002, he was entitled to draw his pay, therefore, recovery of the amount he received as pay from 9.6.1998 to 30.6.2002 being against law is liable to be struck down. He next urged that where the petitioner worked ever since the date of his re-employment to 30.6.2002, he was entitled to get pensionary benefits of the service rendered during the said period.

3. As against that, the learned AAG appearing on behalf of the respondents argued, that he will not grudge the prayer of the petitioner for striking down the order of recovery when it is

not disputed that he worked upto 30.6.2002 but he will have a very serious reservation as far as his entitlement to the pensionary benefits on the strength of his service from 9.6.1998 to 30.6.2002 is concerned.

4. We have gone through the record carefully and considered the submissions of the learned counsel for the parties.

5. Once it is not disputed that the petitioner has worked upto 30.6.2002, the order of recovery of pay from 9.6.1998 to 30.6.2002 is absolutely unwarranted as it is his indefeasible right to get wages for the work he has done. However, he shall not be entitled to pensionary benefits on the strength of his service from 9.6.1998 to 30.6.2002 as no person can be allowed to draw premium on account of his own wrong.

6. For the reasons discussed above, this petition is partially allowed, the impugned order for recovery of the amount mentioned above is struck down, while his claim with regard to the pensionary benefits on account of his service from 9.6.1998 to 30.6.2002 is dismissed.

Dated:9.2.2005 J U D G E

J U D G E

Peshawar High Court

Mst. Asmat Ara --- Appellant/Petitioner (s)

Versus

Ghazala --- Respondent (s)

JUDGMENT

WP. No. 1772/2004 Date of hearing 10.02.2005

EJAZ AFZAL KHAN J.- The petitioner through the instant petition has assailed the order dated 5.11.2004 of the learned Additional District Judge-IV Peshawar whereby he allowed the revision petition filed by respondent No.7 and thus set aside the order dated 22.6.2004 of the learned Civil Judge dismissing her application for being impleaded as party.

2. The learned counsel appearing on behalf of the petitioner argued that respondent No.7 was neither necessary nor proper party, therefore, the learned Additional District Judge erred in allowing her petition for being impleaded as party.

3. We have gone through the available record carefully and considered the submissions of the learned counsel for the petitioner.

4. The record reveals that respondent No.7 has purchased an area measuring 2 kanals 6 marlas 7 sarsai from respondent No.1, vide mutation No.521 dated 3.12.2003 out of the property in dispute. When so, she being necessary party has rightly been allowed to be impleaded by the impugned order. The impugned order, therefore, being free from any error much less jurisdictional is not open to any exception.

5. For the reasons discussed above, this petition being without substance is dismissed in limine.

Dated: 10.2.2005 J U D G E

J U D G E

Peshawar High Court

Abid --- Appellant/Petitioner (s)

Versus

Pashmeed --- Respondent (s)

JUDGMENT

W.P. No. 104/2005 Date of hearing 28.02.2005

EJAZ AFZAL KHAN J.- The petitioner through the instant petition has questioned the order dated 7.12.2004 of the learned Family Judge, whereby she decreed the suit of the respondent for dissolution of marriage on the basis of 'Khula' and after framing issues, fixed the case for evidence thereon.

2. It was argued by the learned counsel for the petitioner that the learned Family Court has no jurisdiction to grant a decree for dissolution of marriage on the basis of 'Khula' without recording evidence.

3. We have gone through the record carefully and considered the submissions of the learned counsel for the petitioner.

4. The record reveals that when every effort for reconciliation failed and the respondent insisted by stating that she would rather prefer death than to live with the petitioner as a wife, the learned family Court proceeded to decree her suit for dissolution of marriage on the basis of 'Khula'.

5. Since in view of the latest amendment in section 10 of the Family Courts Act, 1964, a Family Court is competent to grant a decree for dissolution of marriage on the basis of 'Khula', if reconciliation fails, we do not think, that the impugned order is open to any exception, moreso when it does not suffer from any factual or legal error muchless jurisdictional

7. For the reasons discussed above, this petition being without substance is dismissed in limine.

Dated:28.2.2005 J U D G E

J U D G E

Peshawar High Court

Umar Dabar --- Appellant/Petitioner (s)

Versus

Ibrahim --- Respondent (s)

JUDGMENT

WP. No. 1609/2004 Date of hearing 28.02.2005

EJAZ AFZAL KHAN J.- The petitioners through the instant petition have questioned the order dated 17.9.2004 of the learned Izfi Zila Qazi-IV Swat, whereby he allowed the revision petition filed by the respondents and thus set aside the order dated 22.4.2004 of the learned trial Court.

2. The learned counsel by referring to the cases of Haji Muhammad Tayyab..Vs..Muhammad Sharif Malik, Dy, Suuperintendent, Customs Intelligence and another (1996 SCMR 1967) and Barkat Ali..Vs..Muklhammad Nawaz (PLD 204 Supreme Court 489), argued that where the respondents despite many chances failed to cross-examine the witnesses, their defence was rightly closed by the learned trial Court and that the learned revisional Court by accepting the petition of the respondents and thereby allowing them to cross-examine the witnesses, acted against the declared law of the land.

3. We have gone through the record carefully land considered the submissions of the learned counsel for the petitioners.

4. Since the learned revisional Court for convincing reasons allowed the respondents to cross-examine the witnesses, we will not like to interfere with the impugned order, when it does not suffer from any legal or jurisdictional error.

5. The cases Haji Muhammad Tayyab..Vs..Muhammad Sharif Malik, Dy, Sl;ulperintendent, Cyustoms Intelligence and another and Barkat

Ali..Vs..Muhammad Nawaz (Supra) because of their different and distinguishable features will not be attracted to the facts and circumstances of the instant case, the moreso when decision on merits after giving the parties a fair chance to prove their case is the most cherished goal of law..

6. For the reasons discussed above, this petition being without merit is dismissed in limine.

Dated:28.2.2005 J U D G E

J U D G E

Peshawar High Court

Pervez --- Appellant/Petitioner (s)

Versus

Noor Rehman --- Respondent (s)

JUDGMENT

WP. No. 833/2004 Date of hearing 30.03.2005

EJAZ AFZAL KHAN J.- The petitioners through the instant petition have questioned the order dated 17.4.2004 of the learned Additional District Judge-II Mardan whereby he allowed the revision petition filed by the respondent and set aside the order dated 21.6.2003 of the learned Civil Judge Mardan.

2. It was argued by the learned counsel for the petitioners that where the petitioners were not served in accordance with the requirements of law and they moved an application for setting aside the ex-parte decree well within time after getting knowledge about it, it was rightly allowed by the learned Civil Judge and that the learned revisional Court acted without jurisdiction and lawful authority by setting aside the order of the Court below notwithstanding the fact that it suffered from no jurisdictional error. Relies on the cases of **Miss Reeta..Vs.. Government of Sindh and others (2001 C.L.C. Karachi 1825), Mst. Sardaran Begum ..Vs.. Muhammad Fazil and another (1993 CLC (Azad J & K) 2303) and Munshi Tamizuddin Howalnder and others..Vs.. Altafuddin Moral and other (PLD 1970 Dacca 483).**

3. As against that, the learned counsel appearing on behalf of the respondent by referring to the evidence of the petitioners argued that where it is palpable from the evidence on the record that the petitioners came to know eight months prior to the institution of the application that the house in dispute was in occupation of others that was the occasion to feel concerned about this fact but when in spite of that they did nothing in this behalf, their application for setting aside the ex-parte decree was rightly dismissed by the learned Addl District Judge. The learned counsel

by referring to the cases of **Muhammad Saleem and others..Vs..Mukhtar Ahmad (1996 SCMR 596) and Muhammad Hanif..Vs.. Baqa Muhammad (PLD 1979 SC (AJ & K) 120) ,** argued that where the application for setting aside an ex-parte decree was filed beyond the period of limitation prescribed by Article 164 of the Limitation Act, the learned revisional Court by dismissing it cannot be held to have acted without lawful authority.

4. We have gone through the record carefully and considered the submitted of the learned counsel for the parties.

5. A perusal of the statement of one of the petitioners clearly indicates that he came to know about the ex-parte decree a month before the institution of the application. Though this witness was cross-examined at length but nothing came to the fore as could suggest that the petitioners knew about the ex-parte decree before that. When that being the position, it was rightly set aside by the learned trial Court. As the order of the learned trial Court did not suffer from any jurisdictional error, the learned revisional court was not competent to intervene, more so when none of the petitioners was served in accordance with the requirements of law. The cases of **Miss Reeta..Vs.. Government of Sindh and others, Mst. Sardaran Begum..Vs..Muhammad Fazil and another and Munshi Tamizuddin Howalnder and others..Vs.. Altafuddin Moral and other** (Supra) cited at the bar by the learned counsel for the petitioners may well be referred in this behalf.

6. The argument that when the petitioners came to know eight months prior the institution of the application that the house in dispute was in occupation of others, that was the occasion to feel concerned about this fact and move the Court in this behalf, is no doubt an artful argument, but since it has nothing to do with the knowledge about the ex-parte decree, it cannot be used as a shield to protect the ex-parte decree when it was passed without serving the petitioners in accordance with the requirements of law.

The cases of **Muhammad Saleem and others..Vs..Mukhtar Ahmad and Muhammad Hanif..Vs.. Baqa Muhammad (Supra)** cited at the bar by the learned counsel for

the respondent will not have any relevance to the case in hand as in those cases the application for setting aside the ex-parte decree was moved well beyond the prescribed time which is not the case here.

7. Quite apart from this, as decision on merits after giving the parties an opportunity to produce their evidence is the most cherished goal of law, we do not feel persuaded to maintain the impugned order.

8. For the reasons discussed above, this writ petition is allowed, the impugned order is set aside and that of the trial Court is restored with the modification that cost of Rs.500/- is enhanced to Rs.2000/- and the case is sent back to the learned trial Court for further proceeding in accordance with law.

Dated: 30.3.2005 J U D G E

J U D G E

Peshawar High Court

Rafatullah --- Appellant/Petitioner (s)

Versus

Mst. Najab --- Respondent (s)

JUDGMENT

W.P. No. 1088/2001 Date of hearing 12.04.2005

EJAZ AFZAL KHAN J.- Rafatullah Jan, petitioner herein, has sought quashment of the investigation embarked upon by respondents Nos. 2 to 7 at the instance of respondent No.1 under section 156 of the Cr. P.C. in relation to a gift deed dated 24.1.2000 allegedly executed by late Mst. Ghulam Fatma in his favour.

2. It was argued by the learned counsel for the petitioner that where the matter is essentially of civil nature and is also pending adjudication in a Civil Court, there is absolutely no justification for its investigation under section 156 of the Cr.P.C. The learned counsel next urged that when none of official respondents happens to be an officer Incharge of the Police Station, they cannot investigate the case. The learned counsel by concluding his arguments submitted that where the marginal witnesses of the deed have been coerced and constrained by the respondents to disown its execution in their presence, the investigation cannot be held to be bona fide and that it being permeated with malice is liable to be quashed.

3. As against that, the learned counsel appearing on behalf of the respondents argued that mere pendency of a civil suit is no bar to investigation into a criminal case when the transaction of gift, so called, was a product of criminal acts like fraud and forgery. The learned counsel by controverting the argument of the learned counsel for the petitioner with regard to the capacity of the respondents as Officer Incharge of the Police Station submitted that by virtue of section 551 of the Cr. P.C. every Police Officer superior in rank to an Officer Incharge of the Police Station, is

competent to exercise the power exercised by an Officer Incharge of a Police Station.

4. We have gone through the record carefully and considered the submissions of the learned counsel for the parties.

5. No doubt the matter pertaining to the genuineness or otherwise of the gift deed allegedly executed by late Mst. Ghulam Fatma in favour of the petitioner is pending adjudication in a Civil Court but it alone will not furnish a justification for quashment of investigation when both of them have different and distinct scope. The former deals with the determination of rights of the parties arising out of such deed while the latter deals with the determination of criminal liability of the person, accused of forging such deed. Since these proceedings are independent of each other, pendency of one cannot justify the quashment of another. In the case of **Shahnaz Begum..Vs..Judges of Sindh and Baluchistan High Corurts (PLD 1971 SC 677),** the Hon'ble Supreme Court has observed that the investigation can be quashed in the exercise of constitutional jurisdiction of the High Court, if it is mala fide and conducted without jurisdiction and lawful authority. But in the instant case, the learned counsel for the petitioner could not refer to any provision of law showing that the investigation embarked upon by the respondents is without jurisdiction or lawful authority. Similarly he could not refer to any material on the record as could suggest that the investigation was motivated by malice or mala fide. Even otherwise, this controversy being factual cannot be required into by this Court in its constitutional jurisdiction.

6. The argument that when none of the official respondents is Officer Incharge of Police Station, they cannot investigate the case, has no force, when in view of section 551 of the Cr. P.C. Police Officer superior in rank may exercise the power exercised by the Officer Incharge of Police Station.

7. Having thus considered in this background, we do not agree with the learned counsel for the petitioner that the

investigation is either mala fide or has been carried out without jurisdiction and lawful authority.

8. For the reasons discussed above, this petition being without substance is dismissed. However, none of the observations made in this judgment will tend to influence the proceedings in any Court.

Dated: 12.4.2005 J U D G E

J U D G E

Peshawar High Court

Sultan Muhammad --- Appellant/Petitioner (s)

Versus

A.P.A --- Respondent (s)

JUDGMENT

WP. No. 287/2005 Date of hearing 13.04.2005

EJAZ AFZAL KHAN J.- The petitioner through the instant petition has questioned the legality of the proceeding before the Assistant Political Agent on the ground that neither the cause of action, if any, has taken place in the tribal area nor the petitioner being defendant in the case resides there and that it being coram-non-judice is liable to be quashed.

2. As against that, the learned Acting Advocate General appearing on behalf of the respondents argued that since all these questions can well be urged in the concerned forum, this Court cannot step in, that too, when the controversy involved is essentially factual in nature.

3. We have gone through the record carefully and considered the submissions of the learned counsel for the parties.

4. As the jurisdictional facts highlighted by the petitioner can well be agitated before the concerned forum, we will not like to intervene. However, if and when such questions are urged and agitated by the petitioner before the concerned forum, they being fundamental to the case shall be decided first.

5. With the observations mentioned above, this writ petition is disposed of .

Dated:13.4.2005 J U D G E

J U D G E

Peshawar High Court

Ikramullah Khan --- Appellant/Petitioner (s)

Versus

Federation of Pakistan --- Respondent (s)

JUDGMENT

WP. No. 335/2005 Date of hearing 14.04.2005

EJAZ AFZAL KHAN J.- Petitioners in Writ Petitions Nos.335 to 338 of 2005 have questioned order No. T & D.12-1/2005 dated 7.2.2005 issued by the Deputy chief Engineer (Training), whereby the Management has decided to promote its employees possessing degrees of Engineering/B Tech (hons) as Assistant Engineer/SDO (B-17) on the basis of professional test to be conducted by the Institute of Communication Technology (ICT) Islamabad.

2. It was argued by the learned counsel for the petitioners that promotion on the basis of the professional test conducted by the Institute Communication Technology (ICT) is nothing but a device for discrimination between the petitioners and a chosen few and that it being violative of the Constitutional provisions ensuring equality before law is liable to be struck down.

3. As against that, the learned Deputy Attorney General appearing on behalf of the respondents, argued that the petitioners being Government servants par excellence can seek their grievances by filing an appeal before the Service Tribunal, therefore, this writ petition being misconceived is liable to be dismissed.

4. We have gone through the available record and considered the submissions of the learned counsel for the parties.

4. As the aforesaid order relates to the terms and conditions of service and as such can well be challenged before the

Service Tribunal in view of the dictum of the Hon'ble Supreme Court laid down in the case of I.A. **Sharwani and others..Vs..Government of Pakistan through Secretary, Finance Division, Islamabd and others (1991 SCMR 1041)**, we will not like to intervene in the exercise of our Constitutional jurisdiction. However, instead of dismissing these petitions, we by following the judgment rendered in the case of **Muhammad Anis and others..Vs..Abdul Haseeb and others (PLD 1994 Supreme Court 539)** would sent them to the Service Tribunal for decision in accordance with law and are thus disposed them of.

Dated:14.4.2005 J U D G E

J U D G E

Peshawar High Court

Muhammad Shafqat --- Appellant/Petitioner (s)

Versus

Nasreen Kausar --- Respondent (s)

JUDGMENT

WP. No. 1038/2004 Date of hearing 26.04.2005

EJAZ AFZAL KHAN J.- The petitioner through the instant petition has assailed the order dated 8.6.2004 of the learned Additional District Judge-II Peshawar, whereby he allowed the appeal filed by the respondent, set aside the order dated 24.5.2003 of the learned Family Judge Peshawar.

2. The learned counsel appearing on behalf of the petitioner by referring to the amendment in section 9 of the Family Court Act, 1964, argued that a written statement submitted by a defendant wife could only be treated as a plaint, if in a suit instituted by her husband for restitution of conjugal rights, she makes a claim therein for dissolution of marriage and not the one in which she makes a claim for maintenance, therefore, the learned appellate Court by treating her written statement as plaint and remanding the case for decision afresh has acted without jurisdiction and lawful authority.

3. As against that, the learned counsel appearing on behalf of the respondent argued that the very purpose of the amendment in section 9 of the Act was to curb the multiplicity of suits, therefore, the learned appellate Court has not committed any error muchless jurisdictional by treating the written statement of the respondent as plaint even for maintenance and by remanding the case for decision afresh on merits, particularly when no prejudice has been caused to the petitioner.

4. We have gone through the record carefully and considered the sub missions of the learned counsel for the parties.

5. No doubt according to the provision mentioned above, defendant wife can only make a claim for dissolution of marriage including 'Khula' in a written statement which shall be deemed to be a plaint but there is absolutely no bar if a Court by exercising its inherent jurisdiction treats a written statement setting up a claim for maintenance as plaint in the interest of justice. Needless to say that even a piece of paper written by a person voicing his grievance can be treated as a plaint or even a writ petition for the ends of justice regardless altogether of the fact that it was not drafted or stamped in accordance with the recognized principles of procedure and practice. Therefore, we do not think, that any of the arguments addressed by the learned counsel for the petitioner besides being technical will have any legal force, so as to justify interference with the impugned order that too while exercising extra ordinary equitable discretionary Constitutional jurisdiction of this Court.

7. For the reasons discussed above, this writ petition being without substance is dismissed.

Dated:26.4.2005 J U D G E

J U D G E

Peshawar High Court

Farzana Naureen --- Appellant/Petitioner (s)

Versus

Government of N-W.F.P --- Respondent (s)

JUDGMENT

WP. No. 276/2005 Date of hearing 26.04.2005

EJAZ AFZAL KHAN J.- The petitioners through the instant petition has questioned the vires and jurisdiction of the respondents who have initiated preliminary inquiry and investigation into the allegations leveled against them in a complaint filed by respondent No.6.

2. It was argued by the learned counsel for the petitioners that where the property forming subject matter of this litigation was transferred by respondent No.6 to the petitioners with his free will and consent a decade before, it could not be given a criminal hue because of any ulterior motive. He next submitted that where the dispute is essentially of civil nature and is also pending adjudication in a Civil Court, there is absolutely no justification for its investigation by the Anti-corruption Establishment. Where no allegation of corruption has been leveled against a public servant, the learned counsel concluded, the Anti-corruption Establishment has no jurisdiction to investigate the case. The learned counsel to support his contention placed reliance on the cases of **Government of Sindh through The Chief Secretary, Karachi and 4 others Versus. Raees Farooq and 5 others (1994 SCMR 1283), Muhammad Aslam, Project Manager, Punjab Mineral Development Corporation, Khushab Versus Special Judge, Anti-Corruption Sargoodah and others (2001 MLD 678 Lahaore), Sikandara Karim Versus The State (1995 SCMR 387) and Muhammad Farooq Versus Muhammad Mubeen Akhtar and 7 others (2004 PCrLJ 1958 Lahore).**

3. We have gone through the available record and considered the submissions of the learned counsel for the petitioners.

4. No doubt a civil suit questioning the validity of mutation No.19467 attested on 3.7.1994 is pending adjudication in a Civil Court but it alone will not furnish a justification for nipping the investigation in its bud when each of them is different and distinct in its scope. The former deals with the determination of civil rights of the parties while the latter deals with the determination of criminal responsibility of a person who is at the back of the alleged forgery. Therefore, we do not tend to agree with the learned counsel for the petitioners.

5. The argument that the property forming subject matter of this litigation was transferred by respondent No.6 to the petitioners a decade before with his free will and consent is again a factual controversy which cannot be attended to by this Court while exercising its extra ordinary Constitutional jurisdiction under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973.

6. The argument that where no allegation of corruption has been leveled against a public servant, the Anti-corruption Establishment has no jurisdiction to investigate the case, is also devoid of force when it is y et to b e found as to whether the alleged forgery was done with the aid and abetment of a public servant.

7. In the case of **Shahnaz Begum..Vs..Judges of Sindh and Baluchistan High Courts (PLD 1971 S.C. 677)** , the Hon'ble Supreme Court has no doubt observed that investigation in a criminal case can be quashed in the exercise of Constitutional jurisdiction of the High Court if it is mala fide and conducted without jurisdiction and lawful authority, but in this case no such instance of mala fide or lack of jurisdiction or lawful authority has been pointed out as could call for quashment of investigation, that too, when it is in its preliminary stage.

Peshawar High Court

8. The judgments cited at the bar by the learned counsel for the petitioners will do little to project and prop up their case as none of them supports the proposition of quashment of cases when they are in their investigation stage.

9. Having thus considered in this background, we do not think, that a case for the exercise of Constitutional jurisdiction of this Court is made out.

10. For the reasons discussed above, this petition being without substance is dismissed in limine.

Dated:26.4.2005 J U D G E

J U D G E

Peshawar High Court

Faqir Khan --- Appellant/Petitioner (s)

Versus

Hilmat Khan --- Respondent (s)

JUDGMENT

WP. No. 849/2004 Date of hearing 03.05.2005

EJAZ AFZAL KHAN J.- Petitioners in Civil Revision 158/2004 and Writ Petition No.849/2004 have questioned the judgment and decree dated 22.12.2003 of the learned Additional District Judge-I Peshawar whereby he dismissed the appeal and revision filed by the petitioners and thus upheld the judgment and decree dated 4.9.2002 of the learned trial Court. As both the petitions are arising from the same judgment, they are disposed of by this single judgment.

2. It was argued by the learned counsel for the petitioners that where the earlier suit filed by the respondent Hikmat Khan ended in compromise vide order dated 4.11.1954, subsequent suit being hit by the principle of res judicata was liable to be dismissed. It was next urged that even it if is assumed, without conceding, that the earlier suit being collusive was not instituted by Mst.Jamala in her capacity as next friend of respondent Hikmat Khan, yet his subsequent suit instituted on 26.6.1992 was hopelessly time barred and that both the Courts below committed serious jurisdictional error by ignoring this crucial aspect of the case. The learned counsel by referring to the case of **M. Shahid Saigol and 16 others ..Vs.. M/s Kohinoor Mills Ltd and 7 others (PLD 1995 Lahore 264)**, argued that since next friend is not required to be appointed by a Court, the judgment of the Civil Court in the earlier proceedings cannot be set at naught on this score.

3. As against that, the learned counsel appearing on behalf of the respondents argued that the earlier suit was collusively instituted by one Firdous son of one Yaqoob Khan and

that the judgment given in that suit has rightly been declared collusive by the Courts below, especially when thumb impressions purported to be those of Mst. Jamala have been found otherwise by the finger print expert. She next submitted that where the respondent did not know about the exclusion of his name from inheritance mutation of late Daulat Khan till, 1992, his suit cannot be held to be barred by the law of limitation, that too, when the entire property was jointly enjoyed by his legal heirs including the respondent. The learned counsel by concluding his arguments submitted that where it has been established by an overwhelming evidence on the record that the respondent was born of Mst.Jamala during the substance of her marriage with Daulat Khan and both the Courts below have concurrently held him as such, the impugned finding being free from any infirmity merits no interference.

4. We have gone through the record carefully and considered the submissions of the learned counsel for the parties.

5. The evidence on the record reveals that Daulat Khan married Mst. Jamala somewhere in 1945 and after about 11/12 months of their marriage, Hikmat Khan was born. He was admitted in a Government School as son of Daulat Khan, as is evident from the relevant entries made in the relevant register. Not only that, the evidence of other witnesses also proves that the respondent was treated as such by his father and by the people by and large. The petitioners despite concerted efforts could not succeed in dislodging the fact that the respondent was a legitimate son of Daulat Khan.

6. No doubt there is a prolonged silence on the part of the respondent which is spread over more than 30 years but it to say the least will not reflect adversely on his claim firstly because the proceedings and the judgment in the earlier suit have been held to be collusive by the Courts below and rightly so when none of the thumb impressions available on the relevant documents of that suit has been found to be that of Mst. Jamala and secondly because

the entire property has been jointly enjoyed by him alongwith the other legal heirs of late Daulat Khan.

7. Where there is ample and overwhelming evidence on the record to prove that Mst. Jamala married with late Daulat Khan and she gave birth to the respondent after 11/12 months of her marriage with him, no exception whatever can be taken to the impugned finding, even though on re-appraisal of evidence a view to the contrary is possible.

8. The argument addressed on the strength of the case of **M. Shahid Saigol and 16 others ..Vs.. M/s Kohinoor Mills Ltd and 7 others (Supra)** will not be of any help to the petitioner when we are satisfied from the evidence on the record that the proceedings in the earlier suit purportedly instituted by Mst. Jamala on behalf of the respondent were collusive. The argument that the suit of the respondent being hit by the principle of res judicata too will be of no help when it has been held that the proceedings in the earlier suit were collusive.

9. When considered in this background, we do not think, the finding of the Courts below are based on mis-reading, non-reading of evidence or erroneous assumption of law and fact so as to justify interference therewith in the revisional or constitutional jurisdiction of this Court.

10. For the reasons discussed above, both the petitions being without substance are dismissed.

Dated:3.5.2005 J U D G E

J U D G E

Peshawar High Court

Nazir Muhammad --- Appellant/Petitioner (s)

Versus

Chairman Avenue Trust --- Respondent (s)

JUDGMENT

WP. No. 795/2002 Date of hearing 04.05.2005

EJAZ AFZAL KHAN J.- The petitioner through the instant petition has questioned the order dated 12.1.2001 of the learned Chairman Evacuee Trust Property Board, Government of Pakistan, Lahore, whereby he declared the property in dispute as trust property.

2. It was argued by the learned counsel for the petitioner that when the absence of the petitioner on the date fixed was on account of failure of the Court itself to specify the place of its Camp in the order adjourning the case, it was not in conformity with the recognized cannons of law and propriety to pass the ex-parte order against him.

3. As against that, the learned counsel appearing on behalf of the respondents vehemently argued that even if no place of Camp of the Court was specified in the order adjourning the case, yet the writ petition for having been filed after 1½ years is liable to be dismissed on account of laches, the moreso when no plausible explanation therefor has been given therein or during the course of arguments.

4. We have gone through the record carefully and considered the submissions of the learned counsel for the parties.

5. A perusal of the relevant order sheets would reveal that the petitioner had been attending the Court of the learned Chairman throughout. No doubt he did not attend the Court on the date when the ex-parte order was passed against him but it was not on account of his fault but that of the Court itself, as it while

adjourning the case did not specify the place of its camp. Therefore, we do not think, there was any justification to pass an ex-parte order against the petitioner, especially when his absence was due to an act of the Court.

6. For the reasons discussed above, this writ petition is allowed, the impugned order is set aside and the case is sent back to the learned Chairman for decision afresh in accordance with law after hearing the parties. The parties are directed to appear before the learned Chairman on 6.6.2005.

Dated:4.5.2005 J U D G E

J U D G E

Peshawar High Court

Muhammad Saeed --- Appellant/Petitioner (s)

Versus

Tehsil Nazim Mardan --- Respondent (s)

JUDGMENT

WP. No. 1050/2004 Date of hearing 05.05.2005

EJAZ AFZAL KHAN J.- The petitioner through the instant petition has questioned the order dated 13.7.2004 of the learned Additional District Judge exercising the power of Tribunal under N.W.F.P. Public Property (Removal of Encroachment) Act, 1977, whereby he dismissed the application of the petitioner for temporary injunction.

2. It was argued by the learned counsel for the petitioner that where the controversy forming the subject matter of litigation in this case is a private or public could not have been decided without appointment of a local commissioner even for the purposes of deciding an application for the issuance of temporary injunction, the learned Tribunal by passing the order refusing temporary injunction before doing the needful has failed to exercise jurisdiction so vested in it.

3. As against that, the learned counsel appearing on behalf of the respondents, argued that they do not grudge the construction of a boundary wall by the petitioner but under that garb he cannot be given a carte blanch for obstructing the path and the drains maintained under the aegis of the respondents.

4. We have gone through the record carefully and considered the submissions of the learned counsel for the parties.

5. Merits of the case apart, when the controversy between the parties cannot be adjudicated upon even for the purposes of granting or refusing temporary injunction without appointment of a local commissioner, we cannot give a verdict one

way or the other and while setting aside the impugned order, would send the case back to the learned trial Court for decision afresh even on the application of temporary injunction after doing the needful as mentioned above. The parties are directed to appear in the Court of the learned Tribunal on 18.5.2005. Since the dispute relates to a public path, the matter be disposed of as expeditiously as possible but not later than two months.

6. C.M.No.21 of 2005 is dismissed as not pressed.

Dated: 5.5.2005 J U D G E

J U D G E

Peshawar High Court

Khisro Pervez --- Appellant/Petitioner (s)

Versus

Mst. Nageena --- Respondent (s)

JUDGMENT

WP. No. 85/2004 Date of hearing 08.06.2005

EJAZ AFZAL KHAN J.- The petitioner through the instant petition has impugned the order dated 12.11.2003 of the learned Azafi Zila Qazi Malakand, whereby he dismissed the appeal filed by the petitioner and upheld the order dated 21.3.2003 of the learned trial Court declining to set aside the exparte decree.

2. The main argument of the learned counsel for the petitioner was that where the petitioner was not served in accordance with the requirements of law and was not aware of the exparte proceeding culminating in the exparte decree dated 17.4.2000, his application moved on 19.4.2000 could not have been dismissed when evidence on the record also supported his stance.

3. As against that, the learned counsel appearing on behalf of the respondents argued that the petitioner was served in accordance with the requirements of law and that he was aware of the proceeding right from the very inception, therefore, the Courts below by declining the application for setting aside the exparte decree have not exceeded or over stepped their jurisdiction so as to justify interference therewith in the constitutional jurisdiction of this Court.

4. We have gone through the record carefully and considered the sub missions of the learned counsel for the parties.

5. The record reveals that the petitioner was neither served in accordance with the requirements of law nor was aware

of the exparte proceeding culminating in the exparte decree. The moment he came to know about the exparate decree, he moved the Court for setting it aside without reasonable dispatch and alacrity. When that being the case, we do not think, the Courts below have acted in accordance with law by declining his application for setting aside exparte decree. Even otherwise, we are least moved to maintain the impugned orders when decision on merits after giving the parties a due opportunity for producing their evidence is the most cherished goal of law.

6. For the reasons discussed above, this petition is allowed, the impugned orders are set aside on payment of Rs.10,000/- (Rs. Ten thousand) as cost and the case is sent back to the learned Family Judge Dargai for decision in accordance with law. The parties are directed to appear in the Court of the learned Family Judge Malakand at Dargai on . As it is an old case, it be decided within a period of six months positively.

Dated:8.6.2005 J U D G E

J U D G E

Peshawar High Court

SHAHZADA AMAN-I-ROOM and 24 others-Petitioners

Versus

MUHAMMAD KHALID and 6others---Respondents

JUDGMENT

W.P Nos. 327, 328 and 1455/2004 Decided on 8th June, 2005
(2007 M L D 1413 Peshawar)

West Pakistan Land Revenue Act (XVII of 1967)---

Ijaz ul Hassan Khan and Ejaz Afzal Khan, JJ ---S. 161---Civil Procedure Code (V of 1908), O.XLI, R.1---Constitution of Pakistan (1973), Art. 199---Constitutional petition---Dismissal of appeal for non-filing attested copies of impugned order with memorandum of appeal---Appellate Court without adverting to merits of the case dismissed the appeals filed by the petitioners on the sole ground that those were not accompanied by the attested copies of the impugned mutations---Contention of counsel for petitioners was that when it was not the requirement of S.161 of West Pakistan Land Revenue Act, 1967 that the memorandum of appeal be accompanied by an attested copy of impugned order, it could not have been dismissed by invoking application of R.I. of O.XLI of C.P.C.---Once after hearing the appeals in motion, the record of the lower forum was summoned, Additional Deputy Commissioner should not have dismissed those without adverting to the merits of the case simply because those were not accompanied by the attested copies of the impugned orders---Allowing petition, impugned orders were set aside.

Ghulam Muhammad v. Sardar Muhammad PLD (Revenue) 1956 West Pakistan 32 ref.

Mian Iqbal Hussain for Petitioners.

Peshawar High Court

Abdus Sattar Khan for Respondent No.1 and Parhezgar, DDO, Swat for Respondent No.2 to 7.

Date of hearing: 8th June, 2006.

JUDGMENT

EJAZ AFZAL KHAN, J.---Shahzada Aman-I-Room and others, petitioners in writ petitions Nos. 327, 328 and 1455 of 2044 have impugned the orders, dated 20-3-2003 of the learned Senior Member Board of Revenue whereby he dismissed the revision petitions filed by the petitioners and upheld the orders dismissing their appeals. Since a common question of law is involved in these petitions, they are disposed of by this single judgment.

2. It was argued by the learned counsel for the petitioners that the learned appellate Court without adverting to the .merits of the case dismissed the appeals filed by the petitioners on the sole ground that they were not accompanied by the attested copies of the impugned mutations. The learned counsel next submitted that when it is not requirement of section 161 of the West Pakistan Land Revenue Act that the memorandum of appeal be accompanied by an attested copy of the order impugned, it could not have been dismissed by invoking the application of Rule 1 of Order XLI of the C.P.C.

3. As against that the learned counsel appearing on behalf of the respondents by referring to the case of Ghulam Muhammad v. Sardar Muhammad (PLD (Revenue) 1956 West Pakistan 32) argued that where memorandum of appeal was not accompanied by a copy of the order impugned and no prayer was made for its being dispensed with, it was rightly dismissed. The learned counsel by referring to Rule 3 sub-rule (2) of the West Pakistan

Board of Revenue (Conduct of Appeals and Revisions) Rules, 1959 argued that where the Clerk of Court after examining the record pointed out that the appeal was not accompanied by the certified copies of the impugned orders, the Court had no other option but to dismiss it when .this deficiency was not made up even -after the lapse of seven years.

4. We have gone through the record carefully and considered the submissions of the learned counsel for the parties.

5. Once after hearnig the appeals in motion, the record of the lower forum was summoned, the learned Additional Deputy Commissioner should not have dismissed them without adverting to the merits of the case simply because they were not accompanied by the attested copies of the impugned orders. The rules referred to above have no application to the appeals before the lower forums as they are exclusively meant for appeals and revisions before the Board of Revenue. Applicability of the provisions of C.P.C. to the proceedings before the Courts of Revenue hierarchy will also do little to advance the case of the respondents as none of its provisions in general and Rule 1 of Order XLI of the C.P.C. in particular envisages the dismissal of appeal in any such eventuality. Similarly the argument addressed on the strength of the judgment rendered in the case of Ghulam Muhammad v. Sardar Muhammad supra would not deter this Court from setting aside an order passed on hyper-technical ground firstly because it is not binding on us and secondly because no fetish of technicalities can be made to an extent where the actual purpose behind them is relegated to oblivion and only they are allowed to reign supreme. The moreso when decision on merits is the most cherished goal of law.

Peshawar High Court

For the reasons discussed above, we allow these petitions, set aside all the impugned orders on a cost of Rs.1000 in each petition and send the case back to the Court of learned D.R.O. for decision afresh in accordance with law.

H.B.T./129/P
Petitions allowed.

Peshawar High Court

Saeed Naik Khan --- Appellant/Petitioner (s)

Versus

Mst. Sultan Arab --- Respondent (s)

JUDGMENT

WP. No. 817/2005 Date of hearing 15.06.2005

EJAZ AFZAL KHAN J.- The petitioner through the instant petition has questioned the order dated 15.3.2005 of the learned Zila Qazi Malakand, whereby he dismissed the revision petition filed by the petitioner and thus upheld the order dated 2.10.2003 of the learned trial Court impleading the respondents.

2. The crux of the arguments of the learned counsel for the petitioner was that where the persons impleaded by the impugned orders have no interest in the property forming subject-matter of the litigation, they were neither necessary nor proper parties, therefore, the impugned orders for having been passed in contravention of the provisions contained in Rule 10 of Order I of the C.P.C. are liable to be set aside.

3. We have gone through the available record carefully and considered the submissions of the learned counsel for the petitioner.

4. Once both the Courts below have exercised their discretionary jurisdiction by allowing the respondents to be impleaded as party, we will not like to make a reappraisal of this controversy while exercising our constitutional jurisdiction, that too, when none of the orders impugned herein can be said to have been passed without jurisdiction and lawful authority.

5. For the reasons discussed above, this petition being without substance is dismissed in limine.

Peshawar High Court

Dr. Ahmad --- Appellant/Petitioner (s)

Versus

Federation --- Respondent (s)

JUDGMENT

WP. No. 151/2004 Date of hearing 21.06.2005

EJAZ AFZAL KHAN J.- Dr. Ahmad Jamal, petitioner herein, joined service in Grade-18 as Medical Officer in Government of N.W.F.P. on 1.101974. He was appointed as Civil Surgeon for the Federal Government Employees at Peshawar on 15.10.1980. On 1.2.1989, the then Prime Minister of Pakistan announced that all the Doctors who had been in Grade-18 since 1974 would be promoted to Grade-19 with immediate effect. The order was implemented by the Provincial Government but the Federal Government did not give effect thereto. The petitioner being faced with this situation filed a writ petition in this Court which was allowed, vide judgment dated 25.9.1994 and the respondents were directed to promote the petitioner to Grade-19 with effect from 1.2.19989. The petitioner was accordingly promoted, vide Notification No.F.9-3/92-CU (Pt) dated 7.6.1995 with effect from 12.3.1989 but did not fix his seniority amongst the Officers of the same Grade. The petitioner once again embarked on another enterprise for the purpose but when could not get any relief from the concerned quarters, filed a criminal Misc: No.160/98 against the respondent which ended in a consent order dated 3.11.1998, the relevant paragraph whereof reads as under:-

> "Our attention was also drawn to Para 2 and Para 10 (v) of the comments filed by the Establishment Division wherein it has been stated that fixation of seniority in the Health Division was within the power of

> that Division itself and that they were only advised to determine seniority in accordance with the provisions of the law. Since the Ministry of Health is already of the opinion that the petitioner is entitled to back dated seniority with effect from 12.3.1989, with which we also agree, there is no impediment left in the way of the Ministry of Health to determine seniority in accordance with its own opinion expressed in the office memorandum dated 7.10.1997. By following that opi8nion the Ministry of Health would fully implement the judgment of this Court. Since the non-implementation of the judgment of this Court was not willful but due to its misinterpretation we would not proceed further with the application, which is disposed of in the above terms."

2. On the basis of the above mentioned order the petitioner asked for being promoted to BS-20 but he went unheeded in spite of the fact that Doctor Sadiduddin Arshad who was junior to him was also promoted to BS-20 on 27.10.1994. The respondents after observing a discreet silence for a year or so eventually communicated to the petitioner that he could not be promoted to BS-20 as he was not possessing the requisite Diploma and that his Post Graduate Degree of MSc Clinical (Clinical Tropical medicines) London being a minor diploma cannot be considered for the promotion asked for. The petitioner after getting the required explanation about the nature of the qualification he possessed from PMDC. and other forums competent in this behalf, once again filled the instant constitutional petition.

3. The main argument of the learned counsel for the petitioner was that the Post Graduate Degree of MSc. Clinical (Clinical Tropical medicines) London was not a minor diploma and that if t all it was, it being pre-requisite for direct recruitment cannot be made as such for promotion. The learned counsel by

referring to the correspondence between the Secretary Health Division and the Secretary Establishment Division, urged that when an amendment, providing that a prescribed higher diploma is no more a requirement for promotion to BS-20, has been proposed by the former and approved by the latter, the promotion asked for cannot be denied for want of concurrence of the Public Service Commission therewith as promotion being out side the domain of Public Service Commission is none of its concerns.

4. As against that, the learned counsel appearing on behalf of the respondents argued that when promotion being terms and conditions of service can well be enforced through Service Tribunal, therefore, the writ petition will not lie. The learned counsel next submitted that though amendment has been proposed by the Secretary Health in SRO No.1203 (1)/80 by the Secretary Health Division and has been approved by the Secretary Establishment Division, yet it will have no effect unless concurred by the Public Service Commission as it is one of the functions of the Commission to advise the President on matters relating to qualifications and methods of recruitment to the service and post referred to 2 (a) of the Federal Public Service commission (Functions Rules) 1978.

5. We have gone through the record carefully and considered the submissions of the learned counsel for the parties.

6. The only question for the determination of this Court is whether in view of the SRO mentioned above, higher diploma is a pre-requisite for promotion to BS-20. Before we answer the question, it is worth while to refer to the correspondence between the Secretary Health Division and the Secretary Establishment Division which is reproduced as under:-

GOVERNMENT OF PAKISTAN
HEALTH DIVISON
*****

Subject:- AMENDMENT IN THE RECRUITMENT RULES OF CLINICAL POSTS UNDER THE

HEALTH DIVISION.

Reference Establishment Division's u.o. No.11/2/88-R-5 dated 23.2.1993 on the above subject.

2. The amendment in the recruitment rules of Clinical posts were proposed with the approval of the Secretary (Health) Health Division on the advice of the Secretary Establishment Division. The case is therefore, resubmitted to the Establishment Division for recommendation on the following points:-

(i) The Establishment Division vide para-5 of their D.O. letter No.15.5.1989-CP-3 dated 19.1.1991 had observed that since possession of a lower diploma is prescribed for promotion as well as for direct recruitment to clinical posts in BPS-18 and 19, the requirement of possessing a higher diploma for promotion to posts in BPS-20 is not called for in a career system, and higher diploma for promotion may appropriately be omitted from the Recruitment Rules.

(ii) For promotion expe5rience/length of service is counted and not higher degree or diploma, particularly when a person with lower diploma is promoted from BPS-17 to BPS-18 and then to BPS-19. It is, therefore, not fair to prescribed higher diploma for promotion to posts in BPS-20. However, the possession of higher diploma for

direct recruitment to post in BPS-20 is enough and has already been laid in the Recruitment Rules.

(iii) The post in BPS-20 being floating post is being filled in amongst the regular incumbents of BPS-19 seniority-wise irrespective of speciality.

(iv) The condition for promotion can be; modified by this Division in consultation with the Establishment Division. Establishment Division are again requested to please accord their approval to the proposed amendment in the Recruitment Rules at an early date.

(GUL DARAZ)
SESECTION
OFFICER PER.-1)

Government of Pakistan
Cabinet Secretariat
(Establishment Division)
****

Subject: AMENDMENT IN THE RECRUITMENT RULES OF CLINICAL POSTS ULNDER THE HEALTH DIVISION.

Reference correspondence resting with the Health Division's u.o. No.21-1/92-Per-I dated 21st March, 1993 on the above subject.

2. The proposals made in the Health Division's u.o. No.21-1/92-Per-I dated 21st April, 1992, have been considered in this Division. The Establishment Division agrees

> to the proposal that for promotion to BPS-20 clinical posts persons holding lower of higher diploma should ;both be eligible.
>
> 3. The competent authority has, however, been pleased to reject the proposal of the referring Division that promotion to BPS-20 clinical posts should be made outside the relevant speciality/discipline. In order to revise the recruitment rules of clinical posts to the extent indicated in para 2 above, the Establishment Division agrees to the enclosed draft notification subject to the concurrence of the FPSC.
>
> (Muhammad Arshad)
> Section Officer
> Tele. No.810928"

8. A look at the above mentioned correspondence between the Secretary Health Division and the Secretary Establishment Division, would reveal that the former by proposing and the latter by approving the amendment have agreed on the proposition that a higher diploma is not a pre-requisite for promotion to BS-20. In spite of this, it has not been given a formal expression in the form of a notification simply because the Federal Public Service Commission has not given its concurrence thereto.

9. Now we are to see whether concurrence of Federal Service Commission is necessary to clothe this amendment with statutory sanction? To answer this, it would be pertinent to refer to the relevant provision of the Federal Service Commission Ordinance, 1977 which reads as under:-

> 7. Function of the Commission.- The functions of the Commission shall be---
>
> (a) To conduct tests and examinations for recruitment of persons, other than officers of the Armed Forces of Pakistan who after appointed to such services or posts on the recommendations of

> the High Powered Selection Board constituted by the President for the purpose to all Pakistan Services, the civil services of the Federation and such posts in connection with the affairs of the Federation as may be prescribed by rules made under section 10 and
> (b) to advise the President on matters relating to qualifications for, and methods of recruitment to, the services; and posts referred to in clause (a) and any other matter which the President may refer to the Commission.
> (c) Explanation. - In this section, "recruitment' means initial appointment otherwise than by promotion or transfer."

10. A bare reading of the provision reproduced above would unmistakably indicate that the concurrence of the Federal Public Service Commission is required only with regard to the posts sought to be filled by initial recruitment and not those sought to be filled by promotion. The S.R.O. requiring a higher diploma for promotion to BS-20 stood amended as soon as the amendment was proposed by the Secretary Health Division and was approved by the Secretary Establishment Division. It would not be stripped of its legal attire solely because the Commission has not given its concurrence thereto. Therefore, it is not correct to say that higher diploma for promotion is a pre-requisite for promotion to BS.20.

11. When seen in this backdrop, we do not think, the promotion of the petitioner to BS - 20 can be declined on any ground whatever, moreso when Sadiduddin Arshad having similar qualification and background has been promoted to B.S.20.

12. The argument that the promotion being term and condition of service can well be enforced before the Service Tribunal, is devoid of any force, when the entire controversy about the promotion of the petitioner was agitated and adjudicated upon by this Court and no objection in this behalf was raised by any of the respondents at any time. Even otherwise this argument

has no force when no appeal lies to the Tribunal against an order of the departmental authority determining the fitness or otherwise of the person to be promoted to a higher post in view of the provision contained in section 4 (b) (I) of the Service Tribunal Act, 1973. The other argument of the learned counsel for the respondents would also be shorn of force in view of the foregoing discussion.

13. The long and short of the foregoing discussion is that this writ petition is allowed and the respondents are directed to give the ex-post facto promotion to the petitioner from the date it became due.

Dated:21.6.2005 J U D G E

J U D G E

Peshawar High Court

Shahid Orakzai --- Appellant/Petitioner (s)

Versus

Muhammad Amir Farooqi --- Respondent (s)

JUDGMENT

WP. No. 887/2005 Date of hearing 22.06.2005

EJAZ AFZAL KHAN J.- Shahid Orakzai, petitioner herein, seeks issuance of a writ directing the Federation to enforce his fundamental right of entry into the Supreme Court, to compensate him for its infringement to initiate criminal investigation into the misconduct of the former Registrar, to register a case against him under the High Treason Act for subverting the Constitution of Pakistan and a writ directing the Attorney General of Pakistan to seek an audience with the Supreme Court for early disposal of Cr. Appeal No.162 of 1999 relating to the attack on Supreme Court.

2. The petitioner while referring to Articles 5 and 6 of the Constitution of Islamic Republic of Pakistan, 1973, argued that loyalty to State is a basic duty and obedience to the Constitution and law is an inviolable obligation of every citizen; that any person who abrogates or attempts or conspires to abrogate, subverts or attempts or conspires to subvert the Constitution by use or show of force or by other unconstitutional means shall be guilty of high treason; that the former Registrar of the Supreme Court, respondent No.1 herein, being guilty of betrayal to the State, disobedience to the Constitution and law and high treason is liable to be proceeded against; that respondents Nos.2 and 3 be directed to initiate criminal proceeding into his misconduct and register a case under the High treason Act against him. The petitioner next submitted that it was solely because of respondent No.1 that his entry in the Supreme Court was banned, therefore, he be compensated for the infringement of this right. While winding up his arguments, he also asked for the issuance of a writ against the Attorney General of Pakistan, directing him to seek audience from

the Supreme Court for early disposal of Cr. Appeal mentioned above.

3. We have gone through the petition and heard the arguments of the petitioner.

4. The right of entry into the Supreme Court, if at all, was banned by respondent No.1, the new incumbent can well be approached in this behalf. Prayer for initiating criminal investigation into the misconduct of respondent No.1 appears to be un-called for on the face of it, when a case has already been registered against him and is under investigation. Prayer for registration of a case under the High Treason Act against the respondent for subverting the constitution of Pakistan cannot be countenanced in a void and vacuum on the basis of a bald assertion which is not supported by any tangible evidence. Earlier disposal of criminal appeal No.162 of 1999 can well be sought by moving a misc: application before the Registrar of the Supreme Court. In other words, alternate, adequate and efficacious remedies in all the matters mentioned above are available to the petitioner. Therefore, we do not feel inclined to exercise our extra ordinary equitable discretionary constitutional jurisdiction in the circumstances of the case.

5. For the reasons discussed above, this petition being without substance is dismissed in limine.

Dated:22.6.2005 J U D G E

J U D G E

Peshawar High Court

Hassan Gul --- Appellant/Petitioner (s)

Versus

Government --- Respondent (s)

JUDGMENT

WP. No. 1288/2005 Date of hearing 11.08.2005

EJAZ AFZAL KHAN J.- Muhammad Ilyas Qureshi, petitioner herein, has assailed the order dated 1.8.2004 of the Provincial Government, whereby his brother Muhammad Qasim has been held in preventive detention for one month under section 3(1) of the West Pakistan Maintenance of Public Order Ordinance, 1960/

2. The main argument of the learned counsel for the petitioner was that the impugned order has been passed by the Provincial Government on the basis of surmises and conjectures without there being any material before it showing that the petitioner was in any way acting in a manner prejudicial to pubic safety or maintenance of public order.

3. As against that Pir Liaqat Ali, Additional Advocate General appearing on behalf of the respondents, argued that the impugned order has been passed by the Provincial Government after reviewing the grave ground realities, therefore, it is not open to any exception. He next urged that in view of the availability of alternate efficacious remedy of representation before the Provincial Government, the petitioner cannot straight away invoke the jurisdiction of this Court under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973.

4. We have carefully considered the arguments of the learned counsel for the parties and the grounds calling for preventive detention of the detenu under the Ordinance.

5. A perusal of the impugned order would reveal that the grounds mentioned therein by the Provincial Government for

preventive detention of the detenu are abstract and omni bus. No specific act or event of his making is mentioned as could show that he indulged in activities prejudicial to public safety and maintenance of public order. Likewise nothing of the sort is mentioned in the order as could give rise to the apprehension much less real or reasonable that he indulged in any such activities as could result in damage to the PTCL installations and communication system. In such state of affairs when the grounds of the order besides being omni bus are abstract and hypothetical rather than actual and objective, we are afraid, the preventive detention of the detenu cannot be justified

6. The argument of the learned Additional Advocate General as to the availability of alternate efficacious remedy of representation under section 3 (6-a) of the Ordinance has also left us unmoved because in the absence of any requirement that the Government shall consider the representation, it cannot be held to be an alternate adequate remedy particularly in the matter involving the liberty of a citizen. The case of **Umar Daraz alias Darazai..Vs.. District Magistrate, Peshawar and 2 others (2001 P.Cr.L.J. Peshawar, 1373** and the case of **Masal Khan..Vs..District Magistrate Peshawar and 3 others (PLD 1997 Peshawar 148)** may well be referred in this behalf.

7. Having thus considered in this background, we allow this petition and direct the release of the detenu, if he furnishes a bond to the tune of Rs.2,00,000/- (Rs. Two lacs) with two sureties each in the like amount to the satisfaction of the Illaqa/Judicial Magistrate ensuring that he will not indulge in the activities as mentioned in the impugned order.

Dated:11.8.2005 J U D G E

J U D G E

Peshawar High Court

Qazi Meer Badshah --- Appellant/Petitioner (s)

Versus

Government of Pakistan --- Respondent (s)

JUDGMENT

WP. No. 1290/2005 Date of hearing 11.08.2005

EJAZ AFZAL KHAN J.- Qazi Mir Basdshah, petitioner herein, has assailed the order dated 1.8.2004 of the Provincial Government, whereby his cousin Muhammad Tariq has been held in preventive detention for one month under section 3(1) of the West Pakistan Maintenance of Public Order Ordinance, 1960.

2. The main argument of the learned counsel for the petitioner was that the impugned order has been passed by the Provincial Government on the basis of surmises and conjectures without there being any material before it showing that the petitioner was in any way acting in a manner prejudicial to pubic safety or maintenance of public order.

3. As against that Pir Liaqat Ali, Additional Advocate General appearing on behalf of the respondents, argued that the impugned order has been passed by the Provincial Government after reviewing the grave ground realities, therefore, it is not open to any exception. He next urged that in view of the availability of alternate efficacious remedy of representation before the Provincial Government, the petitioner cannot straight away invoke the jurisdiction of this Court under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973.

4. We have carefully considered the arguments of the learned counsel for the parties and the grounds calling for preventive detention of the detenu under the Ordinance.

5. A perusal of the impugned order would reveal that the grounds mentioned therein by the Provincial Government for

preventive detention of the detenu are abstract and omni bus. No specific act or event of his making is mentioned as could show that he indulged in activities prejudicial to public safety and maintenance of public order. Likewise nothing of the sort is mentioned in the order as could give rise to the apprehension much less real or reasonable that he indulged in any such activities as could result in damage to the PTCL installations and communication system. In such state of affairs when the grounds of the order besides being omni bus are abstract and hypothetical rather than actual and objective, we are afraid, the preventive detention of the detenu cannot be justified.

6. The argument of the learned Additional Advocate General as to the availability of alternate efficacious remedy of representation under section 3 (6-a) of the Ordinance has also left us unmoved because in the absence of any requirement that the Government shall consider the representation, it cannot be held to be an alternate adequate remedy particularly in the matter involving the liberty of a citizen. The case of **Umar Daraz alias Darazai..Vs.. District Magistrate, Peshawar and 2 others (2001 P.Cr.L.J. Peshawar, 1373** and the case of **Masal Khan..Vs..District Magistrate Peshawar and 3 others (PLD 1997 Peshawar 148)** may well be referred in this behalf.

7. Having thus considered in this background, we allow this petition and direct the release of the detenu, if he furnishes a bond to the tune of Rs.2,00,000/- (Rs. Two lacs) with two sureties each in the like amount to the satisfaction of the Illaqa/Judicial Magistrate ensuring that he will not indulge in the activities as mentioned in the impugned order.

Dated:11.8.2005 J U D G E

J U D G E

Peshawar High Court

Fazal Muhammad --- Appellant/Petitioner (s)

Versus

Returning Officer --- Respondent (s)

JUDGMENT

WP. No. 1306/2005 Date of hearing 16.08.2005

EJAZ AFZAL KHAN J.- The petitioner through the instant petition has questioned the order dated 27.7.2005 of the learned District Returning Officer, whereby he dismissed the appeal filed by the petitioner and upheld the order dated 24.7.2005 rejecting his nomination papers.

2. It was argued by the learned counsel for the petitioner that when Sharif Gul, proposer of the petitioner has sworn on an affidavit that he has not subscribed to any nomination papers as a proposer, there was absolutely no justification for rejecting his nomination papers.

3. As against that, the learned AAG argued that the controversy agitated before this Court being one of fact, cannot be gone into in the exercise of writ jurisdiction of this Court, this petition is liable to be rejected.

4. We have gone through the record carefully and considered the submissions of the learned counsel for the parties.

6. The record reveals that the proposer has sworn on an affidavit that he did not propose any other person, which has not been disputed by a counter affidavit either by the learned AAG or any other person on behalf of the contesting respondents despite notice. When this is the state of affairs, we have no other alternative but to accept the statement of the petitioner supported by an affidavit and allow him to contest election. His name thus be entered in the list of validly nominated candidates.

Peshawar High Court

Fazal Akbar Khan --- Appellant/Petitioner (s)

Versus

Chief Election --- Respondent (s)

JUDGMENT

WP. No. 1417/2005 Date of hearing 16.08.2005

EJAZ AFZAL KHAN J.- The petitioners in Writ Petitions Nos.1417, 1390, 1384, 1297, 1394, 1401,1407 and 1416 of 2005 have sought issuance of a writ directing the respondents to enlist their names as voters in the electoral rolls of 2001, so as to enable them to cast their votes in the Local Government election scheduled to be held on 18th instant. As a common question of law and fact is involved in all these petitions, they are disposed of by this single judgment.

2. The learned counsel appearing on behalf of the petitioners contended that where petitioners have been entered as voters in the electoral rolls of 2002, they cannot be disfranchised simply because their names as voters do not figure in the electoral rolls of 2001. The learned counsel to support their contention also placed reliance on the cases of **Shah Nawaz Khan-Vs-Government of N.W.F.P. and 4 others** in W.P.No.1104 of 2005 decided on 20.7.2005, **Muzaffar Khan-Vs-Government of NWFP and others** in W.P.No.1105 of 2005 decided on 20.7.2005, **Sher Azam and others-Vs-Chief Election Commissioner of Pakistan and others** in W.P. No.1225 of 2005 decided on 2.8.2005 and **Fida Muhammad Khan and others-Vs-Chief Election Commissioner of Pakistan and others** in W.P.No.1321 of 2005 decided on 8.8.2005.

3. As against that, the learned AAG alongwith the Deputy Provincial Election Commissioner, appearing on behalf of the respondents, argued that any change in the electoral rolls at

such a belated stage is likely to create confusion, when election material including electoral rolls has already been supplied to the Polling staff and only a day is left to election.

4. We have gone through the record carefully and considered the submissions of the learned counsel for the parties.

5. Though the grievances of the petitioners are, by all means, legal and legitimate but at this stage when election material including electoral rolls, as per statement of Deputy Provincial Election Commissioner, has already been supplied to the Polling Staff, any order directing the respondents for making entries in the electoral rolls of 2001, so as to enable them to cast their votes in election going to be held day after tomorrow, is likely to create scenes and spectacles of confusion, stampede and pandemonium not only in the Election Offices but also at the Polling stations. However, as the maxim ***'ubi jus ibi remedium*** goes, they cannot be left without remedy, we, therefore, direct respondents Nos.2 and 5 to make entries in the electoral rolls of 2001 as asked for soon after the election. The judgments cited at the bar may well be referred in this behalf. These petitions are thus disposed of.

Dated:16.8.2005 J U D G E

J U D G E

Peshawar High Court

Muhammad Faqir --- Appellant/Petitioner (s)

Versus

NAB --- Respondent (s)

JUDGMENT

WP. No. 580/2005 Date of hearing 23.08.2005

EJAZ AFZAL KHAN J.- The petitioner through the instant petition seeks his release on bail mainly on the ground that he is suffering from abdominal cancer.

2. The learned counsel appearing on behalf of the petitioner argued that the petitioner was referred to Medical Board for opinion whose opinion is positive, therefore, it will not be in the fitness of things to keep him for a day more.

3. Mr. Riaz Ahmad Khan, Advocate, appearing on behalf of respondents Nos.1 to 5 and Mr. Obaidullah, AAG, appearing on behalf of the State, do not seriously dispute the arguments addressed at the bar by the learned counsel for the petitioner.

4. In view of the above stated position, this petition is allowed and the petitioner is directed to be released on bail, if he furnishes bail bonds in the sum of Rs.1,50,00,000/- (Rs. One carore and fifty lacs) with two sureties each in the like amount to the satisfaction of the learned trial Judge who is to ensure that the sureties are local, reliable and men of means.

5. Since the other relief asked for by the petitioner in this petition can well be agitated before the trial Court, we will not make any order in this behalf.

Dated:23.8.2005 J U D G E

J U D G E

Peshawar High Court

Sher Ali Baz Khan --- Appellant/Petitioner (s)

Versus

Election Commission --- Respondent (s)

JUDGMENT

WP. No. 1468/2005 Date of hearing 25.08.2005

EJAZ AFZAL KHAN J.- Assailed herein the order dated 20.8.2005 of the learned Returning Officer whereby he declined recount of votes on the ground that a large number of applications in this behalf is poring in and that to deal therewith is next to impossible.

2. The learned counsel appearing on behalf of the petitioners by referring to rule 36 (3) of the N.W.F.P. Local Government (Conduct of Elections) Rules, 2005, argued that where the Returning Officer was required to examine the ballot papers excluded from the count by the Presiding Officer, he could not have declined the recount and that by so doing, he has refused to do what he was required by the law to do, therefore, a case for the issuance of a writ of mandamus is made out.

4. As against that, the Deputy Provincial Election Commissioner appearing on behalf of the Commission argued that since the result has been notified by the Commission and Election Tribunals have been constituted, this petition will not lie.

5. We have gone through the record carefully and considered the submissions of the learned counsel and the respondent.

6. Though the reasons recorded by the learned Returning Officer are neither judicial nor conscionable, all the same, no relief at the moment can be granted to the petitioners through a constitutional petition firstly because the Returning Officer has since become functus officio after the issuance

notification declaring results and constituting Election Tribunals and secondly because the relief asked for can well be granted by the Election Tribunal in view of the provisions contained in Rule 73 of the N.W.F.P. Local Government (Conduct of Elections) Rules, 2005.

7. For the reasons discussed above, this petition being without substance is dismissed.

Dated:25.8.2005 J U D G E

J U D G E

Peshawar High Court

Tilla Muhammad --- Appellant/Petitioner (s)

Versus

Government --- Respondent (s)

JUDGMENT

WP. No. 127/2005 Date of hearing 30.08.2005

EJAZ AFZAL KHAN J.- The petitioner through the instant petition assailed his detention on the ground that he has been in Jail for more than a year for none of his faults and that his detention cannot be justified on any count for a day more. Reliance is placed on the judgments of this Court rendered in the cases of Mrs**. Gul Sahiba Bibi and 7 others – Vs – State and 7 others** in W.P.No.142 /2005 decided on 10.2.2005 and **Gul Shah Jan –Vs – State and 5 others** in W.P.No.5/2005 decided on 20.5.2005.

2. As against that, the learned AAG appearing on behalf of the State argued that since the petitioner can avail his remedy before the forums constituted under the F.C.R., he cannot straight away file a writ petition in this Court.

3. We have gone through the record carefully and considered the submissions of the learned counsel for the parties.

4. Since the petitioner has been in Jail for more than a year for none of his faults, we do not think, his detention even for a day more can be justified under any cannons of law simply because his brother happens to be an accused in a murder case. The judgments cited at the bar by the learned counsel for the petitioner may well be referred in this behalf.

5. For the reasons discussed above, this petition is allowed and the petitioner is directed to be released forthwith, if he furnishes bail bonds in the sum of Rs.1,00,000/- (Rs. One lac) with two sureties each in the like amount to the satisfaction of the

Additional Registrar of the Peshawar High Court, Bench D.I. Khan, who is to ensure that the sureties are local, reliable and men of means.

Dated:30.8.2005 J U D G E

J U D G E

Peshawar High Court

Mian Gulzada --- Appellant/Petitioner (s)

Versus

Government --- Respondent (s)

JUDGMENT

WP. No. 1615/2005 Date of hearing 23.09.2005

EJAZ AFZAL KHAN J.- Assailed herein is the judgment dated 20.6.2005 of the learned Additional District Judge Camp Court Chakdara, whereby he partially accepted the appeal filed by the respondent and thus modified the judgment dated 26.10.2004 of the learned Family Judge.

2. It was argued by the learned counsel for the petitioner that where the learned Family Court proceeded to dissolve the marriage on the basis of 'Khula', the learned appellate Court was not supposed to modify it by burdening the petitioner with the amount of dowry articles to the tune of Rs.10,000/- and maintenance at the rate of Rs.1000/- per month from the date of institution of the suit to the date of its decision including 'Iddat' period.

3. As far as the first contention of the learned counsel for the petitioner is concerned that is totally devoid of force as the learned appellate Court after making proper appraisal of evidence has rightly arrived at the conclusion that dowry articles are lying in the house of the petitioner and that their value is admittedly Rs.10, 000/-. The second contention of the learned counsel for the petitioner is also devoid of force, when there is ample evidence on the record to show that the petitioner has not been fair and just in his treatment towards the respondent and not only that but has also been touching rather over stepping the boundaries of ethics and morality. Therefore, we do not think, the grant of Past maintenance mentioned above, stemmed from any jurisdictional error so as to justify interference therewith in the equitable jurisdiction of this Court.

Peshawar High Court

4. For the reasons discussed above, this petition being without substance is dismissed in limine.

Dated:23.9.2005 J U D G E

J U D G E

Peshawar High Court

HADIA and others--Petitioners

Versus

E.D.O. etc.—Respondents

JUDGMENT

W.P. No. 989/2006 Decided on 21.12.2006
PLJ 2007 Peshawar 221 (DB)

Locus Poenitentiae--

Muhammad Qaim Jan Khan and Ejaz Afzal Khan, JJ.

----Principle of--Service matter--Petitioners were appointed on contract against the vacant posts of PST for a period of 3 years--No fresh applications for appointment on contract against such posts could be invited before the expiry of 3 years--Held: Section 21 of the General Clauses Act, 1897 provides that power to pass an order includes the power to amend vary or rescind it--But such power being enshrined in the principle of locus poenitentiae cannot be exercised where the order passed is acted upon and a valuable right has accrued in consequence thereof. [Pp. 222 & 223] A & B

1992 SCMR 1420, 1947 KB 130, (1975) 1 QB 1917 &

1992 SCMR 1652, ref.

Miss Musarrat Hilali, Advocate for Petitioners.
Mr. Nizar Muhammad Khan, DAG for Respondents.
Date of hearing: 21.12.2006.

JUDGMENT

Ejaz Afzal Khan, J.--Applications were invited through advertisement published in Daily Ausaf dated 27.3.2004 by the Executive District Officer Swabi, for the posts of P.T.C. female teachers. The candidates qualifying the test and interview were appointed as P.S.T., vide order dated 20.10.2004 for a period of three years. They assumed their charge and duty and have been working against the said posts since then. When on 15.6.2006 again applications were invited for the same posts for appointment on contract through advertisement published in the daily Mashriq dated 15.6.2006, the incumbents of the said posts challenged the aforesaid advertisement by filing Writ Petitions Nos.1097, 1101, 1102, 1300, 1526 and 1774 of 2006. These are disposed of by this single judgment as identical point of law is involved in all of them.

2. The learned counsel appearing on behalf of the petitioners contended that when the petitioners were appointed on contract against the vacant posts of PST for a period of 3 years, no fresh applications for appointment on contract against such posts could be invited before the expiration of 3 years and that the impugned act of the respondents being against law and detrimental to the accrued rights of the petitioners is liable to be set at naught.

3. As against that, the learned DAG appearing on behalf of the respondents, by referring to Section 21 of the General Clauses Act submitted that where a power is conferred on a functionary or authority to pass an order, it also includes a power to add to, amend, vary or rescind that, therefore, the order rescinding the appointments is not open to any interference.

4. We have gone through the record carefully and considered the submissions of the learned counsel for the parties.

5. It is not disputed that the petitioners were eligible and that they qualified the prescribed test and interview. It is also not disputed that they were appointed on contract for a period of 3 years, vide

order dated 20.10.2004 and that they have been working as such ever since then. The question arises, then, why fresh applications are invited for appointment on contract for the same posts when the stipulated period has not yet expired? The learned DAG tried to answer the question by referring to Section 21 of the General Clauses Act. But this reference, to our mind, is misconceived on the face of it. This provision of law, undoubtedly, provides that power to pass an order includes the power to amend, vary or rescind it. But this power being enshrined in the principle of locus poenitentiae cannot be exercised where the order passed is acted upon and a valuable right has accrued in consequence thereof. In the case of Muhammad Nawaz Vs. Federation of Pakistan and 61 others (1992 SCMR 1420), the Hon'ble Supreme Court held that the principle of locus poenitenutiae is not available to an authority when the order competently passed by it was acted upon and a valuable right accrued consequent upon that. Such order cannot be recalled or rescinded even under the principle of promissory estoppel. In the case of Central London Property Trust Ltd. Vs. High Trees House Ltd (1947) KB 130, Lord Dinning while dealing with the principle of promissory estoppel held as under:--

"The law has not been standing still since Jorden-v-Money. There has been a series of decisions over the last fifty years which, although they are said to be cases of estoppel are not really such. They are cases in which a promise was made which was intended to create legal relations and which, to the knowledge of the person making the promise, was going to be acted on by the person to whom it was made, and which was in fact so acted on. In such cases the Courts have said that the promise must be honoured."

6. His Lordship while reiterating the same principle in the case of Evenden v. Guildford Football Club (1975) 1 QB 1917, observed as follows:

"Promissory estoppel...applies whenever a representation is made, whether of fact or law, present or future, which is intended to be binding, intended to induce a person to act upon it and he does act upon it. That is the case here. Mr. Evenden entered into his

employment with the football club on the faith of the representation that he would not be prejudiced and that his employment should be regarded as a continuous employment. Acting upon it, he has lost any rights against the supporters' club. The football club cannot be allowed to go back on it. His employment is to be treated as continuous for the whole 19 years. He is entitled to the full redundancy payment of 459 pounds "

7. Government is not an exception to this principle. Its promise or its representation is also binding on it, if and when made or held out. In the case of Messrs Army Welfare Sugar Mills Ltd. and others Vs. Federation of Pakistan and others (1992 SCMR 1652), the Hon'ble Supreme Court after considering the entire case law on the subject held that the promissory estoppel is also available against the Government and its functionaries, if it is not against the legislature, against law or a promise not lawfully extended. But where the promise extended, besides being free from any such infirmity, has also been acted upon and consequent upon a valuable right has accrued, as in this case, it cannot be recalled or rescinded.

8. When considered in this background, we do not think, the respondents have the power to rescind or recall the order thus passed before the expiration of 3 years. Therefore, we allow these writ petitions, declare the act of the respondents as without jurisdiction and lawful authority and hold that the petitioners are entitled to retain the posts till the expiration of the stipulated period.

(M.S.A.) Petitions allowed

Peshawar High Court

Mst. GUL PARI----Petitioner

Versus

Haji MAQSOOD ELAHI and 3 others----Respondents

JUDGMENT

W.P No.282/2004 Decided on 2nd March, 2007
(2009 C L C 837 Peshawar)

Specific Relief Act (I of 1877)---

Ejaz Afzal Khan and Jehan Zaib Rahim, JJ ----S. 42---Constitution of Pakistan (1973), Art.199---Constitutional petition---Suit for declaration---Plaintiff filed suit for declaration on the basis of a mutation claiming that she had become owner of the property in dispute on the basis of said mutation---Application for rejection of plaint filed by the defendant was accepted by the Appellate Court and suit filed by the plaintiff was dismissed against which plaintiff had filed constitutional petition---Validity---Order of Appellate Court dismissing the suit filed by the plaintiff being free from any jurisdictional error, was not open to any exception---Constitutional petition against judgment of the Appellate Court being without substance, was dismissed.

Junaid Rashid and others v. Sultan Muhammad and others 2000 SCMR 1525; Amiabai v. Ibrahim and 4 others PLD 1992 Kar. 270; Rehmatullah v. Ali Muhammad and another 1983 SCMR 1064 and Province of Punjab v. Abdul Ghani PLD 1985 SC 1 rel.

Afridi Khan for Petitioner.
Abdur Rauf Rahaila and Muhammad Shafi for Respondents.

Dates of hearing: 27th February and 1st March, 2007.

JUDGMENT

EJAZ AFZAL KHAN, J.--- Haji Maqsood Elahi, respondent No.1 instituted a petition before the learned Rent Controller Peshawar for the ejectment of Toor Muhammad, respondent No.2 in respect of the suit shop. The latter resisted the application by denying the existence of relationship of landlord and tenant between him and the former. The learned Rent Controller after framing a preliminary issue and recording evidence of the parties rejected the application, vide order dated 26-2-1991. An appeal was preferred by respondent No.1 in the Court of the learned District Judge Peshawar, which was allowed, vide order dated 9-3-1993. Respondent No.2 preferred a writ petition in the High Court which was dismissed, vide judgment dated 5-12-1994. Petition for leave to appeal was preferred in the apex Court by respondent No.2, which too met the same fate, vide judgment dated 20-5-1996. In the meantime Mst. Gul Pari, petitioner herein who is also wife of respondent No.2, instituted a suit for declaration on the basis of Mutation No.3638 attested on 9-10-1980. But when respondent No.1 filed an application for execution of the order ejecting respondent No.2, she also resisted, the execution by filing objections on the ground that she has become owner of the property in dispute on the basis of the mutation mentioned above. The learned Court executing the decree dismissed the application, vide order dated 18-9-1999. She preferred an appeal there against which was also dismissed, vide order dated 14-10-1999. Her revision in this Court was also dismissed, vide judgment dated 28-2-2000. Respondent No.1 then filed an application for rejection of plaint in the suit instituted by the petitioner in the Court of the learned Senior Civil Judge, but it was dismissed by the learned Judge, vide order dated 19-5-1999. A revision against the aforesaid order was filed in the Court of the learned Additional District Judge which was allowed by the learned Judge, vide his judgment dated 22-6-2002 and consequently the suit of the petitioner was dismissed,. The petitioner filed a writ petition in this Court, which

was dismissed as withdrawn with the permission to file a fresh. Hence this writ petition.

2. Learned counsel appearing on behalf of the petitioner contended that the suit of the petitioner on the basis of title was competent notwithstanding the verdict of the learned District Judge in the earlier round of litigation, holding that the relationship of landlord and tenant existed between respondents Nos.1 and 2 was upheld up to the apex Court, as the learned Rent Controller and all the forums functioning in the hierarchy could not have decided the question of title as it exclusively lay within the competence of Civil Court. The learned counsel to support his contention place reliance on the cases of Junaid Rashid and others v. Sultan Muhammad and others 2000 SCMR 1525. The learned counsel next submitted that even a finding on the objections filed by the petitioner before the executing Court cannot operate as res judicata, even if, it is upheld up to the High Court, when they were not disposed of in accordance with the provisions o: rule 103 of Order XXI of the C.P.C. Learned counsel to support his contention placed reliance on the case of Amiabai v. Ibrahim and 4 others PLD 1992 Kar. 270.

3. As against that, the learned counsel appearing on behalf of the respondent contended that when the High Court and the Supreme Court while dealing with the controversy as to the existence of relationship of landlord and tenant between respondents Nos.1 and 2 made in-depth examination of the entire record relating to the title of the parties, the petitioner who is claiming title through the latter and is his wife as well cannot be allowed to start afresh on the pretext that the Rent Controller being a Court of limited jurisdiction could not have decided the title of the parties. He next submitted that the finding given by the Court executing the decree would also operate as bar to a fresh suit when the Courts in that hierarchy including this Court discussed the merits of the case with

reference to the conduct of the petitioner. Learned counsel next contended that it is also unbelievable that a wife would remain unaware of a litigation carried on by her husband for a decade and a half, therefore, the suit of the petitioner being collusive was rightly dismissed by the learned revisional Court.

4. We have gone through the record carefully and considered the submissions of the learned counsel for the parties.

5. The record reveals that respondent No.2, who happened to be the husband of the petitioner, from the very inception denied the relationship of landlord and tenant between him and respondent No.1. The learned trial Court after framing a preliminary issue handed down a finding in his favour but that was reversed by the Court of the District Judge. The finding of the District Judge, however, remained undisturbed up to the Supreme Court. The petitioner then instituted a suit on the basis of title, which also stood dismissed when a revision petition filed by respondent No.1 was allowed by the learned District Judge. And rightly so when it is not a case where the Court of the District Judge or this Court including the Supreme Court in earlier round of litigation between respondents Nos.1 and 2 entertained any doubt about the title of the landlord. This Court while dealing with this aspect in its judgment rendered in earlier round held as under:---

> "The case of the petitioner, on the other hand, is that meters of sui gas and electricity have been installed in the name of the petitioner. The evidence of Amanullah Khan R. W.6 is that, as a general attorney of Muhammad Ali transferee of the land measuring 5 Kanals, he had alienated the disputed premises in favour of the petitioner by virtue of mutation No.3391 sanctioned on 26-1-1978 after the notice under

section 30 of the Displaced Persons (Compensation and Rehabilitation) Act, 1958 was served upon him and he had satisfied himself after seeing the RL-II. The claim of the petitioner in nutshell is that he had raised the superstructure on the land underneath the disputed premises. Ultimately when the petitioner came to know that the land underneath the disputed premises being evacuee property had been transferred to Muhammad Ali and further that he was selling it, the petitioner purchased the 'land through a Court decree photo copy Exh.R.W.8/1 and then got it mutated in his name. In the cross-examination, he had admitted the execution of the rent deed photocopy Exh.A.W.2/1 in favour of the respondent. The land underneath the disputed premises is, however, not definitely shown to have been transferred to Muhammad Ali transferor. The identification of the land underneath to be forming part of Khasra numbers entered in the Court decree has not been proved. The superstructure of the disputed shops has been purchased by the respondent from Pir Bakhsh on the basis of a registered deed while the land underneath it has been purchased by him from Sher Muhammad also by virtue of a registered deed photocopy Exh. P. W.4/3. "

6. In another paragraph this Court held as under:---

"In these circumstances and admission of execution of the rent deed by the petitioner in favour of the respondent and thereafter having admittedly attorned to him, the learned District Judge had rightly adjudged the respondent's claim to be the landlord on the basis of the ownership of the property. The petitioner/tenant had thus not been able to create `reasonable' doubt qua the claim of the respondent to be adjudged as landlord/owner when the Rent Controller had failed to do so. The learned appellate Court had done

the same, which is permissible under two authorities of the Supreme Court, namely, Rehmatullah v. Ali Muhammad and another 1983 SCMR 1064 and Province of Punjab v. Mufti Abdul Ghani PLD 1985 SC 1."

7. The Honourable Supreme Court while examining the judgment of the learned District Judge and this Court held as under:---

"We have heard the learned counsel for the petitioner and the learned counsel appearing for the caveator and perused the record. The ejectment of the petitioner was sought for by the respondent from the suit "Saqawa" on the ground of default. It was alleged in the petition for ejectment that he firstly purchased the superstructure from the person in possession of the suit premises and subsequently obtained the site underneath it from its transferee through another sale-deed and thereby he became the full owner of the suit premises. Petitioner as such accepted the respondent as his landlord and executed a rent deed on 26-6-1970 in his favour and was regularly making payment of rent and subsequently since 1-11-1978 defaulted in payment of rent, presumably after he managed to get a decree in his favour in Suit No.905/1 instituted on 4-12-1977 decided on 10-12-1977. As far as Mutation No.3391 is concerned, which was entered on the basis of aforementioned decree allegedly passed in favour of the petitioner, it pertains to a joint `Khata' measuring 6 Kanals, 3 Marlas through which 2/266 share is shown to have been transferred in his favour. This mutation was, therefore, held by the learned District Judge to have no connection with the "Saqawa" in question which was in possession of the petitioner long before the acquisition of such right and title in the joint "Khata". We, therefore, find no infirmity in the judgment of the learned High Court refusing to interfere with the finding of the

> learned District Judge that the tenant was debarred from challenging the title of his landlord. Petition is, accordingly, dismissed."

8. The petitioner who is claiming title through respondent No.2 when resisted the execution of the order thus passed against him on the ground of ownership, this Court while dealing with her revision petition impugning the orders of forums below held as under:---

> "In the rent proceedings it has been established that Toor Muhammad was tenant of the property and Maqsud Ilahi, the landlord. The question of ownership was also raised by Toor Muhammad in the rent proceedings but eventually it was not accepted as the Court found him to be a tenant in the property. The petitioner Mst. Gul Pari claims that the property in question was transferred through gift mutation by Toor Muhammad in her favour in the year, 1980. Her title to the property cannot be in any case better than the transferor Toor Muhammad. Additionally, the petitioner being the wife of Toor Muhammad must have known about the ejectment proceedings but failed to become a party to those proceedings. Thus, there is no reason to interfere with the findings of the two Courts in revisional jurisdiction. The revision petition is, therefore, dismissed in limine."

9. Where this Court and the Honourable Supreme Court in view of the. dicta rendered in the cases of Rehmatullah v. Ali Muhammad and another 1983 SCMR 1064 and Province of Punjab v. Abdul Ghani PLD 1985 SC 1 neither entertained any doubt as to the title of respondent No.1 nor permitted respondent No.2 to file a fresh suit on the basis of title and proceeded to decide the question of title on merits after considering their respective pleas raised before

them, it would certainly operate as res judicata. The suit of the petitioner in view of the finding given on merits in the revision petition filed by her against the orders dismissing her objection petition, would also operate as bar to the suit when it for not being questioned in the Supreme Court has attained finality. The cases of Junaid Rashid and others v. Sultan Muhammad and others and Amiabai v. Ibrahim and 4 others (supra) cited by the learned counsel for the petitioner because of their distinguishable facts and features have no perceptible relevance to the case in hand.

10. Having thus seen in this background, we have no hesitation to hold that the order of the learned Additional District Judge dismissing the suit of the petitioner being free from any jurisdictional error is not open to any exception.

11. For the reasons discussed above, this writ petition being without substance is dismissed.

H.B.T./68/P
Petition dismissed.

Peshawar High Court

MUHAMMAD ILYAS KHAN PATWARI --- Petitioner

Versus

DISTRICT OFFICER REVENUE AND ESTATE OFFICER, PESHAWAR and another --- Respondents

JUDGMENT

W.P. No. 835/2007 Decided on 23.5.2007
(PLJ 2008 Peshawar 75 (DB)

Constitution of Pakistan, 1973--

Ejaz Afzal Khan and Dost Muhammad Khan, JJ ---- Art. 199--Civil servant--Order of transferring and posting as Patwari was withdrawn — Constitutional petition--Jurisdiction--Validity--Transfer and posting being related to the terms and conditions of service would fall within exclusive domain of Service Tribunal and High Court cannot step into interfere therewith under Art. 199 of Constitution--Even the order mativated by malafides and passed on political considerations to accommodate some blue-eyed-chap, being justiciable can be challenged before the Service Tribunal which has the exclusive jurisdiction to inquire into such matters--Held: Orders of transfer and posting of civil servants passed by the bureaucrats on dictates of the elected representatives or on account of mala fides or political considerations, but when redress can be had by an appeal before departmental authority and then before the Service Tribunal, on proof of such facts--High Court would not like to interfere with such orders in exercise of extra-ordinary equitable discretionary Constitutional jurisdiction--Further held: High Court does not feel persuaded to interfere with impugned order--Instead of dismissing it, treat it as an appeal before departmental authority and send it thereto for decision in accordance with law within one month--Petition disposed of. [Pp. 76, 77 & 80] A, B & C

Mr. Abdul Maabood Khattak, Advocate for Petitioner.

Peshawar High Court

Date of hearing: 23.5.2007.

JUDGMENT

Ejaz Afzal Khan, J.--Petitioner through the instant petition has impugned the order dated 19.3.2007 of the District Officer Revenue and Estate Peshawar, whereby the order dated 13.3.2007 transferring and posting him as Patwari Halqa, Sardar Garhi, was withdrawn.

2. Learned counsel appearing on behalf of the petitioner contended that if the impugned order and the orders preceding it are looked at in their proper perspective, the appear to be motivated by the mala fides and political considerations as such they have to be struck down. The learned counsel to support his contention placed reliance on the judgment rendered in the case of Gulzar Ahmad vs. District Officer Revenue and Estate Peshawar and others in Writ Petition No. 1819 of 2006 decided on 22.11.2006.

3. We have gone through the available record carefully and considered the submissions of the learned counsel for the petitioner.

4. It has been consistently held by the Hon'ble Supreme Court in the cases of Miss Rukhsana Ijaz vs. Secretary, Education, Punjab and others (1997 SCMR 167), Ayyaz Anjum vs. Government of Punjab, Housing and Physical Planning Department through Secretary and others (1997 SCMR 169), and Rafique Ahmad Chaudhry vs. Ahmad Nawaz Malik and others (1997 SCMR 170), that transfer and posting being related to the terms and conditions of service would fall within the exclusive domain of the Service Tribunal and that the High Court cannot step in to interfere therewith under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973. Even the order motivated by mala fides and passed on political considerations to accommodate some blue eyed-chap, being justiciable can be challenged before the Service Tribunal which has the exclusive jurisdiction to

inquire into such matters. The case of Secretary Education NWFP Peshawar and 2 others vs. Mustamir Khan and another (2005 SCMR 17) may well be referred in this behalf. In the case of Peer Muhammad vs. Government of Baluchistan through Chief Secretary and others (2007 SCMR 54), the Hon'ble Supreme Court while dealing with a similar proposition reiterated the same view by holding as under:

"It is settled by now that the question of posting of a Government servant squarely falls within the jurisdictional domain of the Competent Authority subject to law and rules made there under. The question of posting/transfer relates to terms and conditions of a Government servant and Service Tribunal would have exclusive jurisdiction to dilate upon and decide such matters and Constitutional jurisdiction cannot be invoked to get such controversies resolved. We have also adverted to the question of mala fides which according to the learned Advocate Supreme Court could have been dilated upon in Constitutional jurisdiction which is not correct because the provisions as contained in Article 212 of the Constitution of Islamic Republic of Pakistan ousts jurisdiction of all other Courts and orders of the departmental authority even though without jurisdiction or mala fide can be challenged only before the Service Tribunal and jurisdiction of Civil Court including High Court is specifically ousted. The plea of mala fide does not confer upon High Court jurisdiction to act in the matter in view of the Constitution of Islamic Republic of Pakistan and learned Service Tribunal has full jurisdiction to interfere in such like matters."

5. In the case of Zahid Akhtar vs. Government of Punjab through Secretary, Local Government and Rural Development, Lahore and 2 others (PLD 1995 Supreme Court 530), the Hon'ble Supreme Court despite condemning the phenomenon of passing orders of transfer and posting of civil servants on the dictates of the elected representatives, declined to interfere therewith by holding as under:

"We need not stress here that tamed and subservient bureaucracy can neither be helpful to Government nor it is expected to inspire public confidence in the administration. Good Governance is largely dependent on an upright, honest and strong bureaucracy. Therefore, mere submission to the will of superior is not a commendable trait in a bureaucrat. Elected representatives placed as incharge of administrative departments of Government are not expected to carry with them a deep insight in the complexities of administration. The duty of a bureaucrat, therefore, is, to appraise these elected representatives the nicety of administration and provide them correct guidance in discharge of their functions in accordance with the law. Succumbing to each and every order or direction of such elected functionaries without bringing to their notice, the legal infirmities in such orders/directions may sometimes amount to an act of indiscretion on the part of bureaucrats, which may not be justifiable on the plane of hierarchical discipline. It hardly needs to be mentioned that a Government servant is expected to comply only those orders/directions of his superior, which are legal, and within his competent. Compliance of an illegal or an incompetent direction/order can neither by justified on the plea that it came from a superior authority nor it could be defended on the ground that its non-compliance would have exposed the concerned Government servant to the risk of disciplinary action."

6. Another paragraph also merits verbatim reproduction, which reads as under:

"A reading of Rule 21(2) with Schedule V of the Rules of Business ibid, makes it clear that the transfer of a Section Officer/Under-Secretaries and other officers of equivalent rank within the department is to be done by the Secretary of that department. Rule 21 of the Rules of Business, which deals with power of posting, promotion and transfer of Government servants, does not contemplate exercise of these powers by the Minister. The normal period of posting of a Government servant at a station, according to the above referred policy decision of the Government, is 3 years, which has to be followed in the ordinary circumstances, unless for

reasons of exigencies of services mentioned in the aforesaid policy of Government, a transfer before expiry of 3 years' period becomes necessary in the opinion of competent authority. The transfer orders in the present case, therefore, could neither be justified on the plane of policy directive of Government referred to above, nor they were sustainable on the language of Rule 21(2) read with Schedule V of the Rules of Business, ibid. We are in no doubt that if the transfer orders in the case before us would have been made in accordance with the policy directives of the Government referred to above and power was exercised by the competent authority as contemplated by Rule 21(2) read with Schedule V of the Rules of Business, ibid, there would have been no room for manoeuvering by the officers affected by such transfer. The fact that the transfers were made in violation of policy directive of the Government, which has the status of a Rule, and provisions of Rule 21(2) ibid, were not followed strictly opened the door for the Government servant concerned to bring in outside influences to obtain the desired transfers. We are also sorry to note that the Secretary LG & RD, neither resisted these unethical and undesirable moves of his subordinate nor he pointed out to the Hon'ble Minister Incharge, that the transfer orders made by him from time to time in respect of various officers of his department were neither in conformity with the declared policy of Government nor these transfer orders conform to the provisions of Rule 21(2) of the Rules of Business, ibid. It was the duty of the Secretary LG & RD to have pointed out to the Minister concerned the extent of his authority in such matter, besides bringing to his notice that such frequent transfer of a Government servant could neither be justified as the exigencies of service nor it could be described in the Public interest. We are constrained to observe that such unconcerned and lukewarm attitude on the part of a Head of a Government is not expected to promote discipline or efficiency in the Department. On the contrary such attitude may have a demoralizing effect on his subordinates encouraging to seek intervention and favours of outside agencies, which may ultimately adversely affect the overall discipline and efficiently in the department. We, therefore, expect that the guide lines mentioned in the policy directives of the Government referred to above and the

provisions of Rule 21 of the Rules of Business, ibid, will be kept in view by all concerned while dealing with the transfers of Government servants. The office is directed to send a copy of this judgment to the Government of Punjab for circulating it to all its departments, for future guidance. with these observations, this petition stands dismissed as not maintainable."

7. We, too, by respectfully following the above quoted dictum of the Hon'ble Supreme Court condemn the orders of transfer and posting of the Civil Servants passed by the bureaucrats on the dictates of the elected representatives or on account of mala fides or political considerations, but when redress can be had by an appeal before the Departmental authority and then before the Service Tribunal, on proof of such facts, we would not like to interfere with such orders in the exercise of our extraordinary equitable discretionary Constitutional jurisdiction. This is what we held in the cases of Bakhtiar Ahmad vs. SMBR in W.P. No. 1167 of 2006 decided on 3.8.2006, Professor Rehana Matiullah vs. Chief Secretary and others in W.P. No. 1496 of 2006 decided 12.2.2006, S. Mansoor Hussain Shah vs. Secretary LG/Rd in W.P. No. 1153 of 2006 decided on 3.8.2006, Waqif Khan vs. Government of N.W.F.P. in W.P. No. 1114 of 2006 decided on 28.7.2006, Pervez Khan vs. Addl. Chief Secretary FATA in W.P. No. 2261 of 2006, decided on 14.2.2007, Serat Bibi vs. Government of NWFP in W.P. 1559 of 2006 decided on 5.10.2006, Addal Qadir vs. Government in W.P. No. 561 of 2006, 12.5.2006, Nawab Gul vs. SMBR in W.P. No. 1033 of 2006 decided on 18.7.2006 and Sardar Ali vs. Director School in W.P. No. 942 of 2006 decide don 13.7.2006.

8. The case of Gulzar Ahmad vs. District Officer Revenue and Estate Peshawar and others in Writ Petition No. 1819 of 2006 decided on 22.11.2006 cited by the learned counsel for the petitioner would not be relevant to the case is hand, when, it is distinguishable on legal as well as factual plane.

9. Having thus considered in this background, we do not feel persuaded to interfere with the impugned order. However, we by

following the dictum rendered in the case of Muhammad Anis and others vs. Abdul Haseeb and others (PLD 1994 Supreme Court 539) instead of dismissing it, treat it as an appeal before the departmental authority and send in thereto for decision in accordance with law within one month. The petitioner may, if so advised, pray for the interim relief before the same forum. This writ petition thus stands disposed of.

(N.F.) Petition disposed of.

Peshawar High Court

IKRAM ULLAH --- Petitioner

Versus

DISTRICT OFFICER REVENUE AND ESTATE, PESHAWAR AND 3 OTHERS --- Respondents

JUDGMENT

W.P. No. 2143/2006 Decided on 15.6.2007
PLJ 2007 Peshawar 207 (DB)

Talaat Qayyum Qureshi and Ejaz Afzal Khan, JJ

(i) Constitution of Pakistan, 1973--

----Arts. 199 & 212(2)--Matter of transfer and posting--Terms and conditions of service--Interference with smooth sailing of department--Jurisdiction--Transfer and posting being related to the terms and conditions of service would fall within the exclusive domain of the Service Tribunal and High Court cannot step in to interfere--Where transfer is motivated by malafides or is based on extraneous considerations to accommodate some blue-eyed chap, it being justiciable, can well be taken to the Service Tribunal, which has the exclusive jurisdiction to inquire into such matters--Held: Plea of mala fide does not confer upon High Court jurisdiction to act in the matter in view of Constitution of Pakistan and Service Tribunal has full jurisdiction to interfere in such like matters. [Pp. 209 & 210] A, B & C

(ii) Duty of Servant--

----Comply on his superiors orders--Government servant is expected to comply only those orders/directors of his superior, which are legal and within his competence. [P. 211] D

(iii) North West Frontier Province District Government Rules of Business, 2001--

----Rr. 21(2) & 25--Schedule V--Constitution of Pakistan 1973, Art. 199--Constitutional petition--Transfer by Minister of Revenue--Question of transfer and posting--Terms and conditions of service--Interference with smooth sailing of department--Jurisdiction--If the transfer orders would have been made in accordance with the policy directives of the Government and power was exercised by competent authority, there would have been no room for manoeuvering by officers affected by such transfer--Petitioner's case, when it being distinguishable on legal plane as well as factual, has no perceptible relevance to such case--Held: High Court does not feel persuaded to interfere with impugned order--Instead of dismissing this petition, treat it as an appeal before the departmental authority and send it for decision in accordance with law within one month--Petition disposed of.

[Pp. 212 & 213] E, G & H

(iv) Jurisdiction--

----Dictum of Hon'ble Supreme Court condemn the orders of transfer and posting of the civil servants passed by bureaucrats on the dictates of elected representatives or on account of mala fides or political considerations, but when redress can be had by an appeal before the departmental authority and then before the service tribunal, on proof of such facts--Held: No interfere with such orders in exercise of our extra ordinary equitable discretionary Constitutional jurisdiction--Petition disposed of. [P. 212] F

Mian Muhibullah Kakakhel, Advocate for Petitioner.
Sardar Shaukat Hayat, AAG for Respondent Nos. 1 to 3.
Mr. Abdul Qayyum Sarwar, Advocate for Respondent No. 4.
Date of hearing: 8.5.2007.

Peshawar High Court

JUDGMENT

Ejaz Afzal Khan, J.--Ikramullah, petitioner herein, has flung a challenge to the order dated 2.12.2006 of the District Officer Revenue and Estate Peshawar, whereby he has been transferred from Landi Yarghajao to Tarnab.

2. Learned counsel appearing on behalf of the petitioner contended that a look at the impugned order would clearly indicate that the petitioner was transferred at the instance of the Minister for Revenue who has no powers whatever to interfere with the smooth sailing of the Department, if seen in the light of the provisions contained in Articles 129 and 130 of the Constitution of Islamic Republic of Pakistan, 1973 and the Rules of Business framed there under and that it being motivated by mala fides and based on political considerations is liable to be struck down. Such order, the learned counsel added, is all the more liable to be struck down, when it is also violative of Rule 25 of North West Frontier Province District Government Rules of Business, 2001 framed under the North West Frontier Province Local Government Ordinance, 2001. The learned counsel to support his contention relied on the judgment rendered in the cases of Gulzar Ahmad Vs. District Officer Revenue and Estate Peshawar and others in Writ Petition No.1819 of 2006 decided on 22.11.2006 and Himayatullah Mayat vs. Government of N.W.F.P. through Secretary, Schools and Literacy Department Peshawar and 5 others (PLD 2006 Peshawar 119). The learned counsel next contended that though resort can be had to the departmental authority and then to the Service Tribunal but that process being too tedious and time consuming can neither be termed as alternate nor efficacious.

3. As against that, the learned counsel appearing on behalf of Respondent No. 4 contended that transfer and posting being a matter relating to the terms and conditions of service, falls within the domain of the Service Tribunal, therefore, this Court while exercising jurisdiction under Article 199 of the Constitution could not interfere therewith.

Peshawar High Court

4. We have gone through the record carefully and considered the submissions of the learned counsel for the parties.

5. Though the impugned order appears to have been made with the approval of the Minister for Revenue, but it per se would not prove that it was motivated by mala fides and based on considerations as could be termed political. In case it be so, it being essentially a question of fact cannot be inquired into by this Court in the exercise of its constitutional jurisdiction. Disputes as to transfer and posting of civil servants being related to the terms and conditions of service fall within the exclusive domain of the Service Tribunal. Orders of transfer and posting motivated by mala fides and political considerations, too, can be dealt with, in the first instance, by the Departmental Authority and then by the Service Tribunal. So can be the ones passed in violation of the rules of Business framed under the Constitution or the Local Government Ordinance. Jurisdiction of this Court in view of the provisions contained in Article 212(2) of the Constitution is barred. In the cases of Miss Rukhsana Ijaz Vs. Secretary, Education, Punjab and others (1997 SCMR 167), Ayyaz Anjum Vs. Government of Punjab, Housing and Physical Planning Department through Secretary and others (1997 SCMR 169), and Rafique Ahmad Chaudhry Vs. Ahmad Nawaz Malik and others (1997 SCMR 170), it has been consistently held by the Hon'ble Supreme Court that transfer and posting being related to the terms and conditions of service would fall within the exclusive domain of the Service Tribunal and that the High Court cannot step in to interfere therewith under Article 199 in view of an express bar envisaged by Article 212(2) of the Constitution. In the case of Secretary Education NWFP Peshawar and 2 others Vs. Mustamir Khanand and another (2005 SCMR 17), the Hon'ble Supreme Court held in no uncertain terms that where transfer is motivated by mala fides or is based on extraneous considerations to accommodate some blue-eyed chap, it being justiciable, can well be taken to the Service Tribunal, which has the exclusive jurisdiction to inquire into such matters. In the case of Peer Muhammad Vs. Government of Baluchistan through Chief Secretary and others (2007 SCMR

54), the Hon'ble Supreme Court while dealing with similar proposition held as under:

"It is settled by now that the question of posting of a Government servant squarely falls within the jurisdictional domain of the Competent Authority subject to law and rules made there under. The question of posting/transfer relates to terms and conditions of a Government servant and Service Tribunal would have exclusive jurisdiction to dilate upon and decide such matters and Constitutional jurisdiction cannot be invoked to get such controversies resolved. We have also adverted to the question of mala fides which according to the learned Advocate Supreme Court could have been dilated upon in Constitutional jurisdiction which is not correct because the provisions as contained in Article 212 of the Constitution of Islamic Republic of Pakistan ousts jurisdiction of all other Courts and orders of the departmental authority even though without jurisdiction or mala fide can be challenged only before the Service Tribunal and jurisdiction of Civil Court including High Court is specifically ousted. The plea of mala fide does not confer upon High Court jurisdiction to act in the matter in view of the Constitution of Islamic Republic of Pakistan and learned Service Tribunal has full jurisdiction to interfere in such like matters."

6. In the case of Zahid Akhtar vs. Government of Punjab through Secretary, Local Government and Rural Development, Lahore and 2 others (PLD 1995 Supreme Court 530), the Hon'ble Supreme Court despite condemning the phenomenon of passing orders of transfer and posting of civil servants on the dictates of the elected representatives, declined to interfere therewith by holding as under:

"We need not stress here that tamed and subservient bureaucracy can neither be helpful to Government nor it is expected to inspire public confidence in the administration. Good governance is largely dependent on an upright, honest and strong bureaucracy. Therefore, mere submission to the will of superior is not a commendable trait in a bureaucrat. Elected representatives

placed as Incharge of administrative departments of Government are not expected to carry with them a deep insight in the complexities of administration. The duty of a bureaucrat, therefore, is, to apprise these elected representatives the nicety of administration and provide them correct guidance in discharge of their functions in accordance with the law. Succumbing to each and every order or direction of such elected functionaries without bringing to their notice, the legal infirmities in such orders/directions may sometimes amount to an act of indiscretion on the part of bureaucrats, which may not be justifiable on the plane of hierarchical discipline. It hardly needs to be mentioned that a Government servant is expected to comply only those orders/directions of his superior, which are legal, and within his competence. Compliance of an illegal or an incompetent direction/order can neither be justified on the plea that it came from a superior authority nor it could be defended on the ground that its non-compliance would have exposed the concerned Government servant to the risk of disciplinary action."

7. Another paragraph also merits verbatim reproduction, which reads as under:--

"A reading of Rule 21(2) with Schedule V of the Rules of Business ibid, makes it clear that the transfer of a Section Officer/Under Secretaries and other officers of equivalent rank within the department is to be done by the Secretary of that department. Rule 21 of the Rules of Business, which deals with power of posting, promotion and transfer of Government servants, does not contemplate exercise of these powers by the Minister. The normal period of posting of a Government servant at a station, according to the above referred policy decision of the Government, is 3 years, which has to be followed in the ordinary circumstances, unless for reasons of exigencies of services mentioned in the aforesaid policy of Government, a transfer before expiry of 3 years' period becomes necessary in the opinion of competent Authority. The transfer orders in the present case, therefore, could neither be justified on the plane of policy directive of Government referred to above, nor they were sustainable on the language of Rule 21(2) read with

Schedule V of the Rules of Business, ibid. We are in no doubt that if the transfer orders in the case before us would have been made in accordance with the policy directives of the Government referred to above and power was exercised by the competent Authority as contemplated by Rule 21(2) read with Schedule V of the Rules of Business, ibid, there would have been no room for manoeuvering by the officers affected by such transfer. The fact that the transfers were made in violation of policy directive of the Government, which has the status of a Rule, and provisions of Rule 21(2) ibid, were not followed strictly, opened the door for the Government servant concerned to bring in outside influences to obtain the desired transfers. We are also sorry to note that the Secretary LG&RD, neither resisted these unethical and undesirable moves of his subordinates nor he pointed out to the Hon'ble Minister Incharge, that the transfer orders made by him from time to time in respect of various officers of his department were neither in conformity with the declared policy of Government nor these transfer orders conform to the provisions of Rule 21(2) of the Rules of Business, ibid. It was the duty of the Secretary LG & RD to have pointed out to the Minister concerned the extent of his authority in such matter, besides bringing to his notice that such frequent transfer of a Government servant could neither be justified as the exigencies of service nor it could be described in the Public interest. We are constrained to observe that such unconcerned and lukewarm attitude on the part of a Head of a Government is not expected to promote discipline or efficiency in the Department. On the contrary such attitude may have a demoralizing effect on his subordinates encouraging to seek intervention and favours of outside agencies, which may ultimately adversely affect the overall discipline and efficiency in the department. We, therefore, expect that the guide lines mentioned in the policy directives of the Government referred to above and the provisions of Rule 21 of the Rules of Business, ibid, will be kept in view by all concerned while dealing with the transfers of Government servants. The office is directed to send a copy of this judgment to the Government of Punjab for circulating it to all its departments, for future guidance. With these observations, this petition stands dismissed as not maintainable."

Peshawar High Court

8. We, too, by respectfully following the above quoted dictum of the Hon'ble Supreme Court condemn the orders of transfer and posting of the Civil Servants passed by the bureaucrats on the dictates of the elected representatives or on account of mala fides or political considerations, but when redress can be had by an appeal before the Departmental authority and then before the Service Tribunal, on proof of such facts, we would not like to interfere with such orders in the exercise of our extra ordinary equitable discretionary constitutional jurisdiction. This is what we held in the cases of Bakhtiar Ahmad Vs. SMBR in W. P. No. 1167 of 2006 decided on 3.8.2006, Professor Rehana Matiullah Vs. Chief Secretary and others in W.P. No. 1496 of 2006 decided 12.2.2006, S. Mansoor Hussain Shah Vs. Secretary LG/RD in W.P. No. 1153 of 2006 decided on 3.8.2006, Waqif Khan Vs. Government of N.W.F.P. in W.P. No. 1114 of 2006 decided on 28.7.2006, Pervez Khan vs. Addl. Chief Secretary FATA in W.P. No. 2261 of 2006 decided on 14.2.2007, Serat Bibi Vs. Government of NWFP in W.P. 1559 of 2006 decided on 5.10.2006. Abdal Qadir Vs. Government in W.P. No. 561 of 2006, decided on 12.5.2006, Nawab Gul Vs. SMBR in W.P. No. 1033 of 2006 decided on 18.7.2006, Sardar Ali vs. Director School in W.P. No. 942 of 2006 decided on 13.7.2006 and Muhammad Ilyas Khan Vs. District Revenue and Estate Officer and others in W.P. No. 835 of 2007 decided on 23.5.2007.

9. The case of Gulzar Ahmad Vs. District Officer Revenue and Estate Peshawar and others in Writ Petition No. 1819 of 2006 decided on 22.11.2006 cited by the learned counsel for the petitioner being per-incurium and even sub-silentio would not advance the case of the petitioner. For the precedent per-incurium being rendered in derogation of the Statute and the precedent sub-silentio being not fully argued with reference to the relevant law would not have binding force. The case of Himayatullah Mayat Vs. Government of N.W.F.P. through Secretary, School and Literacy Department Peshawar and 5 others (PLD 2006 Peshawar 119), too would not advance the case of the petitioner, when it being distinguishable on legal plane as well as factual, has no perceptible relevance to the case in hand.

Peshawar High Court

10. Having thus considered, we do not feel persuaded to interfere with the impugned order. However, we by following the dictum rendered in the case of Muhammad Anis and others Vs. Abdul Haseeb and others (PLD 1994 Supreme Court 539), instead of dismissing this petition, treat it as an appeal before the departmental authority and send it thereto for decision in accordance with law within one month. The petitioner may, if so advised, ask for interim relief before the departmental authority. This writ petition thus stands disposed of.

(N.F.) Petition disposed of

Peshawar High Court

Mst. LAL BAHA----Petitioner

Versus

Mst. ZELLE HUMA AHMAD and 27 others----Respondents

JUDGMENT

W.P No.885/2007 Decided on 17th July, 2007
(2007 C L C 1855 Peshawar)

North-West Frontier Province Local Government Elections Rules, 2005---

Ijaz-ul-Hassan Khan and Ejaz Afzal Khan, JJ ----Rr. 35 & 71---Constitution of Pakistan (1973), Art.199---Constitutional petition---Re-counting of votes---Proceedings before Election Tribunal---Record had resealed that petitioner was not served in accordance with the requirements of law---Substituted service through proclamation in the newspapers though was resorted to, but nothing in writing had been brought on record to show as to why the normal modes of service were leaped over---Recount done at the back of petitioner was left intact, while the ex parte proceedings, for quite tenable reasons, had been set aside---No canon of law would justify such course---Entire proceedings including the recount was to be made de novo, once the Election Tribunal looked at the ex parte proceedings with reservation---Election Tribunal going wrong in law, went outside its jurisdiction, conferred on it---Order passed by the Tribunal could not be maintained---Structure based on a defective order could not sustain itself and had to collapse together with the order---Impugned orders were set aside and case was sent back to Election Tribunal for decision afresh in accordance with law after making the recount in the presence of the petitioner.

Pearlman v. Governors of Harrow school (1978) 3 WLR 736 and Utility Stores Corporation of Pakistan Limited v. Punjab Labour Appellate Tribunal and others PLD 1987 SC 447 ref.

Peshawar High Court

Khalid Mahmood for Petitioner.
Shakeel Ahmad for Respondents.
Date of hearing: 17th July, 2007.

JUDGMENT

EJAZ AFZAL KHAN, J.--- Petitioner through the instant petition has assailed the proceeding before the Election Tribunal culminating in the order dated 30-4-2007.

2. The main contention of the learned counsel for the petitioner was that where the petitioner was not served in accordance with the requirements of law, any proceeding taken at her back cannot be vested with any sanctity. He next submitted that once the application of the petitioner for setting aside the ex parte proceedings was allowed, the order of recount made at her back could not be left intact. Such an order, he added, would defeat the very purpose of setting aside the ex parte proceeding.

3. As against that, the learned counsel appearing on behalf' of the contesting respondents contended that where the order on the application for setting aside the ex-parte proceeding, leaving the recount done at the back of the petitioner intact, was accepted and acquiesced to, the petitioner cannot turn round now to question that through the instant petition, that too, when no specific prayer for its quashment has been made in the petition.

4. We have gone through the record carefully and considered the submission of the learned counsel .for the parties.

5. The record reveals that the petitioner was not served in accordance, with the requirements of law. Though substituted service through proclamation in the newspaper was resorted to, but nothing in black and white has been brought on the record to show as to why the normal modes of service were leaped over. We do not understand why the recount, done at the back of the petitioner, was left intact, when the ex parte proceeding, for quite tenable reasons, has been set aside. No canons of law would justify such a course. The entire proceeding including the recount was to be done de novo, once the Tribunal looked at the ex parte proceeding with reservation. The Tribunal going wrong in law, goes out side its jurisdiction, conferred on it, therefore, an order, thus, passed cannot be maintained. The cases of Pearlman v. Governors of Harrow School (1978) 3 WLR 736 and Utility Stores Corporation of Pakistan Limited v. Punjab Labour Appellate Tribunal and others PLD 1987 SC 447 may well be referred hi this behalf.

6. Yes, many procedural technicalities, as highlighted by the learned counsel for the answering respondents, stumble the way of the petitioner to the redress asked for, but we without a moment's hesitation, would hold that they be taken as the stepping stones rather than the stumbling blocks in the way of administration of justice. This is what the procedural technicalities stand for acid nothing more. Even otherwise, a structure based on a defective order cannot sustain itself and has to collapse together with the order. B We, therefore, do not feel persuaded to maintain the impugned orders. For transparency in the proceeding, from the point of its commencement to the point of its accomplishment, is the most cherished requirement of law.

Peshawar High Court

7. For the reasons discussed above, we allow this writ petition, set aside the impugned orders and send the case back to the learned Election Tribunal for decision afresh in accordance with law after making the recount in the presence of the petitioner. The parties are directed to appear before the learned Election Tribunal on 25-7-2007.

H.B.T./162/P

Case remanded.

Peshawar High Court

Haji AMIR ZADA---Petitioner

Versus

CHIEF ELECTION COMMISSIONER OF PAKISTAN and 5 others---Respondents

JUDGMENT

W.P No. 1237/2007 with
C.M.A. No. 457/2007 Decided on 2nd August, 2007
(2007 M L D 1923 Peshawar)

North-West Frontier Province Local Government Ordinance (XIV of 2001)---

Talaat Qayum Qureshi and Ejaz Afzal Khan, JJ---- S.152(2)---North-West Frontier Province Local Government (Conduct of Elections) Rules, 2005, Rr.61, 62, 63 & 72---Constitution of Pakistan (1973), Art.199---Constitutional petition---Disqualification of returned candidates---Jurisdiction of Election Tribunal---Petitioner/returned candidate in his constitutional petition had assailed judgment of Election Tribunal, whereby it had allowed election petition filed by respondent and by declaring election of petitioner void; had directed to held fresh election of Nazim---Contention of petitioner was that power to disqualify a returned candidate on ground of any disqualification exclusively lay with the Chief Election Commissioner in view of S.152(2) of North-West Frontier Province Local Government Ordinance, 2001; and that Election Tribunal had overstepped its jurisdiction by passing an order on such score---Validity---Chief Election. Commissioner under S.152(2) of North-West Frontier Province Local Government Ordinance, 2001, no doubt had the power to disqualify a candidate for election to any office of Local Government or an elected Member of Local Government, if he vas found to have contravened the provisions contained in said section, but that power had also been delegated to the Election Tribunal by the Chief Election Commissioner himself---Rule 72 of the Local

Government (Conduct of Elections) Rules, 2005, listing the premises for the exercise of that jurisdiction by the Tribunal, included the ground of declaring the election of returened candidate as void on account of disqualification---Power being concurrent and co-extensive with that of the Chief Election Commissioner, could be exercised by the Tribunal as well---Such power being exercisable by both Chief Election Commissioner and Election Tribunal, it could not be said chat same fell within exclusive jurisdiction of the Chief Election Commissioner and could not be exercised by the Election Tribunal---Judgment of election Tribunal being free from any infirmity, muchless jurisdictional error, was not open to any interference.

Shakeel Shahid v. Muhammad Younis Zahid and others PLD 2005 Lah. 357; S.M. Ayub v. Syed Yousaf Shah and others PLD 1967 SC 486 and Abdul Nasir and another v. Election Tribunal Toba Tek Singh and others 2004 SCMR 602 rel.

Barrister Masood Kausar for Petitioner.

Abdul Latif Afridi for Deputy Election Commissioner in person.

Shafiq Ahmed for Respondent.

Date of hearing; 2nd August, 2007.

JUDGMENT

EJAZ AFZAL KHAN, J.---Haji Amir Zada; petitioner herein, has assailed the judgment; dated 18-7-2007 of the Election Tribunal for Kohistan at Battagram, whereby it allowed the election petition filed by respondent No.6 and by declaring his election void, directed to hold fresh election of Nazim Tehsil Palis, District Kohistan.

2. Learned counsel appearing on behalf of the petitioner contended that power to disqualify a returned candidate on the ground of any disqualification exclusively lies with the Chief Election Commissioner in view of section 152(2) of the Local Government Ordinance, 2001 and that the Election Tribunal overstepped its jurisdiction by passing an order on such score. The learned counsel next contended that when the question of jurisdiction was raised before the Election Tribunal, it was required to decide it first, especially when a direction in this behalf was also given by this Court, vide its judgment, dated 4-4-2007 rendered in Writ Petition No. 312 of 2006. The learned counsel next contended that where the Junior Clerk, .Inquiry Section, examined on behalf of the Board of Intermediate and Secondary Education, Abbottabad, testified to the correctness of the Secondary. School .Certificate issued in favour of Haji Amir Zada, it cannot be held fake on any count. No order muchless adverse to the petitioner could be passed, the learned counsel vehemently added, when the petition itself was liable to be dismissed for not complying with the provisions of Rules 61, 62 and 63 of the N.W.F.P. Local Government (Conduct of Election) Rules, 2005.

3. As against that, the learned counsel appearing on behalf of the respondent submitted that where the jurisdiction exercised by the Chief Election Commissioner under section 152(2) of the Local Government Ordinance and the one exercised by the Election Tribunal under Rule 72 of the above mentioned Rules is concurrent, the latter has the power to declare the election void on the ground of disqualification. The learned counsel to support his contention placed reliance on the case of Shakeel Shahid v. Muhammad Younis Zahid and others (PLD 2005 Lahore 357). Responding the other argument, the learned counsel submitted, that when many of the antecedents of the petitioner do not coincide with those mentioned in the Secondary School Certificate, it would prima facie have no nexus with the petitioner, notwithstanding its genuineness is not open to any doubt. The learned counsel by concluding his arguments, submitted that if the petitioner writes

the name of his counsel to day in the Court, he would concede that his election cannot be declared void on the ground of disqualification.

4. We have gone through the available record carefully and considered the submissions of the learned counsel for the parties.

5. It is correct that the. Chief Election Commissioner under section 152(2) of the Local Government Ordinance, has the power to disqualify, a candidate for election to any office of Local Government or an elected Member of a Local Government, if he is found to have contravened the provisions contained in section 152(1) of the Ordinance, but, at the same time., this power has also been delegated to the Election Tribunal by the Chief Election Commissioner himself. Rule 72 of the Local Government (Conduct of Election) Rules, 2005, listing the premises for the exercise of this jurisdiction by the Tribunal includes the ground of declaring the election of the returned candidate void on account of disqualification. It being coeval, concurrent and co-extensive with that of the Chief Election Commissioner can be exercised by the Tribunal as well. In the absence of any bar or restriction either- in the Ordinance or in the Rules, it cannot be said to be exclusive either of the former or the latter. Since it can well be exercised by both of them, we do not agree with the learned counsel for the petitioner that it being an exclusive jurisdiction of the Chief Election Commissioner could not be exercised by the Election Tribunal. Though the Statute itself is clear, all the same; the case of Shakeel Shahid v. Muhammad Younas Zahid and others (supra) may-well be referred in this behalf.

6. Assuming that a Junior Clerk, Inquiry Section, examined on behalf of the Board of the Intermediate and Secondary Education,

Abbottabad, testified to the correctness of the Certificate issued by the. Board but where its antecedents as to date of birth etc. do not coincide with those of the petitioner, it cannot be said to have any nexus with him, notwithstanding its genuineness cannot be looked askance at. Failure on the part of the petitioner to write a sentence or so before the Tribunal further proves that the Secondary School Certificate thus relied upon by him, to show his qualification to hold the elected office, is not relating to him but to some one else: The finding handed down by the learned Tribunal on these issues being based on proper appraisal of evidence is thus unexceptionable.

7. The argument that no order muchless adverse to the petitioner could be passed against him when the petition, filed by the respondent, itself' was liable to be dismissed for not complying with the provisions contained in Rules 61, 62 and 63 of the. N.W.F.P. Local Government (Conduct of Election) Rules, 2005, would do little to advance the case of the petitioner, when it is weak and vulnerable on many legal as well as factual grounds. Even otherwise such grounds cannot be given much weight, when it has not been specifically stated in the written statement filed before the Tribunal as to how the respondent failed to comply with the Rules mentioned above. Even if, it be so, such grounds cannot render the election petition un-maintainable as held by the apex Court in the cases of S.M. Ayub v. Syed Yousaf Shah and others (PLD 1967 Supreme Court 486} and Abdul Nasir and another v. Election Tribunal Toba Tek Singh and others (2004 SCMR 602), whip .interpreting the provisions in pari-materia with the provisions mentioned above.

8. The upshot of the above discussion is that the judgment of the learned Election Tribunal being free from any infirmity muchless jurisdictional is not open to any interference. Therefore; this

petition being without substance is dismissed in limine along with the C.M.

H.B.T./164/P
Petition dismissed.

Peshawar High Court

FARIDULLAH KHAN, TEHSIL NAZIM LAKKI MARWAT--
Petitioner

Versus

PROVINCE OF N.W.F.P. through Chief Secretary Govt.
N.W.F.P., Peshawar and 5 others –Respondents

JUDGMENT

W.P. No. 664/2006 with
C.Ms. No. 39 and 390/2006 heard on 25.10.2007
(PLJ 2008 Peshawar 223 (DB)

Constitution of Pakistan, 1973--

Ijaz-ul-Hassan and Ejaz Afzal Khan, JJ ----Art. 199--Punjab Local Government Ordinance 2001, S. 2(xxa)--Inauguration of Sports Complex--Allegation of misconduct--Suspension of the petitioner--Challenged to--Report of commission--Evidentiary value & effect--Validity--Finding of the commission, which is based on no evidence, cannot be maintained--Held: Condition for the conferment of jurisdiction on a tribunal or any other forum exercising judicial or quasi judicial authority is that it should decide a lis before it according to law and it is essential requirement of law that its finding be based on proper appraisal of evidence--It would not deserve any other fate but quashment, when it is based on misreading or non reading of evidence, erroneous assumptions of law and facts or no evidence. [P. 227] A

M/s. Qazi Mohammad Anwar and Muhammad Arif Khan,
Advocate for Petitioner.
Mr. Muhammad Usman, AAG for Govt. of NWFP.
Dates of hearing: 14.11.2006, 24.1.2007 and 25.10.2007.

JUDGMENT

Ejaz Afzal Khan, J.--Inauguration of Sports Complex at Lakki Marwat by Mr. Anwar Kamal Khan, MPA, weighed heavy on the mind of the former Chief Minister. He perhaps wanted to inaugurate it himself. On being informed about the said inauguration, he directed the D.C.O. to remove the plaque bearing the name of the said MPA. It was accordingly removed. People of the area protested against the said removal. They allegedly under the leadership of the petitioner not only took out a procession but also made an effort to reaffix it. This culminated in an action against the petitioner. A Commission of two members was constituted by the Chief Minister to submit a detailed report within three days. The Chief Minister on receipt of the report suspended the petitioner. The petitioner filed the instant writ petition. He also asked for the issuance of an interim order restraining the respondents from taking any adverse action against him. It was accordingly passed on 8.6.2006 and extended on 13.6.2006. On 26.6.2006 the petition was admitted for regular hearing. Though in response to the request of the learned counsel for the petitioner for extension of the interim order, the Court responded in the affirmative, but did not mention anything of the sort in the order sheet. The respondents by making use of the omission passed the notification removing the petitioner. C.M. No. 39 of 2006 was filed for initiating contempt proceeding against the respondents therein. While C.M. No. 390 of 2006 was filed with an additional prayer catering to the situation emerging in the wake of the order for removal. C.M. No. 391 of 2006 was also moved for seeking annulment of the notification removing the petitioner. After hearing the arguments on that C.M. the notification removing the petitioner was set at naught. This case was heard on many occasions but it could not witness conclusion either due to the strike of the lawyers or due to the non-availability of his lordship Mr. Justice Ijaz-ul-Hussan on account of summer vacation. Today, some how or the other, the case was reheard.

Peshawar High Court

2. Learned counsel appearing on behalf of the petitioner by referring to Section 2 (xxa) of the Local Government Ordinance, 2001 contended that when misconduct means transgression of prescribed Code of Conduct, violation of law or lawful directions or orders, gross negligence or an act involving wrongful gain, petitioner could not be held guilty of misconduct without proving any one of them. The learned counsel by referring to the evidence on the record contended that where none of the witnesses examined before the Commission has stated that the Chief Minister ever desired to inaugurate the Sports Complex himself or communicated any directive in this behalf to the petitioner, inauguration of the Complex by the MPA would not constitute a misconduct. He next contended that where there is no evidence on the record to show that it was the petitioner who re-affixed the plaque, nothing could be said to have been proved against him. Even if it be otherwise, the learned counsel urged in the alternative, he could not be held guilty when it is not established on the record that directive of the Chief Minister restraining him from re-affixing it was communicated to him.

3. As against that, the learned AAG, appearing on behalf of the respondents, contended that correspondence on the record and finding of the commission leave no doubt that the petitioner manoeuvered inauguration of the Sports Complex by Mr. Anwar Kamal Khan, MPA against the directive of the Chief Minister. It is taken for granted, the learned AAG added, that the Sports Complex was to be inaugurated by the Chief Minister, as the project was partially funded by the Provincial Government and partially by the Central Government. The petitioner, the learned AAG further submitted, created law and order situation by exciting the people and leading procession in protest against the removal of the plaque bearing the name of the MPA. The petitioner, the learned AAG concluded, was rightly found guilty of misconduct by the commission, when it is writ large on the face of the record that he defied the directive of the Chief Minister by reaffixing the plaque.

4. We have gone through the record carefully and considered the submissions of the learned counsel for the parties.

5. The charges levelled against the petitioner found expression in the following issues:--

"Whether the Tehsil Nazim, TMA Lakki Marwat.

1. in flagrant violation of the orders of the Chief Executive and the Provincial Government, forcibly reinstalled the foundation stone of the Sport Complex, District Lakki Marwat, that had earlier been removed by the District Coordination Officer, Lakki Marwat, in the compliance with the directives of the Chief Executive NWFP,

2. took out and led the procession against the District Coordination Officer, Lakki Marwat,

3. ordered the law enforcing agencies to protect his unlawful act of reinstallation of the foundation stone of the Sports Complex,

4. created law and order situation in District Lakki Marwat,

5. unlawfully interfered in the business of the Provincial Government,

6. is guilty of misconduct within the meaning of clause (xxa) of Section 2 of N.W.F.P. Local Government Ordinance, 2001.

While dealing with Issue No. 1 we noticed that inauguration of the Sports Complex by Mr. Anwar Kamal Khan, MPA, was not in issue before the Commission notwithstanding it was the basic cause of the entire episode. Even removal of the plaque of his name was not in issue before the Commission. It was its re-affixation against the directive of the Chief Minister, which created a storm in the teacup. But how could the petitioner be held guilty of misconduct, when the directive of the Chief Minister restraining him from reaffixing the plaque removed was never

communicated to him. Though the D.C.O. stated in his statement that he communicated the directive to the petitioner through Police Officers but none of them while being examined before the Commission stated anything about it. Violation of the directive of the Chief Minister cannot be said to have been proved against the petitioner where its communication to the latter has not been established on the record.

7. Granted that the people including the petitioner felt excited and even enraged at the removal of the plaque in the name of their MPA and took out a procession to register their protest against it, but it being an integral part of political process is quite natural and spontaneous. Expression of such reaction cannot be brought at par with creation of law and order situation. Especially when it ended peacefully without causing any casualty or carnage. It was a healthy and wholesome activity. It being cathartic tended to give vent to the grievance of the people caused by the uncalled for removal of the plaque. It cannot be termed as unlawful interference with the business of the Provincial Government by any stretch of imagination, that too, when it was stirred by an act unbecoming of the person who is on the top of its pyramid. We do not agree with the learned AAG that it is taken for granted that the Sports Complex was to be inaugurated by the Chief Minister, as the project was partially funded by the Provincial Government. For, the fact that the project was partially or wholly funded by the Provincial Government would not entitle the Chief Minister, to inaugurate it as of right; order the removal of the plaque if and when it is inaugurated by a lesser being or take action against an inmate or office holder of the area, if and when he registers his protest or takes out a procession to voice his grievance against the act of its removal. The Chief Minister or any other incumbent should not forget that he is at the helm of affairs in the Government of the Province because of democracy--a system advocating equality, tolerance, mutual accommodation and maximum participation of maximum people in running the Government. Therefore, there was hardly an occasion for the Chief Minister to be enraged on the inauguration of the Complex by a person other than him and create a dust storm on such a peripheral

thing, which is non-issue on the face of it from every angle of vision.

8. When seen in this background, the finding of the Commission, which is based on no evidence, cannot be maintained. It is, too, settled to be reiterated that the very condition for the conferment of jurisdiction on a Tribunal or any other forum exercising judicial or quasi juridical authority is that it should decide a lis before it according to law. And it is an essential requirement of law that its finding be based on proper appraisal of evidence. It would not deserve any other fate but quashment, when it is based on mis-reading or non-reading of evidence, erroneous assumptions of law and facts or no evidence as in this case. In the case of Anisminic Ltd. Vs. Foreign Compensation Commission Lord Denning who was the pioneer of this principle held as under:--

"I would suggest that this distinction should now be discarded. The High Court has, and should have, jurisdiction to control the proceedings of inferior Courts and tribunals by way of judicial review. When they go wrong in law, the High Court should have power to put them right. Not only in the instant case to do justice to the complainant. But also so as to secure that all Courts and tribunals, when faced with the same point of law, should decide it in the same way. It is intolerable that a citizen's rights in point of law should depend on which judge tries his case, or in what Court it is heard. The way to get things right is to hold thus: No Court or tribunal has any jurisdiction to make an error of law on which the decision of the case depends. If it makes such an error, it goes outside its jurisdiction and certiorari will lie to correct it."

9. In the case of Utility Stores Corporation of Pakistan Limited Vs. Punjab Labour Appellate Tribunal and others (PLD 1987 S.C. 447), the Hon'ble Supreme Court held as under:--

"It is not right to say that the Tribunal, which is invested with the jurisdiction to decide a particular matter, has the

jurisdiction to decide it "rightly or wrongly" because the condition of the grant of jurisdiction is that it should decide the matter in accordance with the law. When the Tribunal goes wrong in law, it goes outside the jurisdiction conferred on it because the Tribunal has the jurisdiction to decide rightly but not the jurisdiction to decide wrongly. Accordingly, when the tribunal makes an error of law in deciding the matter before it, it goes outside its jurisdiction and, therefore, a determination of the Tribunal which is shown to be erroneous on a point of law can be quashed under the writ jurisdiction on the ground that it is in excess of its jurisdiction."

10. In the case of Muhammad Lehrasab Khan Vs. Mst. Aqeel-un-Nisa and 5 others (2001 SCMR 338), the Hon'ble Supreme Court after considering a string of its judgments held as under:--

"There is no cavil with the proposition that ordinarily the High Court in its Constitutional jurisdiction would not undertake to reappraise the evidence in rent matters to disturb the finding of facts but it would certainly interfere if such findings are found to be based on non-reading or misreading of evidence, erroneous assumptions of facts, misapplication of law, excess or abuse of jurisdiction and arbitrary exercise of powers. In appropriate cases of special jurisdiction, where the District Court is the final Appellate Court, if it reverse the finding of the trial Court on the grounds not supported by material on record, the High Court can interfere with it by issuing writ of certiorari to correct the wrong committed by the Appellate Authority.

11. In the case of Rahim Shah Vs. Chief Election Commissioner PLD 1973 SC 24, the Honourable Supreme Court while dealing with a similar aspect of the case held as under:--

"The scope of interference in the High Court is, therefore, limited to the inquiry whether the Tribunal has in doing the act or undertaking the proceedings acted in accordance with law. If the answer be in the affirmative the High Court will stay its hands and will not substitute its own findings for the findings recorded by the

Tribunal. Cases of no evidence, bad faith, misdirection or failure to follow judicial Procedure, etc. are treated as acts done without lawful authority and vitiate the act done or proceedings undertaken by the Tribunal on this ground. Where the High Court is of opinion that there is no evidence proper to be considered by the inferior Tribunal in support of some point material to the conviction or order, certiorari will be granted."

12. In the case of Assistant Collector Vs. Al-Razak Synthetic (Pvt.) Ltd. (1988 SCMR 2514), the Honourable Supreme Court re-affirmed this view in the following words:--

"In our view, it was not proper on the part of the learned Judges of the Division Bench of the High Court to have decided the above technical questions without getting first the decision of the Central Board of Revenue on the basis of the material which the parties might have produced before it in support of their claims. The High Court generally does not investigate disputed questions of fact in exercise of its Constitutional jurisdiction. However, it can interfere with a finding of fact, if it is founded on no evidence or is contrary to the evidence on record or the inferences drawn therefrom are not in accordance with law."

13. In the case of Mst. Ulfat Shaheen Vs. Akram Khan and 2 others (2006 CLC Peshawar 51), we while dealing with a similar situation held as under:--

"Now we are to see whether the learned Additional District Judge has based his finding on an evidence as could be looked into under the law. A perusal of the impugned judgment would reveal that the learned Judge while deciding this case was influenced by the prescriptions of psychiatrist and drew inferences therefrom without realizing that the prescriptions were neither produced in original nor their author was examined to prove them in accordance with the provisions of the law of evidence. He could not have taken into account any of those prescriptions without proper proof. Now the question is whether it is an error of law? We have no doubt in our mind that it is and it is an error of law which

will entitle this Court to interfere in the exercise of its constitutional jurisdiction if a finding of fact is based on no evidence or is contrary to evidence on record, or the inferences drawn there from are not in accordance with law."

14. Having considered in the light of the foregoing discussion and dicta quoted above, we allow the writ petition alongwith C.M. No. 390 of 2006, set aside the entire proceeding including the impugned orders and reinstate the petitioner. C.M. No. 39 of 2006 for initiating contempt proceeding is dismissed as not pressed.

(W.I.B.) Petition allowed

Peshawar High Court

MUJAHID and another---Petitioners

Versus

APA/ADM BARA KHYBER AGENCY and 7 others---Respondents

JUDGMENT

W.P No.1426/2009 Decided on 17th June, 2009
(2009 Y L R 2303 Peshawar)

Criminal Procedure Code (V of 1898)---

Ejaz Afzal Khan and Shahji Rehman Khan, JJ ----S. 86-A---Constitution of Pakistan (1973). Act.199---Constitutional petition---Removal in custody to Tribal areas---Petitioners had prayed for issuance of an appropriate writ directing the authorities not to arrest and remove them to the Tribal areas without complying with the provisions contained in S. 86-A, Cr.P.C.---Petitioners were arrested in criminal cases registered against them in Peshawar in which they were released on bail---When their release warrants were taken in jail, where they were confined, it transpired that they were also required in a case' registered against them in the Tribal areas---Effect---If the petitioners were required in a case registered against them in the Tribal areas, then resort could be had to the course provided by law---When the. authorities did not resort to the course provided by law, they were out to defeat the spirit of law and such a course could not be allowed---Courts of law, in any case, had to preserve the spirit of law, while preserving its words, notwithstanding the device employed towards that end was quite deft, dexterous and even deceitful---Allowing constitutional petition, it was directed that the petitioners be released forthwith---In case the authorities required the petitioners in the case, they would be at liberty to procure their arrest and put them to trial in the courts functioning under the umbrella of the relevant law after complying with the provisions of S.86-A, Cr.P.C.

Shabbir Ahmad for Petitioners.

Qaisar Rasheed, A.A.-G. and Iqbal Ahmad Durrani for Respondents.

Date of hearing: 17th June, 2009.

JUDGMENT

EJAZ AFZAL KHAN, J.--Petitioners through the instant writ petition have asked for the issuance of an appropriate writ directing the respondents not to arrest and remove them to the tribal area without complying with the provision contained in section 86-A, Cr.P.C.

2. Learned counsel appearing on behalf of the petitioners contended that once the petitioners were released on bail in criminal cases registered against them, the respondents could not withhold their release nor could they remove them to the Court functioning in the hierarchy of FCR without complying with the provision contained in section 86-A, Cr.P.C. So long as, the learned counsel added, the said provision is not complied with, their release from jail could not be withheld.

3. As against that, Mr. Qaiser Rashid, A.A-G. and Mr. Iqbal Ahmad Durrani, learned counsel for respondent vehemently argued that application of section 86-A, Cr.P.C. would come into play only when a person arrested pursuant to a warrant issued under section 85 of the Cr.P.C. is removed to the tribal area for trial, but in this case the petitioners were already in jail, therefore, they cannot be held to have been arrested pursuant to a warrant issued under section 85 of the Cr.P.C.

The learned A.A-G. and the learned counsel further submitted that compliance with the provision of section 86-A of the Cr.P.C. would hardly be called for, as the petitioners will not be removed to the tribal area, because the Court functioning in the hierarchy of FCR are now housed at Peshawar.

4. We have gone through the record carefully and considered the submissions of the learned counsel for the parties.

5. The record reveals that the petitioners were arrested in few criminal cases registered against them in Police Station Khazana and Police Station Michani Gate, 'Peshawar in which they were released on bail. When their release warrants were taken to the Jail, they were confined in, it transpired that they were also required in a case registered against them in the tribal area. Assumed, agreed and accepted that they have not been arrested pursuant to a warrant issued under section 85 of the Cr.P.C. nor shall they be physically removed to the tribal area because most of the Courts functioning in the tribal area under the umbrella of the FCR are now housed at Peshawar. But the question arises, why was their release withheld? If the answer to the question is that they were required in a case registered against them in the tribal area, then resort could be had to the course provided by law. When the respondent did not resort to the course provided by law, we would be constrained to hold that they are out to defeat the spirit of law without defeating its words. Such a course, we are afraid, cannot be allowed. The Court of law, in any case, has to preserve the spirit of law, while preserving its words, notwithstanding the device employed towards that end is quite deft, dexterous and even deceitful. We, therefore, allow this writ petition and direct that the petitioners be released forthwith. In case the respondents require the petitioners in the case mentioned above, they would be at liberty to procure their

arrest and put them to trial in the Courts functioning under the umbrella of the FCR after complying with the provision of section 86-A of the Cr.P.C.

H.B.T./168/P

Petition allowed.

Peshawar High Court

KASHIF-UR-REHMAN KHALIL--- Petitioner

Versus

KHYBER MEDICAL UNIVERSITY AND GIRLS CAMPUS, PESHAWAR through Vice-Chancellor and 5 others---Respondents

JUDGMENT

W.P Nos.713 and 1303/2008 Decided on 2nd July, 2009
(2009 Y L R 2220 Peshawar)

Constitution of Pakistan (1973)---

Ejaz Afzal Khan and Jehanzaib Rahim, JJ ----Art.199---General Clauses Act (X of 1897), S.24-A---Constitution petition---Educational institution---Migration from one Medical College to another---Petitioners had asked for the issuance of appropriate writ directing the authorities to countenance their prayer for migration from one College, to another College---Migration, on papers though was regulated by the provisions contained in the Prospectus, but the details as to the number of the students migrating from different colleges to the Khyber Medical College would show that except for one or two, all the migrations had been allowed at the instance of the Government in derogation of the said provisions---Neither the college nor the Government adhered to the provisions of the Prospectus; they permitted it, if and when their whim and caprice permitted and they declined it if it was otherwise---Validity---If the provisions of the Prospectus mean anything, they mean something for every body including Government---Once an application before the Principals of the colleges or the Government was made, it was to be decided . for reasons to be recorded in accordance with the provisions of S.24-A of the General Clauses Act, 1897---Such application was not to be sat upon and slept over for an indefinite period of time, but was to be decided with due regard to the merits of each case in the light of the grounds mentioned in the application as expeditiously .as

possible---Many of the contentions raised by counsel for the petitioners fell in the realm of factual controversy, same could not be decided by the High Court in the exercise of its constitutional jurisdiction---High Court, instead of expressing its own view one way or the other, directed Principals of the colleges and the Government to decide the cases strictly in accordance with law for the reasons to be recorded within specified period.

M.S.H. Qureshi for Petitioner.

Ghulam Shoaib Jolly and Qaiser Rashid, A.A-G. for Respondents along with Baghdad Shah, S.O. for Respondents.

Dates of hearing: 1st and 2nd July, 2009.

JUDGMENT

EJAZ AFZAL KHAN, J.---By this single judgment we propose to dispose of Writ Petitions Nos.713 and 1303 of 2008, wherein the petitioners have asked for the issuance of an appropriate writ directing the respondents to countenance their prayer for migration from Ayub Medical College, Abbottabad to Khyber Medical College, Peshawar.

2. Learned counsel appearing on behalf of the petitioner in Writ Petition 713 of 2008 contended that when the parents of the petitioner are living hand to mouth, they couldn't afford to bear the extra expenditure on his education in Ayub' Medical College. The learned counsel next contended that the petitioner couldn't have smooth sailing in his studies with, stress on his mind as ailing parents and sisters are in the lurch and there is none to look after them. The learned counsel next contended that where migration is allowed to the undeserving children of highups with utter disregard

of merit, resort to constitutional jurisdiction would be the only course open before an aggrieved person.

3. The learned counsel appearing on behalf of the petitioner in Writ Petition No.1303 of 2008 contended that where the petitioner is suffering from recurrent urticaria and his ailment gets aggravated because of the inclement weather at Abbottabad, a case for migration from Ayub Medical College Abbottabad to Khyber Medical College, Peshawar, is made out. Ailing parents, the learned counsel added is another factor which constitutes a compassionate ground to justify his migration from Ayub Medical College, Abbottabad to Khyber Medical College, Peshawar, that too, when there is none to look after them in the absence of the petitioner. The learned counsel next contended that when all the migrations from one College to another have been made without any legal and moral jurisdiction, the case of the petitioners for being placed on a higher plank of merit calls for interference by this Court.

4. As against that, the learned counsel appearing on behalf of the Medical Colleges contended that none of the students has been allowed migration without jurisdiction and that where the college has already outgrown its sanctioned strength, neither the petitioner in Writ Petition 713/08 nor the one in Writ Petition No.1303 of 2008 can be accommodated.

5. The learned A.A-G. appearing on behalf of the Provincial Government contended that the Provincial Government comes into play only when the matter has been cleared with concurrence of the Principals of the respective Colleges. It, he added, does not take a decision on its own independently of the Principals of the Colleges.

Peshawar High Court

6. We have gone through the record carefully and considered the submissions of the learned counsel- for the parties.

7. Though migration, on papers, is regulated by the provisions contained in Prospectus but the details as to the number of the students migrating from different colleges to the Khyber Medical College would show that except for one or two all the migrations have been allowed at the instance of the Government in derogation of the said provisions. When confronted as to what is the criterion for migration of a student from one College to another, the learned counsel for the Medical Colleges read out the relevant provisions of the Prospectus. When confronted as to how a student could be allowed to migrate from one College to another, when the College has exceeded its sanctioned strength, the learned counsel replied that it was done at the instance of the Government by relaxing the rules. This answer, to say the least, shows that neither the College nor the Government adheres to the provision of the Prospectus. They permit it, if and when their whim and caprice permit and they decline it if it is otherwise. Adherence to merit or the provisions of the Prospectus may be seen in clear words on papers but it cannot be seen even with microscope in practice. Semblance or even pretence of adherence to merit and the provisions of the Prospectus has become extinct' specie, if seen in the light of details mentioned above. If the provisions of the Prospectus mean something, they mean something for every body including Government. If none of the Colleges is required to accommodate even a single student over the above its sanctioned strength, how could the Government be an exception to that? Here lie the tragedy, the frustration of merit, the violation of the equality clause and cause for bad governance. Where an application for migration of a student from one College to another is decided by looking to a nod from above and not by looking into its merit, the Courts of law, quite naturally, would have to be thronged by the aggrieved persons. We have also been informed, during the course of arguments, about the number of

applications awaiting concurrence of the Principals and decision of the Government respectively but what would be their fate is any body's guess.

8. Be all that as it may, once an application before the Principals of the Colleges or the Government is made, it is to be decided for reasons to be recorded in accordance with the provisions of section 24-A of the General Clauses Act. Such application is not to be sat and slept over for an indefinite period of time. It is to be decided with due regard to the merit of each case in the light of the grounds mentioned in the application as expeditiously as possible. We, too, were quite poised to decide the question of migration in the petitions before us but since many of the contentions raised by the learned counsel for the petitioners falling in the realm of factual controversy cannot be decided by us in the exercise of our constitutional jurisdiction, we instead of expressing our own view one way or the other at this stage, would direct Principals of the Colleges and the Government to decide their cases strictly in accordance with law for the reasons to be recorded as highlighted above within a month positively. These petitions, thus, stand disposed of.

H.B.T./170/P
Order accordingly

Peshawar High Court

RIZWAN ULLAH and 2 others---Petitioners

Versus

SECRETARY HOME AND TRIBAL AFFAIRS GOVT. OF N.-W.F.P. PESHAWAR and 3 others---Respondents

JUDGMENT

W.P No. 2016/2009 Decided on 26.08.2009
2009 M L D 1482

West Pakistan Maintenance of Public Order Ordinance (XXXI of 1960)

Ejaz Afzal Khan, J ---- S.3---Constitution of Pakistan (1973), Art. 199-Constitutional petition---Preventive detention---Petitioners had questioned the order of their preventive detention contending that they had never been involved in any activity as could prejudicial to the public safety or the maintenance of public order in the District---Nothing had been brought on the record to show that petitioners ever indulged in any activity, which could be prejudicial to the public safety and the maintenance of public order in the District concerned---Allegation that petitioners had been involved in a good number of cases in Swat, remained unsubstantiated as nothing had been brought on the record in that behalf---Havoc to the peace of area was anticipated on account of visits of militants to their house, but who witnessed those visits and how would they work havoc to the peace of area, was yet another allegation which also remained unsubstantiated---Petitioners were sons of Sofi Muhammad, who had been a source of strife and insurgency in Swat, but that alone could not justify their preventive detention on the analogy of S.21 of Frontier Crimes Regulation, 1901, which was not applicable in the area---When no material much less satisfactory had been brought (In the record to show that the petitioners were acting in a manner prejudicial to public safety and the maintenance of public order---Petitioners were directed to be released.

Peshawar High Court

Mahmood Atlas Khan for Petitioners.

Fazal Rehman Khan, A.A.-G. along with Liaqat Ali S.O. Litigation L.R.I. for Respondents.

Date of hearing: 26th August, 2009.

Judgment:

Petitioners through the instant petition have questioned the order, dated 27-7-2009 of their preventive detention on the grounds that they have never been involved in any activity, as could prejudicial to the public safety or the maintenance of the public order in District Peshawar and that in the absence of any material on the record to justify any such inference, the order would be bad in law.

2. As against that, the learned A.A.G., appearing on behalf of the respondents defended the impugned order by submitting that the petitioners are sons of Sofi Muhammad who has been a source of strife and insurgency in Swat; that their presence in the City is not without any mischief and sinister designs; that the petitioners are also involved in a good number of cases in Swat and that frequent visits of the militants to their house and reports of Secret Agencies also show that they are out to play havoc with the peace of the area. The detention, thus, ordered, the learned A.A.G. added, being based on sufficient material is not open to any exception.

3. I have gone through the record and considered the submissions of the learned counsel for the parties.

4. It has been alleged that presence of the petitioners is not without mischief in the area but nothing has been brought on the record to

show that they ever indulged in any activity, which could be prejudicial to the public safety and the maintenance of public order in the District., It has also been alleged that the petitioners have been involved in a good number of cases in Swat but this too, remained unsubstantiated, as nothing has been brought on the record in this behalf. Havoc to the peace of the area is, anticipated on account of visits of the militants to their house but who witnessed these visits and how would they work havoc to the peace of the area is yet another allegation, which also remained unsubstantiated. A reference to the reports of the Secret Agencies was also made but none of them was brought to light either in camera or in the open Court. Yes, the petitioners are sons of Sofi Muhammad, who has been a source of strife and insurgency is Swat, but this alone cannot justify their preventive detention on the analogy of section 21 of the ' F.C.R., which is not applicable to this part of the country. Such detention can only be justified, when there is material on the record and not on the basis of surmises and conjectures. When no material muchless satisfactory has been brought on the record to show that the petitioners are acting in a manner prejudicial to public safety and the maintenance of the public order, I do not think, it would be for the Court to contrive grounds for such detention.

5. For the reasons discussed above, this writ petition is allowed and it is directed that the petitioners be released forthwith, if not required in any other case.

H.B.T./177/P
Petition allowed

Peshawar High Court

MURAD ALI---Petitioner

Versus

ASSISTANT POLITICAL AGENT, LANDI KOTAL and 2 others---Respondents

JUDGMENT

W.P No.2066/2009 Decided on 15th September, 2009
(2009 Y L R 2497 Peshawar)

Frontier Crimes Regulation (III of 1901)---

Ejaz Afzal Khan and Abdul Aziz Kunehri, JJ ----S.40---Constitution of Pakistan (1973), Arts.199 & 247(7)---Constitutional petition---Administration of Tribal Areas---Jurisdiction of Supreme Court and High Court---Petitioner had asked for the issuance of an appropriate writ directing the authorities to set him free on the grounds that he had been incarcerated under S.40 of Frontier Crimes Regulation, 1901 without any rhyme or reason and without there being any material on the record---Counsel for the authorities had stated that since the petitioner had also been involved in a case of Explosive Substances Act, 1908 he having been shifted to place 'Landikotal', High Court had no jurisdiction to proceed in the matter in view of the provisions contained in Art.247(7) of Constitution---Petitioner could have been required in the case of heinous nature, but no effort was made to shift him from judicial lock-up to the custody of Investigating Agency for such a long time, despite he was charged with offences of heinous nature and required much greater attention as compared to S.40 of Frontier Crimes Regulation, 1901, which did not deal with offences, but security measures for maintaining law and order in the area---Fundamental rights were available even to the residents of Tribal Areas and the provisions of the Constitution guaranteeing them were not only mandatory but self-executing---High Court had jurisdiction under Art.199 of the Constitution to grant relief to a person incarcerated illegally---In

the present case, it was otherwise, the fundamental rights with all their guarantees in the Constitution would be reduced to a farce, which could never be the intent of its framers---Petitioner was directed to be released on bail under S.40 of Frontier Crimes Regulation, 1901 and other offences.

Ch. Manzoor Elahi v. Federation of Pakistan and others PLD 1975 SC 66 ref.

M. Mohibullah Kaka Khel for Petitioner.

Iqbal Muhammad, D.A.-G. and Ikramullah Khan, A.A.-G. for Respondents.

Date of hearing: 15th September, 2009.

JUDGMENT

EJAZ AFZAL KHAN, J.---The petitioner through the instant petition has asked for the issuance of an appropriate writ directing the respondents to set him free on the grounds that he has been incarcerated under 40, FCR without any rhyme or reason and without there being any material on the record, that he being a Government servant receives his pay regularly and that his service itself is a far greater guarantee for his peaceful behaviour than a proceeding under section 40, FCR.

2. Mr. Iqbal Ahmad Durrani, Advocate, representing respondents Nos.1 and 2 appeared in this Court on 1-9-2009 and sought time to lay his hand on the record. He, however, submitted that according to the information, he had from the respondents, the petitioner has been incarcerated under 40 FCR. The case was, however, adjourned to 3-9-2009. The learned counsel appearing on the date stated that since the petitioner has also been involved in a case of Explosive Substances Act, he has been shifted to Landikotal, therefore, this Court has no jurisdiction to proceed in the matter in view of the provision contained in Article 247(7) of the Constitution of Islamic Republic of Pakistan, 1973. When we

inquired from Mr. Ikramukllah Khan, A.A.-G, as to when the petitioner has been shifted to Landikotal, he after seeking the Jail record submitted that he has been in Jail from 18-5-2009 to 1-9-2009 till one P.M. When we confronted Mr. Iqbal Ahmad Durrani, as to what was that extraordinary which necessitated his shifting from the Central Jail Peshawar to Landikotal, that too, on 1-9-2009 soon after his appearance in this Court, the learned counsel could not give any satisfactory reply except this that the petitioner was required in a case of Explosive Substances Act. On 9-9-2009 the number of offences was tripled and quadrupled with the addition of section 392/121-A/148/149, P.P.C., read with 11 FCR. When we inquired about the origin of these cases, the learned counsel submitted that it dates back to the days when the petitioner was free. But when we asked him to produce something in black and white in this behalf, he produced a report purportedly based on the reports of Agencies. No other material to substantiate the involvement of the petitioner in the cases mentioned above was, however, produced before us.

3. We have gone through the record annexed with the petition and the one produced by the learned counsel for the respondents carefully and considered the arguments addressed at the Bar.

4. Granted that the petitioner may have been required in the cases mentioned above, but why no effort was made to shift him from judicial lock-up to the custody of the Investigating Agency for such a long time notwithstanding the offences he was charged with were heinous in nature and required much greater attention as compared to 40 FCR which does not deal with offences but security measures for maintaining law and order in the area. We also failed to understand how the petitioner has still been in the service of the Government and has not been proceeded against despite the fact his track record as per reports of the Agencies is so dismaying. Why did respondents Nos.1 and 2 remain in so deep a slumber, when the gravity of the offences mentioned above called for immediate response and reaction in terms of investigation and inquiry? Failure on the part of respondents Nos.1 and 2 to answer any of the questions mentioned above, inescapably leads us to the

conclusion that it was nothing but a ruse and a ploy to take away the petitioner outside the territorial jurisdiction of this Court. In such circumstances, we cannot sit with our eyes shut, with our hands folded and with our legs crossed, so as to acquiesce to what is illegal altogether on the face of it.

5. The learned A.A.-G appearing on behalf of the State when faced with this state of things also raised the question of jurisdiction of this Court by referring Article 247(7) of the Constitution but this will not help him, when the petition was taken away from the jurisdiction of this Court illegally and even deceitfully after when it took cognizance of the prolonged detention of the petitioner under section 40 of the FCR without requiring him to submit bond in accordance with the mandate of the afore-said section. The learned A.A.-G also made a reference to the situation prevailing in the area, which, according to him, is war like by every attribute, but it, to our mind, cannot influence the course of law, which is to remain alike whether it is war or peace. Such phenomenon, thus, cannot defeat the enforcement of fundamental rights or even application of law. Nor can it deter the Court from doing what it is required by law to do. Here I cannot do better than to quote the words of Lord Atkin who in the case of Liverside-Vs-Anderson, while dealing with a similar situation held as under:--

> "I view with apprehension the attitude of judges who, on a mere question of construction, when face to face with claims involving the liberty of the subject, show themselves more executive minded than the executive...In England amidst the clash of arms the laws are not silent. They may be changed but they speak the same language in war as in peace."

6. With regard to the question of jurisdiction, I would like to refer to the celebrated judgment of Ch. Manzoor Elahi v. Federation of Pakistan etc. PLD 1975 SC 66, wherein his lordship Mr. Justice Salahuddin, as he then was held as under:--

"It has been contended in this context that there is no remedy provided by the Constitution to enforce the rights and obligations mentioned in Article 4. The contention is misconceived. In the first place, the injunctions contained in Article 4(2) are not only mandatory but they are also clothed in prohibitory language which indicate that the provisions are self-executing and no legislation is necessary to give effect to them. The rules of interpretation of a written Constitution as reproduced above support this view. Apart from the question of any machinery to enforce the right or obligation, as I have said earlier, nobody is relieved of the obligation to comply with them. In the second place, I am unable to conceive that a right or obligation so clearly and solemnly given or put can be without a content, meaning or purpose. Unless, therefore, on an examination of the Constitution, I am led to the inevitable conclusion that the Courts are powerless to enforce the inalienable right or the obligation mentioned in Article 4, I am of the opinion that the Courts are bound to give the Article a meaning and a purpose. I have, however, already noticed that Article 199 of the Constitution gives indeed wide powers to a High Court to act for the enforcement of the rights and obligations mentioned in Article 4 of the Constitution."

While summing up his conclusion his lordship held as under:--

"Pakistan is governed by the rule of law, as embodied in Articles 4 and 5 of the Constitution. The Constitution creates no right and imposes no duty in vain.

> Remedy or no remedy, nobody is relieved of his basic obligation to obey the Constitution and law.
>
> Each one of the three organs of the State-the Executive, the Legislature and the Judiciary is bound by the oath not only

to preserve, protect and defend the Constitution but also to abide by the Constitution and the law.

The `will' of the Constitution is supreme, and nobody can be permitted to flout the `will'. It is inconceivable that the Constitution be not followed. Anything done in violation of the Constitution is void and has no existence in law. No violation of the Constitution can be tolerated.

Fundamental Rights are available throughout Pakistan including the Tribal Areas and the Superior Courts have jurisdiction to enforce them within the limits of their respective territorial jurisdiction including the Tribal Areas.

A Fundamental Right not suspended under Article 233 of the Constitution remains fully operative, and every body in Pakistan is under an obligation to respect it. The mere fact that an aggrieved person is temporarily prevented from moving any Court for the enforcement of a Fundamental Right does not relieve an authority of its obligation to comply with it.

A High Court has jurisdiction under Article 199 of the Constitution to grant relief to a person arrested illegally within its jurisdiction although he is for the time being detained outside the jurisdiction.

A High Court has power to grant relief to a person, detained within its territorial jurisdiction although he was arrested illegally outside the jurisdiction.

Where the liberty of a person is involved a High Court can exercise its jurisdiction under Article 199 of the Constitution and grant him relief even though he has misconceived his remedy and come up with an application

under sections 498 and 561-A of the Code of Criminal Procedure.

Under Article 199 of the Constitution a High Court has a variety of powers, any one of which can be exercised to grant relief to the aggrieved person.

Article 1999 of the Constitution is available not only for the enforcement of the Fundamental Right but also to enforce the rights and obligations as contained in Articles 4 and 5 of the Constitution.

Frontier Crimes Regulation is `existing law' under Article 268 of the Constitution and it is continued in force subject to the Constitution and until altered, repealed or amended, etc.

Section 11 of the FCR is not `law' within the accepted connotation of the term, and is, therefore, not `law' as contemplated in Articles 4 and 5 of the Constitution. Where two kinds of procedures are applicable--one which is normal, free from arbitrariness and consistent with reason and justice, and the other that is not so, the former should be preferred."

7. It can thus be summed up that where fundamental rights are available even to the residents of tribal area and the provisions of the Constitution guaranteeing them are not only mandatory but self executing, a High Court has jurisdiction under Article 199 of the Constitution to grant relief to a person incarcerated illegally. In case it is otherwise as it is contended by the learned counsel for the respondents and learned A.A.-G, the fundamental rights with all their guarantees in the Constitution would be reduced to a farce, which we are afraid, can never be the intent of its framers.

Peshawar High Court

8. We, therefore, allow this petition and direct that the petitioner be released on bail forthwith under 40 FCR and other offences mentioned above on furnishing bond in the sum of Rs.4,00,000 with two sureties each in the like amount to the satisfaction of the Additional Registrar (Judicial) of this Court.

H.B.T./178/P
Petition allowed.

Peshawar High Court

Said Nawab --- Appellant/Petitioner (s)

Versus

Muhammad --- Respondent (s)

JUDGMENT

W.P No. 1359/2008 Date of hearing 29.09.2009

EJAZ AFZAL KHAN, J.- Petitioners through the instant petition have questioned the order dated 12.06.2008 of the learned Senior Member Board of Revenue, NWFP, whereby, he up-held the order of the fora below and dismissed the revision petition, filed by them.

2. The learned counsel appearing on behalf of the petitioners contended that once a civil suit filed by the petitioners in respect of Khasra Nos.1086 and 1095 was decreed to the extent of their entitlement therein vide judgment dated 31.01.2004 of the learned Civil Judge, Swabi, it could not be lost sight of while determining the share of the parties in its produce that too when the same was upheld up to the High Court.

3. The learned counsel appearing on behalf of the respondents contended that the petitioners are owner only to the extent of 1/5th even if the judgments of the Civil Court are considered to be correct as such they are to give a share of produce to the respondents and retain that much only which is in proportion to their entitlement and that the impugned order being free from any error, absence or excess of jurisdiction is not open to any interference.

4. We have gone through the record carefully and considered the submissions made by the learned counsel for the parties.

5. The record reveals that the petitioners have been declared co-owners in Khasra Nos.1086 and 1095 vide judgment mentioned above, which was upheld up to the High Court. What would be the extent of produce, the petitioners could retain and what would be the extent they were to part with, in the wake of the aforesaid judgment has not been attended to altogether. A just and balanced decision without attending to this aspect cannot be thought of. The contention of the learned counsel for the respondents that respondents are owners in the property to the extent of $4/5^{th}$ may not be without substance but this too has not been attended to in the impugned order. When, this being the case, remand of the case would be inevitable.

6. For the reasons discussed above, this petition is allowed, the impugned order is set aside and the case is sent back to the learned Senior Member Board of Revenue for decision afresh by attending to the question highlighted above. There is no order as to costs.

Announced.
29. 09. 2009 J U D G E

J U D G E

Peshawar High Court

Haji Khairul Bashar --- Appellant/Petitioner (s)

Versus

Government of NWFP --- Respondent (s)

JUDGMENT

W.P No. 1662/2006 Date of hearing 29.09.2009

EJAZ AFZAL KHAN, J.- Petitioner through the instant petition has questioned the order dated 23.06.2006 of the learned Additional District Judge-III, Mardan, exercising the powers of Tribunal, constituted under the Public Property (Removal of Encroachment) Act, 1977, whereby he allowed the application of the respondents, filed under Section 12(2) of the C.P.C and varied the decree dated 12.11.2001, granted earlier by his predecessor-in-office.

2. The learned counsel appearing on behalf of the petitioner contended that when the petitioner has not at any point of time parted with the ownership of the property over which, the street has been constructed, the learned Additional District Judge, exercising the powers of Tribunal could not have varied the decree passed earlier by importing his own loud thinking into the matter and that the impugned order being against the record and the statement of the petitioner, is liable to be set aside.

3. The learned Additional Advocate General appearing on behalf of the official respondents did not defend the impugned order by submitting that it being against the material on the record cannot be sustained.

4. We have gone through the record carefully and considered the submissions made by the learned counsel for the parties.

5. How the property over which street has been constructed by the petitioner could be given in control of respondent No.3, when he never parted with its ownership at any point of time either during the earlier or later round of litigation. The learned Additional District Judge, exercising the powers of the Tribunal does not appear to have appreciated the entire spectrum of the litigation and the material before him while handing down the impugned order. It would clearly be a case of misreading and even non-reading of material on the record. The learned Additional District Judge, while exercising the powers of the Tribunal was required to base his finding on proper appraisal of evidence. Gone are the days when finding of a Court or Tribunal in contradistinction to a persona designata, were not interfered with in the constitutional jurisdiction on the ground that once it is given jurisdiction, it is given jurisdiction to decide rightly or wrongly. Every Court or even a Tribunal in contradistinction to a persona designata, is required to decide the lis before it in accordance with law and on proper appraisal of evidence. The case of **"Utility Stores Corporation of Pakistan Limited vs. Punjab Labour Appellate Tribunal (PLD 1987 SC 447)** may well be referred to in this behalf.

6. For the reasons discussed above, this petition is allowed, the impugned order is set aside and the case is sent back to the learned Tribunal for decision afresh as highlighted above. The parties are directed to appear before the Tribunal on 17.10.2009. There is no order as to costs.

Announced.
29. 09. 2009

J U D G E

J U D G E

Peshawar High Court

Shabir ud Din --- Appellant/Petitioner (s)

Versus

SMBR --- Respondent (s)

JUDGMENT

W.P No. 2293/2009 Date of hearing 29.09.2009

EJAZ AFZAL KHAN, J.- Petitioners through the instant petition have asked for the issuance of an appropriate writ, directing the respondents to proceed in accordance with law afresh while filling the vacancies falling in the quota of promotion.

2. The learned counsel appearing on behalf of the petitioners contended that when a mode and mechanism have been laid down by the statute for filling the vacancies falling in the quota of promotion, no deviation could be made therefrom. Seniority-cum-fitness, the learned counsel added, which are the time honoured norms cannot be sacrificed on the altar of nepotism, cronyism and other considerations, which are political par excellence.

3. We have gone through the available record carefully and considered the submissions made by the learned counsel for the petitioners.

4. How respondents No.4 & 5 could be promoted to the posts of "Field Kanungo" and "Peshi Kanungo" respectively in disregard of seniority-cum-fitness and without preparing working paper highlighting such aspects is not understandable. Disregard of the time honoured norms, laid down by the statute for promotion, would naturally give way to nepotism, cronyism and other considerations, which in the long run would lead to inefficiency, indiscipline and other uncalled for phenomenon. The arguments of the learned counsel for the petitioners in this behalf, therefore, may not be without substance. But since the points urged before us by

the petitioners can well be urged before the departmental authority and then before the Service Tribunal, we while exercising constitutional jurisdiction under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 cannot step in at least at this stage. Since the petitioners have already made representations to the departmental authority, we in the circumstance of the case, direct it to decide the representations of the petitioners in accordance with law within two weeks positively. This petition thus stands disposed of.

Announced.
29. 09. 2009

J U D G E

J U D G E

Peshawar High Court

Hizbullah --- Appellant/Petitioner (s)

Versus

I.G. Frontier Corps --- Respondent (s)

JUDGMENT

W.P No. 2332/2009 Date of hearing 01.10.2009

EJAZ AFZAL KHAN, J.- Petitioners through the instant petition have asked for issuance of a direction to the respondents to provide them with the copy of the order, whereby, their services have been terminated.

2. The learned counsel appearing on behalf of the petitioners contended that though the order terminating the services of the petitioners has been passed on their back in violation of principle of natural justice, enshrined in the maxim audi alteram partem, all the same, they are required to provide its copy to the petitioners enabling them to seek redressal of their grievances in the competent forum of law.

3. We have gone through the available record carefully and considered the submissions made by the learned counsel for the petitioners.

4. If any order terminating the services of the petitioners has been passed by the respondents, they are bound to provide its copy to the petitioners forthwith. We, thus, direct the respondents to provide the copy of the order terminating the services of the petitioners forthwith so as to enable them to approach the competent forum of law for the redressal of their grievances. This petition is, thus, disposed of in the above terms.

Announced.
01. 10. 2009 J U D G E

J U D G E

Peshawar High Court

Mst. Shah Begum --- Appellant/Petitioner (s)

Versus

Bashir Ullah Khan --- Respondent (s)

JUDGMENT

W.P No. 1714/2008 Date of hearing 27.10.2009

EJAZ AFZAL KHAN, CJ.- Petitioner through the instant petition has questioned the judgment and decree dated 17.07.2008 passed by the learned Additional District Judge-I, Nowshera, whereby, he dismissed the appeal filed by the petitioner and maintained the judgment and decree dated 08.12.2007 passed by the learned Family Judge, Nowshera.

2. The learned counsel appearing on behalf of the petitioner by referring to the evidence on the record contended that the learned Appellate Court while handing down the impugned finding, did not discuss the entire evidence. The learned Judge, he added, just indulged in gross cutting without adverting either to the evidence on the record or the relevant provision contained in Section 7 of the Muslim Family Laws Ordinance, 1961. The learned counsel by refereeing to the case of "**Mst. Farah Naz vs. Judge Family Court, Sahiwal, PLD 2006 SC 457"**, contended that where the divorce could not be given effect from the date of its pronouncement unless it was conveyed in accordance with Section 7 of the Ordinance, the petitioner was entitled maintenance till the institution of her suit.

3. As against that the learned counsel appearing on behalf of the respondent contended that the learned Appellate Court adverted to every piece of evidence while handing down the impugned finding. He next contended that the observation of the learned Appellate Court that the petitioner failed to produce the best possible evidence implies a reference to the evidence on the record and that where the petitioner herself averred in the plaint

about the pronouncement of divorce, it was for her to prove how and when did she know about this fact.

4. We have gone through the available evidence on the record carefully and considered the submissions made by the learned counsel for the parties.

5. A perusal of the impugned evidence reveals that the learned Appellate Court did not discuss the entire evidence, having bearing on the fate of the case. If at all any piece of evidence was accepted or discarded, it was required to record reasons for that. Reasons in this behalf are conspicuous by their absence. Reference to the provision of Section 7 of the Ordinance was all the more desirable for determining the period, in which, the petitioner was entitled to maintenance. Failure on the part of the learned Appellate Court to highlight this aspect would constitute another reason for not maintaining the impugned finding. Needless to say that gone are the days when it used to be held that when a Court or Tribunal is having jurisdiction, it is having jurisdiction to decide rightly or wrongly. In the case of "**Utility Stores Corporation of Pakistan Limited vs. Punjab Labour Appellate Tribunal, PLD 1987 SC 447"**, the Hon'ble Supreme Court held in, no one certain terms that where a Court or Tribunal is given jurisdiction, it is given jurisdiction to decide every lis before it after proper appraisal of evidence.

6. For the reasons discussed above, this petition is allowed. The judgment and decree of the learned Additional District Judge is set aside and the case is sent back to the learned Judge for decision afresh after hearing the parties by attending to the aspects highlighted above. Record be sent there forthwith.

Announced.
27. 10. 2009

CHIEF JUSTICE

J U D G E

Peshawar High Court

Said Nawab Khan --- Appellant/Petitioner (s)

Versus

Mst. Saeeda --- Respondent (s)

JUDGMENT

W.P No. 2045/2009 Date of hearing 27.10.2009

EJAZ AFZAL KHAN, CJ.- Petitioner through the instant petition has questioned the judgment dated 20.07.2009 passed by the learned Additional District Judge-IV, Nowshera, whereby, she partially allowed the appeal of the respondent-wife and modified the judgment and decree dated 19.03.2009 passed by the learned Family Judge, Nowshera.

2. The main contention of the learned counsel for the petitioner was that where the petitioner is living with his father, provision of separate house to the respondent would not be called for as there is none to look after his father in the house, he is occupying at the moment.

3. We have gone through the record carefully and considered the submission made by the learned counsel for the petitioner.

4. The record reveals that the petitioner has contracted second marriage, when so, do not find any fault with the impugned finding much less, legal or jurisdictional. The impugned finding is, thus, unexceptional.

5. For the reasons discussed above, this petition being without merit is dismissed in limine.

Announced.
27. 10. 2009 CHIEF JUSTICE

J U D G E

Peshawar High Court

Said Nawab --- Appellant/Petitioner (s)

Versus

Mst. Saeeda --- Respondent (s)

JUDGMENT

W.P No. 2209/2009 Date of hearing 27.10.2009

EJAZ AFZAL KHAN, CJ.- Petitioner through the instant petition has questioned the judgment dated 20.07.2009 of the learned Additional District Judge-IV, Nowshera, whereby, she partially allowed the appeal of the respondent-wife and held her entitled to recovery of plot given in dower and the articles given in dowry mentioned at Serial No.1, 2, 5, 6, 7 & 8 of the list.

2. The learned counsel appearing on behalf of petitioner contended that the learned Additional District Judge-IV did not appreciate the evidence on the record in its correct prospective because the deed whereby plot was sold to one Nisar does not bear the signature of the petitioner and that the learned Additional District Judge while debiting the sale of the plot in account of the petitioner has not read the evidence properly, as such, it is liable to be set at naught.

3. We have gone through the available record carefully and considered the submissions made by the learned counsel for the petitioner.

4. The record reveals that the petitioner admitted unambiguously in his statement that the plot was given to the respondent in dower. The sale in favour of one Nisar has not been proved on the record to have been transacted by the respondent. When so, we do not think the findings of the learned Additional District Judge can be said to have been based on misreading or non-reading of evidence or erroneous assumptions of law and fact,

so as to justify interference therewith in exercise of the constitutional jurisdiction of this Court.

5. For the reason discussed above, this petition being without merit and substance is dismissed in limine.

Announced.
27. 10. 2009

CHIEF JUSTICE

J U D G E

Peshawar High Court

Giefen Barkat --- Appellant/Petitioner (s)

Versus

Parvez Masih --- Respondent (s)

JUDGMENT

W.P No. 2659/2009 Date of hearing 27.10.2009

EJAZ AFZAL KHAN, CJ.- Petitioner through the instant petition has questioned the order date 17.09.2009 passed by the learned Rent Controller, Peshawar, whereby, she struck off the defence of the petitioner on account of his failure to deposit the rent and its arrears in conformity with the order dated 09.06.2009.

2. The learned counsel appearing on behalf of the petitioner contended that when the order dated 09.06.2009 was challenged through the Writ Petition, defence of the petitioner could not be struck off.

3. We have gone through the available record carefully and considered the submission made by the learned counsel for the petitioner.

4. Once the petitioner failed to deposit the rent and its arrears in conformity with the order of the Rent Controller, striking off defence was inevitable. Such order cannot, thus, be held to have been passed without jurisdiction and lawful authority so as to justify interference therewith in exercise of the extra-ordinary, equitable discretionary constitutional jurisdiction of this Court. The more-so, no restraint order was passed by the High Court in the writ petition mentioned above.

5. For the reason discussed above, this petition being without merit and substance is dismissed in limine.

Announced.
27. 10. 2009 CHIEF JUSTICE

J U D G E

Peshawar High Court

Wahid --- Appellant/Petitioner (s)

Versus

Mst. Nasia --- Respondent (s)

JUDGMENT

W.P No. 1225/2009 Date of hearing 29.10.2009

EJAZ AFZAL KHAN, CJ.- Petitioner through the instant petition has questioned the order dated 26.01.2009 of the learned Additional District Judge, Izafi Zilla Qasi, Buner, whereby, he dismissed the appeal of the petitioner by maintaining the order of the learned Trial Court.

2. The learned counsel appearing on behalf of the petitioner contended that where the petitioner admitted that all the articles given in the dowry to the respondent are lying in his house, the suit was liable to be decreed in respect of the articles and not their price because both the parties used them for a considerable lapse of time.

3. The learned counsel appearing on behalf of the respondent contended that respondent was entitled to the price of articles notwithstanding they were used by the spouses together and that impugned finding being free from any jurisdictional infirmity is not open to interference.

4. We have gone through the available record carefully and considered the submissions made by the learned counsel for the parties.

5. Once, it was admitted by the petitioner that all the dowry articles given in dowry to the respondent by her parents are lying in his house, return thereof, instead of award of their price was just and equitable. Award of price for the articles used by the

spouses appears to be unjust and unfair in the circumstances of the case.

6. For the reasons discussed above, we admit this petition and partially allow it and modify the impugned judgments of the Courts below by holding that respondent would be entitled to the dowry articles and not their price.

Announced.
29. 10. 2009

CHIEF JUSTICE

J U D G E

Peshawar High Court

Mst. Khilwat Bibi --- Appellant/Petitioner (s)

Versus

Khaista Gul --- Respondent (s)

JUDGMENT

W.P No. 1311//2009 Date of hearing 29.10.2009

EJAZ AFZAL KHAN, CJ.- Petitioner through the instant petition has questioned the Judgment dated 21.05.2008 of the learned Family Judge, Buner, whereby, he granted the decree for dissolution of marriage on the basis of "*Khula*" but omitted to grant maintenance during the period of "*Iddat*".

2. The learned counsel appearing on behalf of the petitioner contended that where the Court granted a decree for dissolution of marriage, it was bound to grant the maintenance during the period of "*Iddat*".

3. The learned counsel appearing on behalf of the respondent contended that if the learned Family Judge omitted to grant maintenance in respect of the period of "*Iddat*", the petitioner could file an appeal in this behalf in the Court of District Judge, which she has not done. The petitioner cannot, learned counsel added, claim through a Writ Petition what she could have claimed through an appeal.

4. We have gone through the available record carefully and considered the submissions made by the learned counsel for the parties.

5. Once, the Court granted a decree for dissolution of marriage, it was bound to grant a decree for maintenance in respect of the period of "*Iddat*". No appeal has been filed by the petitioner but this would not restrain this Court from awarding what the learned Family Court was required to award under the law.

6. For the reasons discussed above, we admit this petition, partially allow it and modify the impugned judgment of the learned Trial Court by holding that the petitioner would be entitled to the maintenance of Rs.2,000/- per month during the period of "*Iddat*".

Announced.
29. 10. 2009

CHIEF JUSTICE

J U D G E

Peshawar High Court

Saifur Rehman --- Appellant/Petitioner (s)

Versus

Mst. Amber Javed --- Respondent (s)

JUDGMENT

W.P No1397/2009 Date of hearing 04.11.2009

EJAZ AFZAL KHAN, CJ.- Petitioner through the instant petition has questioned the judgment dated 21.05.2009 of the learned District Judge, Kohat, whereby, he dismissed his appeal and maintained the judgment and decree dated 28.03.2009 of the learned Trial Court.

2. The learned counsel appearing on behalf of the respondent while defending the impugned judgments contended that where the petitioner deserted his wife and went even to the extent of levelling false allegations of adultery, harmonious union between the parties was not possible and that the Courts below have rightly decreed the suit of the respondent.

3. We have gone through the record carefully and considered the submissions made by the learned counsel for the respondent.

4. A perusal of the impugned judgments reveals that the learned Courts below took stock of entire material on the record and after appraising it in accordance with the recognized principles of law of evidence have rightly decreed the suit of the respondent. The impugned judgments being free from any jurisdictional infirmity are not open to interference.

5. For the reasons discussed above, this petition being without merit and substance is dismissed.

Announced.
04. 11. 2009

CHIEF JUSTICE
J U D G E

Peshawar High Court

Sakhi Marjan --- Appellant/Petitioner (s)

Versus

PA Khyber --- Respondent (s)

JUDGMENT

W.P No. 1896/2009 Date of hearing 05.11.2009

EJAZ AFZAL KHAN, CJ.- Latter states that the petitioners would be released on bail, if they furnish bail bonds to the satisfaction of the political authorities.

2. In view of the above statement, this petition is allowed and the petitioners are directed to be released on bail on furnishing bail bonds in the sum of Rs.1,00,000/- (Rupees one lac) each, with two sureties, each in the like amount to the satisfaction of the Assistant Political Agent, who is to ensure that the surety is local, reliable and man of means.

Announced.
05. 11. 2009 CHIEF JUSTICE

J U D G E

Saeed --- Appellant/Petitioner (s)

Versus

CCPO --- Respondent (s)

JUDGMENT

W.P (HCP) (No. 2412/2009 Date of hearing 05.11.2009

EJAZ AFZAL KHAN, CJ.- Latter states that the petitioner would be released on bail, if he furnishes bail bonds to the satisfaction of the political authorities.

2. In view of the above statement, this petition is allowed and the petitioner is directed to be released on bail on furnishing bail bonds in the sum of Rs.1,00,000/- (Rupees one lac), with two sureties, each in the like amount to the satisfaction of the Assistant Political Agent, who is to ensure that the surety is local, reliable and man of means.

Announced.
05. 11. 2009 CHIEF JUSTICE

J U D G E

Peshawar High Court

Mst. Salma --- Appellant/Petitioner (s)

Versus

Muhammad Amir --- Respondent (s)

JUDGMENT

W.P No. 2843/2009 Date of hearing 10.11.2009

EJAZ AFZAL KHAN, CJ.- Petitioners through the instant petition have questioned the judgment and decree dated 19.10.2009 of the learned Additional District Judge-II, Nowshera, whereby, he allowed the appeal of the respondent and modified the judgment and decree dated 10.07.2009 of the learned Family Judge, Nowshera.

2. The learned counsel appearing on behalf of the petitioners contended that when the dower deed was exhibited without there being any objection from the other side, subsequently, it could not turn round to dispute its execution.

3. We have gone through the available record carefully and considered the submissions made by the learned counsel for the petitioners.

4. A perusal of the record would reveal that the petitioners did not examine any of the marginal witnesses, witnessing the execution of the deed, notwithstanding at-least two of them were their close relatives. When the petitioners despite the chance did not examine the marginal witnesses, we are afraid, the dower deed cannot be held to have been proved in accordance with the requirements of law of evidence. The mere fact that it was exhibited without there being any objection from the other side, cannot make it reliable, when it is not proved as mentioned above. Having thus considered, we do not think the learned Appellate Court has committed any error much less jurisdictional while allowing the appeal of the respondent.

5. For the reasons discussed above, this petition being without merit and substance is dismissed in limine.

Announced.
10. 11. 2009

CHIEF JUSTICE

J U D G E

Peshawar High Court

Miss. Zarqa Shabir --- Appellant/Petitioner (s)

Versus

NWFP Public Service Commission --- Respondent (s)

JUDGMENT

W.P. No. 2088/2009 Date of hearing 12.11.2009

EJAZ AFZAL KHAN, C.J.- By this single judgment we propose to dispose of W.P.Nos.2088, 2267 and 2648 of 2009 wherein petitioners have asked for the issuance of an appropriate writ directing the respondents to declare the petitioners as successful in the examination held under the aegis of the NWFP Public Service Commission for the appointment of the Judicial Officers.

2. During the course of arguments, learned counsel for the petitioners insisted for the production of their papers which was accordingly done. The petitioners after seeing the papers owned them notwithstanding they failed in them. When this being the state of things, we cannot issue the writ asked for. These writ petitions being without any merit stand dismissed. However, if the petitioners are left with any grievance about re-totalling, they may approach the respondents for the same.

CHIEF JUSTICE

Announced on
12th November, 2009. J U D G E

Peshawar High Court

Adil Majeed --- Appellant/Petitioner (s)

Versus

NWFP Public Service Commission --- Respondent (s)

JUDGMENT

W.P. No. 2204/2009 Date of hearing 12.11.2009

EJAZ AFZAL KHAN, C.J.- By this single judgment we propose to dispose of W.P.Nos.2204, 2342, 2343, 2344, 2345, 2363, 2370 , 2378 and 2401 of 2009 wherein the petitioners have asked for the grant of 6 to 10 grace marks on the ground that if five grace marks could be given to really deserving candidates in one or two papers, that could be given up to 10.

2. The learned Additional Advocate General appearing on behalf of the respondents contended that the total number of grace marks to be given cannot exceed five in any case if seen in the light of the language used in the Rule.

3. We have gone through the record carefully and have also considered the submissions made by the learned counsel for the parties.

4. Before we proceed to discuss merits of the case, it would be worthwhile to refer to the relevant Rule which reads as under:-

> **"Five grace marks may be given to really deserving candidates in one or two papers, provided that such grant of grace marks shall not entitle the grantee to have a better position on the merit list than those successful candidates who have not been granted any grace marks."**

5. A bare reading of the Rule quoted above reveals that the total number of grace marks to be given in one or two papers cannot exceed five. The expression "in one or two papers" cannot be construed to stretch the number of grace marks up to 10. Such construction, we are afraid, would be grotesque if not bizarre. We thus do not feel persuaded to accede to the prayer thus made.

6. For the reasons discussed above, these writ petitions are dismissed.

CHIEF JUSTICE

Announced on
12th November, 2009. J U D G E

Peshawar High Court

Muhammad Saleem --- Appellant/Petitioner (s)

Versus

Superintendent Jail --- Respondent (s)

JUDGMENT

W.P (HCP) (No. 2604/2009 Date of hearing 12.11.2009

EJAZ AFZAL KHAN, CJ.- Petitioner through the instant petition has asked for the issuance of an appropriate writ directing the respondents to release the detenue as he has no concern with the tribal area, so as to justify his detention under 40 FCR.

2. Mr. Ziaur Rehman, the learned Advocate General, representing respondents No.1, 3 & 4 and Mr. Iqbal Ahmad Durrani, Advocate for political authorities could not convincingly dispute it.

3. In this view of the matter, it is directed that Muhammad Ibrahim, detenue be released on bail on furnishing bail bonds in the sum of Rs.1,00,000/- (Rupees one lac), with two sureties, each in the like amount to the satisfaction of the learned Additional Registrar (Judicial) of this Court.

Announced.
12. 11. 2009 CHIEF JUSTICE

J U D G E

Peshawar High Court

Adil --- Appellant/Petitioner (s)

Versus

The State --- Respondent (s)

JUDGMENT

W.P No. 2621/2009 Date of hearing 12.11.2009

EJAZ AFZAL KHAN, CJ.- Latter states that petitioners would be released on bail, if they furnish bail bonds to the satisfaction of the political authorities.

2. In view of the above statement, this petition is allowed and the petitioners are directed to be released on bail on furnishing bail bonds in the sum of Rs.2,00,000/- (Rupees two lac) each, with two sureties, each in the like amount to the satisfaction of the Assistant Political Agent, who is to ensure that the surety is local, reliable and men of means.

Announced.
12. 11. 2009 CHIEF JUSTICE

J U D G E

Peshawar High Court

Nadeem Shah --- Appellant/Petitioner (s)

Versus

District Police Peshawar --- Respondent (s)

JUDGMENT

W.P No. 2755/2009 Date of hearing 12.11.2009

EJAZ AFZAL KHAN, CJ.- Latter states that Sadique Shah, detenue would be released on bail, if he furnishes bail bonds to the satisfaction of the Assistant Political Agent.

2. In view of the above statement, this petition is allowed and the detenue is directed to be released on bail on furnishing bail bonds in the sum of Rs.2,00,000/- (Rupees two lac), with two sureties, each in the like amount to the satisfaction of the Assistant Political Agent.

Announced.
12. 11. 2009 CHIEF JUSTICE

J U D G E

Mst. Izzat Bibi --- Appellant/Petitioner (s)

Versus

Umar Zada --- Respondent (s)

JUDGMENT

W.P No. 775/2008 Date of hearing 18.11.2009

EJAZ AFZAL KHAN, CJ.- Petitioner through the instant petition has questioned the judgment and decree dated 12.04.2008 of the learned District Judge, Malakand at Batkhela, whereby, he allowed the appeal of the respondent and held him entitled to recover two tolas of golden ornaments from the petitioner.

2. The learned counsel appearing on behalf of the petitioner contended that there is absolute no evidence on the record to show that two toals of golden ornaments were ever given to the petitioner except her own admission. If, he added, the admission is taken as evidence of giving golden ornaments to the petitioner, it has to be read as whole by considering the later part thereof, which shows that she left the ornaments in the house of the respondent.

3. As against that, the learned counsel appearing on behalf of the respondent contended that a part of the statement of the petitioner that she left the golden ornaments in the house of the respondent cannot be linked with the admission as it came forth in an answer to another question. The finding handed down by the learned Appellate Court, the learned counsel submitted, being based on proper appraisal of evidence is not open to any interference.

4. We have gone through the record carefully and considered the submissions made by the learned counsel for the parties.

5. A look at the impugned judgment reveals that the learned Appellate Court has not appreciated the evidence on the record in its totality. A part of evidence has been commented upon while the other has been ignored altogether. Since, a Court of law is required to give a finding on proper appraisal of evidence, findings given otherwise cannot be upheld. The case of **"Utility Stores Corporation of Pakistan Limited vs. Punjab Labour Appellate Tribunal (PLD 1987 SC 447)** may well be referred to in this behalf.

6. For the reasons discussed above, this petition is allowed, the impugned judgment and decree are set aside only to the extent of dower and the case is sent back to the learned Appellate Court for decision afresh after hearing the parties as hinted to above. The decree for dissolution of marriage would, however, remain intact. Both the parties are directed to appear before the said Court on 05.12.2009.

Announced.
18. 11. 2009

CHIEF JUSTICE

J U D G E

Peshawar High Court

Mst. Tauseef Bibi --- Appellant/Petitioner (s)

Versus

Zia ud Din --- Respondent (s)

JUDGMENT

W.P No. 1036/2009 Date of hearing 18.11.2009

EJAZ AFZAL KHAN, CJ.- Petitioner through the instant petition has questioned the judgment and decree dated 06.04.2009 of the learned Addition District Judge, Chakdara, Dir Payan, whereby, he dismissed her appeal and maintained the judgment and decree dated 22.06.2006 of the learned Family Judge, Chakdara.

2. The learned counsel appearing on behalf of the petitioner contended that evidence in the case has been appreciated in piecemeal and not in totality by commenting on its one portion and bypassing the other. What was, he added, the total number of golden ornaments, what was its weight and how much was to be returned to the respondent has been left ambiguous in the impugned judgment.

3. As against that, the learned counsel appearing on behalf of the respondent contended that the learned Appellate Court has handed down the impugned finding by appreciating every bit of evidence on the record, therefore, no fault can be imputed to the impugned finding. It is all the more unexceptionable, the learned counsel added, when it is concurrent on a question of fact.

4. We have gone through the record carefully and considered the submissions made by the learned counsel for the parties.

5. What was the number of golden ornaments, what was its weight and what was to be returned to the respondent in the wake of dissolution of marriage are the questions, which have not been conclusively answered by the impugned judgments. Even the evidence on the record does not appear to have been appreciated in its totality. Shifting stands of the parties should have been commented upon in an alike manner while appreciating evidence. Reading a few portions of evidence, out of their context, cannot be held just and fair. Verdict on such appraisal cannot be approved or upheld. Only that verdict can be held to be a balanced and befitting, which is based on appraisal of evidence in its totality. A finding lacking this virtue cannot, thus, be maintained.

6. For the reasons discussed above, this petition is allowed, the impugned finding to the extent of return of golden ornaments is set aside and the case is sent back to the learned Appellate Court for decision afresh, after hearing both the parties, as hinted to above, while decree regarding dissolution of marriage would remain intact. Both the parties are directed to appear before the said Court on 05.12.2009.

Announced.
18. 11. 2009

CHIEF JUSTICE

J U D G E

Peshawar High Court

Badshagay --- Appellant/Petitioner (s)

Versus

APA --- Respondent (s)

JUDGMENT

W.P.No. 2834/2009 Date of hearing 18.11.2009

EJAZ AFZAL KHAN, C.J.- Petitioner through the instant petition seeks his release on bail on the ground that he is declined bail notwithstanding he is ready to furnish the bonds . Mr.Iqbal Ahmad Durrani, Advocate, representing respondents, submits that the petitioner shall be released on bail if he furnishes bail bonds.

2. In this view of the matter, we direct release of the petitioner on bail, provided he furnishes bail bonds in the sum of Rs.Two lac, with two sureties, each in the like amount to the satisfaction of the respondents.

CHIEF JUSTICE

Announced on
18th November, 2009. JUDGE

Peshawar High Court

Darya Khan --- Appellant/Petitioner (s)

Versus

Usman --- Respondent (s)

JUDGMENT

W.P. No. 4103/2010 Date of hearing 18.11.2009

EJAZ AFZAL KHAN, C.J.- This petition has been moved for the issuance of a writ directing the respondents No.3 & 4 to release the petitioners as the matter has been patched up between them and the complainant.

2. The learned AAG appearing on behalf of the State submitted that if the matter has been patched up, relevant documents could be produced before the concerned court for action thereon. Mr.Iqbal Ahmad Durrani, Advocate, representing respondents Nos.3 & 4 also reiterated the same thing.

3. We have gone through the available material carefully and have also considered the submissions made by the learned counsel for the parties.

4. If in fact the matter has been patched up between the petitioners and the complainant of case FIR No.1482, dated 1-8-2009, registered under Section 390 PPC read with 11 FCR in Police Station Landi Kotal, the documents showing the compromise could well be produced before the trial court which is directed to pass an appropriate order thereon.

5. This petition thus stands disposed of.

Announced on CHIEF JUSTICE
18th November, 2009.

J U D G E

Peshawar High Court

Sher Gul --- Appellant/Petitioner (s)

Versus

APA --- Respondent (s)

JUDGMENT

W.P. No. 2782/2009 Date of hearing 18.11.2009

EJAZ AFZAL KHAN, C.J.- Petitioners through the instant petition seek their release on bail on the ground that they are declined bail notwithstanding they are ready to furnish the bonds Mr. Iqbal Ahmad Durrani, Advocate, representing respondents, submits that the petitioners shall be released on bail if they furnish bail bonds.

2. In this view of the matter, we direct the release of the petitoners on bail, provided they furnish bail bonds in the sum of Rs.Two lac each, with two sureties, each in the like amount to the satisfaction of the respondents.

CHIEF JUSTICE

Announced on
18th November, 2009. J U D G E

Peshawar High Court

Ms Mehran Comfurts --- Appellant/Petitioner (s)

Versus

MBR --- Respondent (s)

JUDGMENT

W.P.No. 224/2007 Date of hearing 02.12.2009

EJAZ AFZAL KHAN, C.J.- Petitioner through the instant petition asks for the issuance of direction to the Central Board of Revenue for implementing the judgment dated 23rd September, 2002 of the august Supreme Court of Pakistan rendered in Appeal No.1253/2000.

2. Learned counsel for petitioner by referring to the concluding paragraph of the judgment dated 11-10-2006 of the Supreme Court in Criminal Original Petition No.57/2004 contended that the competent forum in this case would be the High Court, therefore, the writ asked for be issued.

3. Learned counsel appearing on behalf of the respondents opposed the stance of the learned counsel for the petitioner by submitting that the High Court by no stretch of imagination can be pushed into the definition of competent forum if seen in the light of the judgment referred to above and that the petition being misconceived is liable to be dismissed.

4. We have gone through the record carefully and have also considered the submissions made by the learned counsel for the parties.

5. Before we proceed ahead, we would like to refer to the concluding paragraph of the judgment which reads as under :-

> "We have heard learned counsel for parties and have also gone through the impugned judgment. It may be noted that respondents had an obligation to decide the case in terms of the concluding para of the judgment of this court. Prima facie, it seems that application was considered and examined, as it is evident from the relevant para of the order reproduced herein before. Therefore, we are of the opinion that if petitioner is aggrieved from the decision of the CBR to which he has a contrary stand, he instead of making this application for contempt of court should have approached the competent forum for redressal of his grievance. We may point out that such an application for contempt of court could conveniently be entertained if the order of the Court is not implemented and since the order of the Court has been implemented, therefore, the respondents have not committed the contempt of court."

6. A perusal of the above quoted paragraph would reveal that the High Court cannot be pushed into the definition of competent forum because many disputed questions of facts are involved in this petition which cannot be decided by this court while hearing petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973. This writ petition thus being misconceived on the face of it, is dismissed. However, the petitioner would be at liberty to approach the competent forum in this behalf.

CHIEF JUSTICE

Announced on
2nd Dec. 2009.

J U D G E

Peshawar High Court

Haji Fareedullah --- Appellant/Petitioner (s)

Versus

Khaista Gul --- Respondent (s)

JUDGMENT

W.P No. 1501/2009 Date of hearing 09.12.2009

EJAZ AFZAL KHAN, J.- Petitioner through the instant petition has questioned the order dated 26.08.2008 of the learned Additional Sessions Judge-III, Nowshera, whereby, he adjourned the case sine die till the decision of the dispute by the Civil Court.

2. The learned counsel appearing on behalf of the parties referred to a good number of documents to support their respective claims of ownership, viz-a-viz, the house in dispute but this Court, while hearing a petition under Article 199 of the Islamic Republic of Pakistan, 1973, cannot embark upon appraisal or reappraisal of evidence as it is the exclusive domain of the Trial Court. It is quite disquieting to see the way the learned Additional Sessions Judge has dealt with the matter. If no case was made out, the learned Judge after discussing the evidence could have dismissed the complaint. In case, the matter could not be decided without recording evidence, he should have proceeded to record that. But sine die adjournment could not be ordered under any cannons of criminal law, at least in the cases of this type. The impugned order, thus, cannot be maintained.

3. For the reasons discussed above, this petition is allowed, the impugned order is set aside and the case is sent back to the learned Trial Court to proceed as hinted above and to decide it as early as possible. Both the parties are directed to appear before the said Court on 23.12.2009

Announced.
09. 12. 2009 CHIEF JUSTICE

J U D G E

Peshawar High Court

Gul Muhammad Shah --- Appellant/Petitioner (s)

Versus

Mst. Sharafat Bibi --- Respondent (s)

JUDGMENT

W.P No. 2207/2009 Date of hearing 09.12.2009

EJAZ AFZAL KHAN, J.- Petitioners through the instant petition have questioned the judgment dated 20.06.2009 of the learned Additional District Judge, Lahore, District Swabi, whereby, he allowed the appeal filed by the respondents and modified the judgment dated 21.01.2009 of the learned Judge, Family Court, Lahore, District Swabi.

2. The learned counsel appearing on behalf of the petitioners contended that where the document, which has been made basis for the claim of the dower appears to be doubtful, it was rightly discarded by the learned Judge Family Court and that the learned Appellate Court has wrongly made it a basis for modification of the judgment of the learned Trial Court.

3. As against that, the learned counsel appearing on behalf of the respondents by defending the impugned judgment submitted that the words "my wife" mentioned in deed on account of inadvertence cannot be exaggerated to defeat the case of the respondents when, otherwise, the document has been proved on the record.

4. We have gone through the record carefully and considered the submissions made by the learned counsel for the parties.

5. The record reveals that the document forming the basis of the judgment of the learned Appellate Court was proved in accordance with the requirements of law. Granted that the words

"my wife" instead of "daughter-in-law" had been mentioned in the said document, but it cannot be taken to an illogical extreme when the other words including the name and parentage of the beneficiary refer to the respondent. We would not like to interfere with the impugned judgment on this hyper technical ground when otherwise, the document cannot be looked at with doubt and suspicion.

6. For the reasons discussed above, this petition being without substance is dismissed.

Announced.
09. 12. 2009

CHIEF JUSTICE

J U D G E

Peshawar High Court

Mst. Asia Gohar --- Appellant/Petitioner (s)

Versus

Government --- Respondent (s)

JUDGMENT

W.P No. 3039/2009 Date of hearing 09.12.2009

EJAZ AFZAL KHAN, CJ.-Petitioner through the instant petition has questioned the Notification dated 13.10.2009 of respondent No.2, whereby, she has been transferred from the post of Vice Principal, GGCHSS, Peshawar to the post of District Officer (Female), E&SE, Peshawar.

2. The learned counsel for the petitioner contended that where teaching and management have been divided into two cadres, the employee of the one could not be transferred to the other and that the transfer order on account of being against rules and policy is liable to an outright annulment. The learned counsel in support of their contentions placed reliance on the case of ***Secretary, Revenue Division & others vs. Muhammad Saleem (2008 SCMR 948).***

3. We have gone through the available record carefully and considered the submissions made by the learned counsel for the petitioner.

4. Since the posting and transfer being related to the terms and condition of service can be urged before the Service Tribunal, this Court, while exercising its jurisdiction under Article 199 of the Constitution of Islamic Republic of Pakistan, cannot step-in the case. Reference may well be made to the cases of ***Miss Rukhsana Ijaz vs. Secretary, Education, Punjab & others (1997 SCMR 167); Ayyaz Anjum vs. Government of Punjab, Housing and Physical Planning Department through Secretary and others (1997 SCMR 169); Rafique Ahmad Chaudhry vs. Ahmad Nawaz Malik & others (1997 SCMR 170); Secretary Education NWFP,***

Peshawar and 2 others vs. Mustamir Khan & another (2005 SCMR 17) and Peer Muhammad vs. Government of Baluchistan through Chief Secretary & others (2007 SCMR 54). The judgment cited by the learned counsel for the petitioner would not advance his case as it being distinguishable on the factual and legal plain is not germane to the situation in hand.

5. For the reasons discussed above, this Writ Petition being without substance is dismissed in limine. However, since the petitioner has already filed a representation before the competent authority, it is directed to dispose it of within a fortnight.

Announced.
09. 12. 2009

CHIEF JUSTICE

J U D G E

Peshawar High Court

Hazrat Baz --- Appellant/Petitioner (s)

Versus

The State --- Respondent (s)

JUDGMENT

W.P. No. 1946/2009 Date of hearing 15.12.2009
(PLD 2010 Peshawar 7)

EJAZ AFZAL KHAN, C.J.- Hazrat Baz petitioner herein has questioned the order dated 21-7-2007 of the Political Agent, Khyber Agency, and those of higher fora in the hierarchy whereby he has been sentenced to ten years R.I. with a fine of Rs.one lac, or in default to undergo 2-1/2 years S.I.

2. Learned counsel appearing on behalf of the petitioner contended that where the court was not established and notified in accordance with the provisions of Section 46 of the CNSA in the Tribal Areas, the petitioner could not be tried by the Political Agent and that the entire proceedings and subsequent orders passed by the next higher fora in the hierarchy being against law and statute are liable to be struck down.

3. Learned counsel appearing on behalf of the Political Agent contended that once the CNSA was extended to the Federally Administered Tribal Areas, vide SRO 1295(1)/98 dated 16-11-1998 with addition of Section 2(c) in the 2nd Schedule, the Political Agent had the powers to try the petitioner. Learned counsel by referring to the Notification No.8-W, dated 9-3-1939, contended that where the powers of Sessions Court are also conferred on the Political Agent, no infirmity much less legal can be found in the trial of the petitioner or in the decisions given by the next higher fora in the hierarchy. The learned AAG appearing on behalf of the Federal Government also adopted the stance taken by the learned counsel for the Political Agent. Mr.Ishtiaq Ibrahim, AAG, appearing on behalf of the State was also in agreement with the

proposition canvassed at the bar by the learned counsel for the Political Agent.

4. We have gone through the record carefully and have also considered the submissions made by the learned counsel for the parties.

5. No doubt, CNSA has been extended to the tribal areas by virtue of the Notification mentioned above. Similarly powers of Sessions Judge have also been conferred on the Political Agent by virtue of the Notification cited above but can a "Jirga" constituted under the FCR be treated as a Court established in accordance with the requirements of section 46 of the CNSA. The answer to this question can be in affirmative if we confine ourselves to the Notification cited above. But it would certainly be in negative if seen in the light of the overall scheme of the Act. It, in the first instance, requires establishment of Special Courts and then appointment of a Sessions Judge or an Additional Sessions Judge as a Judge Special Court, after consultation with the Chief Justice of the High Court. The Courts thus established and the Special Judge thus appointed is to try the accused in the cases registered under the Act. If the trial terminates in conviction or acquittal, an appeal there-against lies to the High Court and is heard by a Bench of not less than two Judges when seen in the light of Section 48 of the Act. We despite over- stretching the Notifications mentioned above in consonance with the thrust of the arguments addressed at the bar by the learned counsel for the respondents, cannot afford to agree with them as this would not only defeat the provisions of the Act but their spirit as well. We, thus without indulging in unnecessary semantics or verbal quibbles, would straightaway hold that the Political Agent was not competent to try the petitioner and that the next higher fora in the hierarchy were not competent to hear appeal or revision.

6. This petition is thus allowed, the impugned conviction and sentence is set aside and the petitioner Hazrat Baz who has been in jail ever since his trial, is directed to be released on bail if he furnishes bail bonds in the sum of Rs.Three lac, with two

sureties, each in the like amount to the satisfaction of the Political Agent Khyber agency.

7. We, therefore, direct the Federal Government to take necessary measures for the establishment of a Special Court in the area in accordance with the provisions of the Act mentioned above. We also direct the prosecution to forward the case of the petitioner to the court of competent jurisdiction, if and when constituted. Office is directed to send a copy of this judgment to the Federal Secretary (Law & Justice Divisions) Islamabad, for necessary action, as discussed above.

CHIEF JUSTICE

Announced on
15th December, 2009.

J U D G E

Peshawar High Court

Najeeb Khan --- Appellant/Petitioner (s)

Versus

PA Khyber --- Respondent (s)

JUDGMENT

W.P. No. 3019/2009 Date of hearing 15.12.2009

EJAZ AFZAL KHAN, C.J.- Petitioner Najeeb Khan who has been hauled up in 40 FCR by the respondents, seeks his release on bail which has been declined to him notwithstanding he is ready to furnish bonds to the satisfaction of the respondents. Mr. Iqbal Ahmad Durrani, Advocate, representing respondents, submits that the petitioner shall be released on bail if he furnishes bail bonds.

2. In this view of the matter, we direct release of the petitioner on bail, provided he furnishes bail bonds in the sum of Rs.Two lac, with two sureties, each in the like amount to the satisfaction of the respondents.

CHIEF JUSTICE

Announced on
15 th December, 2009. J U D G E

Peshawar High Court

Kifayatullah --- Appellant/Petitioner (s)

Versus

Federation of Pakistan --- Respondent (s)

JUDGMENT

W.P No. 1267/2009 Date of hearing 15.12.2009

EJAZ AFZAL KHAN, CJ. Petitioners through the instant petition have asked for the issuance of an appropriate writ directing the respondents to treat them at par with the employees of the Peshawar High Court, similarly placed and positioned.

2. The learned counsel appearing on behalf of the petitioners by referring to the case of **Sadaqat Ali vs. Government of Punjab through Chief Secretary & 3 other, [2008 PLC (CS) 1047]** contended that where the employees of similar establishment, are performing similar duties, they are required to be treated alike and that refusal of the respondents to do so would culminate in discrimination and violation of constitutional provision ensuring equality before the law.

3. As against that, the learned counsel appearing on behalf of the respondents contended the petitioners, original as well as added, are admittedly civil servants, they can approach the Service Tribunal in this behalf.

4. We have gone through the available record carefully and considered the submissions made by the learned counsel for the parties.

5. When confronted, why the petitioners did not approach the departmental authority and then the Tribunal in line with Section 4 of the Service Tribunal Act, the learned counsel for the petitioners replied that they have already filed a representation but that has not been decided so far. When this being the case, we

instead assuming jurisdiction at this stage, would direct the departmental authority to decide the representation of the petitioners within a fortnight. The petitioners may, if so advised, thereafter approach the competent forum for the redressal of their grievance. The writ petition is, thus, disposed of.

Announced.
15. 12. 2009

CHIEF JUSTICE

J U D G E

Peshawar High Court

Hussain Badshah --- Appellant/Petitioner (s)

Versus

Government --- Respondent (s)

JUDGMENT

W.P. No. 1023/2009 Date of hearing 15.12.2010

EJAZ AFZAL KHAN, C.J.- Petitioner through the instant petition has asked for the issuance of an appropriate writ directing the respondents to appoint his son against the vacancy in the Government High School Sorgul, Kohat.

2. Learned AAG appearing on behalf of the respondents contended that though there was a vacancy but that has been filled by transfer yet in due course it would be advertised and the petitioner's son shall be given chance to try his luck there against. When this being the state of things, this petition is disposed of with the direction that the vacancy filled by transfer be advertised as early as possible but not later than one month and in case son of the petitioner also applies, he be considered against the said vacancy.

CHIEF JUSTICE

Announced on
15th December, 2010. J U D G E

Peshawar High Court

Samiullah --- Appellant/Petitioner (s)

Versus

The Chief Executive PESCO --- Respondent (s)

JUDGMENT

W.P. No. 318/2008 Date of hearing 16.12.2009

EJAZ AFZAL KHAN, C.J.- By this single judgment we propose to dispose of W.P.Nos. 318, 319, 320, 321, 322 & 512 of 2008 wherein petitioners have challenged the vires of the Rules on the ground that they are discriminatory and violative of the provisions ensuring equality before law.

2. Main contention of the learned counsel for the petitioners was that the classification is no doubt permissible provided it is based on intelligible differentia but the one which has been made here in this case cannot be termed as having been based on intelligible differentia by any stretch of imagination as the Diploma Holder who is otherwise eligible to be appointed against the post of LS-II by direct recruitment has been deprived of his right of being promoted on account of the Rules under challenge.

3. Learned counsel appearing on behalf of the respondents contended that the Department is to proceed in accordance with the Rules and so long as the Rules are in-tact, they cannot afford to make any deviation or departure there from. Learned counsel next contended that where Section 17(B) of the West Pakistan Water and Power Development Authority Act is still in- tact, petitioners are civil servants to all intents and purposes, therefore, they can raise their grievance before the Federal Service Tribunal in view of the dictum laid down in the case of "**I.A.Sharwani and others Vs. Government of**

Pakistan through Secretary, Finance Division, Islamabad and others" (1991 S C M R – 1041)

4. We have gone through the record carefully and have also considered the submissions made by the learned counsel for the parties.

5. Before we proceed ahead, we would like to refer to the relevant Rules which are reproduced as under :-

	(a)LS-II (NPS No.11 **b)Line Foreman-II (NPS-11)**	**1. 50% by direct recruitment** **2. 25% by promotion from Matric LM-I on seniority cum fitness basis.** **3. 25% by promotion Non- matric/ Illiterate Lineman-I by Selection on merit with due regard to seniority.**	**3 years Diploma Course in Electrical Engineering From Government Polytechnic Institute**
.	**Lineman Grade-I (NPW – 7)**	**100% from amongst Lineman-**	
.	**Lineman Grade-II (NPS**	**100% from ALM**	

	-6)		
.	**Asstt. Lineman (NPS-5)**	**100% from amongst Work charged ALM working in Construction Division on seniority cum fitness basis.**	

6. A look at the above quoted rule would reveal that a Diploma Holder and a simple matriculate have not only been lumped together but have also been treated alike though Diploma Holder has been made eligible to be appointed against the post of LS-II against 50% quota even by initial recruitment. The worse of this state of things is that the Diploma Holder has not been given any right to be promoted on the strength of his Diploma. This classification appears to be discriminatory, violative of Constitutional provisions. It, thus cannot be held to have been based on intelligible differentia.

7. The argument that the petitioners in view of Section.0 17(B) of the Act mentioned above, are civil servants and as such can raise their grievance before the Federal Service Tribunal is devoid of force when the employees of the Power Wing after their transfer and absorption in the WAPDA related companies cease to be civil servants. The case of **"Humayun Akhtar and others Vs Chairman, Water and Power Development Authority, Wapda House, Lahore and others"** (**PLJ 2008 Tr.C. (Services) 374),** may well be referred in this behalf.

8. For the reasons discussed above, We allow these petitions and direct the respondents to suitably amend the relevant Rules so as to eliminate the anomaly highlighted above. These petitions are thus disposed of.

CHIEF JUSTICE

Announced on
16th Dec. 2009.

J U D G E

Peshawar High Court

Muhammad Yaqoob --- Appellant/Petitioner (s)

Versus

The State --- Respondent (s)

JUDGMENT

W.P.No. 2893/2009 Date of hearing 16.12.2009

EJAZ AFZAL KHAN, C.J.- This writ petition has been moved for the release of the petitioners on bail who have been convicted and sentenced to undergo one year R.I. each with a fine of Rs.3 lac each under Section 9 of the National Accountability Ordinance, 1999, by the Accountability Court-III, Peshawar, vide judgment dated 8th August, 2009.

2. Learned Deputy Prosecutor General appearing on behalf of respondents submitted that the court below has already taken lenient view, therefore, the sentence may not be suspended.

4. We have gone through the record carefully and have also considered the submissions made by the learned counsel for the parties.

5. Since the sentence is short and the fine is also not so huge, we allow this petition and direct the release of the petitioners on bail if they furnish bail bonds in the sum of Rs. Three lac each, with two sureties, each in the like amount, to the satisfaction of the Additional Registrar of this Court.

CHIEF JUSTICE

Announced on
16th Dec. 2009. J U D G E

Peshawar High Court

Kashghar Gul --- Appellant/Petitioner (s)

Versus

PA Khyber --- Respondent (s)

JUDGMENT

W.P (No. 3082/2009 Date of hearing 16.12.2009

EJAZ AFZAL KHAN, CJ.- Petitioner, who has been hauled up in 40 FCR, has asked for his release on bail on the ground that despite his willingness to submit bail bonds he has not be released.

2. The learned counsel appearing on behalf respondents No.1 and 2 states that petitioner would be released on bail, if he furnishes bail bonds to the satisfaction of respondent No.2.

3. In view of what is stated above, this petition is allowed and it is directed that the petitioner be released on bail if he furnishes bail bonds in the sum of Rs.2,00,000/- (Rupees two lac), with two reliable sureties, each in the like amount to the satisfaction of the Assistant Political Agent. Needless to say that it would be the discretion of the petitioner to choose the sureties, while the APA is only required to ensure whether they are men of means or not.

Announced.
16.12. 2009 CHIEF JUSTICE

J U D G E

Peshawar High Court

Abdul Manan --- Appellant/Petitioner (s)

Versus

PA --- Respondent (s)

JUDGMENT

W.P No. 3083/2009 Date of hearing 16.12.2009

EJAZ AFZAL KHAN, CJ.- Petitioner, who has been hauled up in 40 FCR, has asked for his release on bail on the ground that despite his willingness to submit bail bonds he has not be released.

2. The learned counsel appearing on behalf respondents No.1 and 2 states that petitioner would be released on bail, if he furnishes bail bonds to the satisfaction of respondent No.2.

3. In view of what is stated above, this petition is allowed and it is directed that the petitioner be released on bail if he furnishes bail bonds in the sum of Rs.2,00,000/- (Rupees two lac), with two reliable sureties, each in the like amount to the satisfaction of the Assistant Political Agent. Needless to say that it would be the discretion of the petitioner to choose the sureties, while the APA is only required to ensure whether they are men of means or not.

Announced.
16.12. 2009 CHIEF JUSTICE

J U D G E

Peshawar High Court

Raqibullah --- Appellant/Petitioner (s)

Versus

PA --- Respondent (s)

JUDGMENT

W.P No. 3089/2009 Date of hearing 16.12.2009

EJAZ AFZAL KHAN, CJ.- Petitioner, who has been hauled up in 40 FCR, has asked for his release on bail on the ground that despite his willingness to submit bail bonds he has not be released.

2. The learned counsel appearing on behalf respondent No.1 states that petitioner would be released on bail, if he furnishes bail bonds to the satisfaction of respondent No.1.

3. In view of what is stated above, this petition is allowed and it is directed that the petitioner be released on bail if he furnishes bail bonds in the sum of Rs.2,00,000/- (Rupees two lac), with two reliable sureties, each in the like amount to the satisfaction of the Assistant Political Agent. Needless to say that it would be the discretion of the petitioner to choose the sureties, while the APA is only required to ensure whether they are men of means or not.

Announced.
16.12. 2009 CHIEF JUSTICE

J U D G E

Peshawar High Court

Irfanullah --- Appellant/Petitioner (s)

Versus

PA --- Respondent (s)

JUDGMENT

W.P No. 3090/2009 Date of hearing 16.12.2009

EJAZ AFZAL KHAN, CJ.- Petitioners, who have been hauled up in 40 FCR, have asked for their release on bail on the ground that despite their willingness to submit bail bonds they have not be released.

2. The learned counsel appearing on behalf respondent No.1 states that petitioners would be released on bail, if they furnish bail bonds to the satisfaction of respondent No.1.

3. In view of what is stated above, this petition is allowed and it is directed that the petitioners be released on bail if they furnish bail bonds in the sum of Rs.2,00,000/- (Rupees two lac), with two reliable sureties each, each in the like amount to the satisfaction of the Assistant Political Agent. Needless to say that it would be the discretion of the petitioners to choose the sureties, while the APA is only required to ensure whether they are men of means or not.

Announced.
16.12. 2009 CHIEF JUSTICE

J U D G E

Peshawar High Court

Adnan Rustam --- Appellant/Petitioner (s)

Versus

APA etc --- Respondent (s)

JUDGMENT

W.P.No. 2841/2009 Date of hearing 17.12.2009

EJAZ AFZAL KHAN, C.J.- Petitioner through the instant petition seeks his release on bail on the ground that he is declined bail notwithstanding he is ready to furnish the bonds . Mr.Iqbal Ahmad Durrani, Advocate, representing respondents, submits that the petitioner shall be released on bail if he furnishes bail bonds.

2. In this view of the matter, we direct the release of the petitioner on bail, provided he furnishes bail bonds in the sum of Rs.Two lac, with two sureties, each in the like amount to the satisfaction of the respondents.

CHIEF JUSTICE

Announced on
17th December, 2009. J U D G E

Peshawar High Court

Shabbir Sharif Mughal --- Appellant/Petitioner (s)

Versus

SHO, Police S.East Cantt. Peshawar --- Respondent (s)

JUDGMENT

W.P No. 2766/2009 Date of hearing 17.12.2009

EJAZ AFZAL KHAN, CJ.-Petitioner through the instant petition has questioned the order dated 10.10.2009 of the learned Additional Sessions Judge-III, Peshawar, whereby, he dismissed his application for registration of case.

2. The learned counsel appearing on behalf of the petitioner contended that where information given by the petitioner disclosed the commission of a cognizance case, the SHO had no other option but to register a case and that the order of the learned justice of peace being against the dictum of the Supreme Court rendered in the case of **Muhammad Bashir vs. Station House Officer, Okara Cantt: (2007 PLD SC 539),** is liable to be set aside.

3. We have gone through the available record carefully and considered the submissions made by the learned counsel for the petitioner.

4. In view of the nature of the information furnished by the petitioner, we don't think, the only option open before the concerned SHO was to register a case. No hard and fast rule can be laid down in this behalf. Every case having its own facts and circumstances has to be dealt with accordingly. The impugned order being free from any error, excess or absence of jurisdiction, warrants no interference in the exercise of constitutional jurisdiction of this Court.

Peshawar High Court

5. For the reasons discussed above, this Writ Petition being without substance is dismissed in limine.

Announced.
17. 12. 2009

CHIEF JUSTICE

J U D G E

Peshawar High Court

Khairullah --- Appellant/Petitioner (s)

Versus

Wing Commandant (Rtd) Farhad Ali Shah --- Respondent (s)

JUDGMENT

W.P No. 3103/2009 Date of hearing 17.12.2009

EJAZ AFZAL KHAN, CJ.-By this single judgment, we propose to decide Writ Petitions No.3103, 3148, 3149, 3150, 3151, 3163, 3182, 3183, 3184, 3195, 3231 & 3242 of 2009, wherein, the petitioners have challenged the order dated 19.10.2009 of the learned Additional District Judge, Chitral, whereby, he dismissed their appeals and maintained the order dated 01.07.2009 of the learned Rent Controller, Chitral.

2. The main contention of the learned counsel for the petitioners was that the landlord doesn't require the demised premises for reconstruction in good faith because many other premises located in the same vicinity were got vacated on such ground but no demolition or reconstruction has been made so far.

3. We have gone through the available record carefully and considered the submissions made by the learned counsel for the petitioners.

4. The record reveals that the landlord / respondent has asked for ejectment of the petitioners from the demised premises on the ground of reconstruction. He led sufficient evidence to support and substantiate his need. The plan has also been sanctioned for the aforesaid reconstruction. There is nothing in the impugned judgments as could show that they have been based on misreading, non-reading of evidence or erroneous assumptions of law and fact. The learned Courts below after appraising the evidence on the record rightly held that the respondent needs the premises in good faith for reconstruction. We, therefore, don't feel

inclined to interfere with the impugned finding, that too, when the rights of the petitioners to get the demised premises back after reconstruction have been guaranteed by the Courts below.

5. For the reasons discussed above, these Writ Petitions being without substance are dismissed in limine. However, the petitioners may, if so advised, apply for restoration of the demised premises, if they are not demolished within a period of four months after their eviction.

Announced.
17. 12. 2009

CHIEF JUSTICE

J U D G E

Peshawar High Court

Messrs LAL GHEE OIL MILLS (PVT.) LTD. through Chief Executive

Versus

PAKISTAN through Secretary, Finance and Economic Affairs, Islamabad and 9 others

JUDGMENT

W.P Nos. 1134, 1191, 1208, 1239, 1246, 1617/2004, 5, 6, 157, 158/2005, 50, 51, 223, 844, 854/2006 and 1049/2007 Decided on 18th December, 2009

2010 PTD 438 Customs Act (IV of 1969)---

Ejaz Afzal Khan, C.J. and Abdul Aziz Kundi, J ---- S.19---Sales Tax Act (VII of 1990), S.13---Central Excise Act (I of 1944), S.12-B---Constitution of Pakistan (1973), Arts.199 & 247(3)---Constitutional petition---Levy and collection of federal excise and regulatory duty---Exemption of Tribal Areas---Counsel for the petitioner had contended that where the manufacturing units of the' petitioners were located in the tribal areas, anything imported from abroad for their consumption, could not be subjected to the levy of regulatory or excise duty, so long as, the laws imposing such levy, were not extended to such areas---Contention of counsel for department was that since the taxable event for the purposes of Excise Act, 1944, Customs Act, 1969 or Sales Tax, 1990 was import of goods into Pakistan, it was immaterial, whether any of those enactments had been extended to the Tribal Areas or not---Validity---Whether it was regulatory duty, excise duty or sales tax, the taxable event for the purposes of Excise Act, 1944, Customs Act, 1969 or Sales Tax Act, 1990 or S. R. Os. issued thereunder, was import of goods into Pakistan--Once the goods were imported into Pakistan, they were liable to be (axed under said Acts or the S. R. Os. issued thereunder regardless

altogether of the fact that those had been imported for being transported to or consumed in an area where neither of the said enactments or S.R.Os. issued thereunder were applicable---Neither Central Excise Act, 1944 nor the amendments made in the Customs Act, 1969 nor the Sales Tax Act, 1990 including the S.R.Os. issued under those Acts had been extended to the Tribal Areas; but it would be absolutely insignificant when the legislature in its wisdom, had made the levy contingent only upon the import of goods, which had nothing to do with their onward transmission to an area whether settled or tribal---Argument that where none of the said Acts or the S.R.Os. issued thereunder had been extended to the Provincially Administered Tribal Areas or Federally Administered Tribal Area in the terms of Article 247(3) of the Constitution, the department had no authority to levy the duty, was not tenable; it was all the more untenable, when the incidence of levy was independent of all the subsequent events---Import of goods being within the regime of said Acts, could not be exempted from the levy---Levy and collection 'being two different events, levy would become a fait accompli on the arrival of the goods at the seaport notwithstanding the collection was done at a different stage or place.

Messrs Gul Cooking Oil v. Government of Pakistan and others 2002 PTD 2079; Messrs Master Foam (Pvt.) Ltd. and 7 others v. Government of Pakistan and others PLD 2005 SC 373; Messrs Shroof and Co. v. Municipal Corporation of Greater Bombay 1989 Supp (1) SCC 347 and N.B. Sanjana v. Eliphinstone Spinning and Waving Mills AIR 1971 SC 2039 ref.

Isacc Ali Qazi for Petitioners.
Iqbal Mohmand, Dy. A.-G. for Respondents Nos.1, 2.
Raja Muhammad Irshad, S. Muhammad Ghazi, Ozair Kirmat Bandari, Shamshad Ali Cheema, Muhammad Hamayun Khan along with Muhammad Jamil, Law Officer for Respondents Nos. 3 to 5, 7 to 10.
Eid Muhammad Wahallah for Respondent No.6.
Date of hearing: 18th December, 2009.

Peshawar High Court

JUDGMENT

EJAZ AFZAL KHAN, C.J.---By this single judgment, we propose to dispose of Writ Petitions Nos.1134, 1191, 1208, 1239, 1246 and 1617 of 2004, 5, 6, 157 and 158 of 2005, 50, 51, 223, 844 and 854 of 2006 and 1049 of 2007, wherein the petitioners have asked for the issuance of an appropriate writ directing the respondents not to levy and collect the Federal Excise and Regulatory duty on edible oil under any law which has not been extended to the tribal area in terms of Article 247 (3) of the Constitution of Islamic Republic of Pakistan, 1973.

2. The learned counsel appearing on behalf of the petitioners contended that where the manufacturing units of the petitioners are located in tribal area, anything imported from abroad for their consumption cannot be subject to the levy of regulatory or excise duty, so long as, the laws imposing such levy, are not extended to such areas. The learned counsel next contended that levy and collection of even Sales Tax under different hue and colour would also be uncalled for under the law, when the Sales Tax Act has not been extended to the tribal area. The learned counsel then contended that even the issuance of S.R.O.No.503(1) 2004, dated 12-6-2004 is a device to circumvent the provisions of Article 247(3) of the Constitution, therefore, it is also liable to be set at naught. The learned counsel to support his contention placed reliance on the case of Messrs Gul Cooking Oil v. Government of Pakistan and others, 2002 PTD 2079. The learned counsel further contended that though in the case of Messrs Master Foam (Pvt.) Ltd., and 7 others v. Government of Pakistan and others, PLD 2005 SC 373, the taxable event is held to be the import of goods irrespective of their onward transportation to another place but it being the case of AJK does not have any relevance to the instant case, as in the former case any amount of sales tax levied under the Act can be adjusted as an input tax under the provisions of Sales

Tax (Adoption) Act of AJK, while in the latter case its burden is borne by the consumer in the tribal area. The learned counsel by concluding his arguments submitted that the where the goods are taken from the Sea Port to the Bonded Ware House located in the tribal area, levy in any form cannot be collected under any law or S.R.O. issued there under, if it has not been extended to the said and that the amount collected without lawful justification is liable to be refunded.

3. As against that, the learned counsel appearing on behalf of the respondents contended that since the taxable event for the purposes of Excise Act, 1944, Customs Act, 1969 or Sales Tax Act, 1990 is import of goods into Pakistan, it is immaterial whether any of these enactments have been extended to the tribal area or not. The learned counsel next contended that transportation of the goods imported from the Seaport to the Bonded Ware House or postponement in payment of levy cannot change the nature of the taxable event, as levy and payability of duty are two different things. The learned counsel to support his contention placed reliance on the case of Messrs Shroof and Co. v. Municipal Corporation of Greater Bombay, 1989 Supp (1) SCC 347 and the case of NB Sanjana v. Eliphinstone Spinning and Waving Mills, AIR 1971 SC 2039. Claim of refund, the learned counsel added, cannot be urged in a Constitutional petition, as it being related to the turf of factual controversy, cannot be trodden over by this Court in its Constitutional jurisdiction.

4. We have gone through the record carefully and considered the submission of the learned counsel for the parties.

5. Whether it is regulatory duty, excise, duty or Sales Tax, the taxable even for the purpose of Excise Act, 1944, Customs Act,

1969 or Sales Tax Act, 1990 or S.R.Os. issued there under, is import of goods into Pakistan. Once the goods are imported into Pakistan, they are liable to be taxed under the Acts mentioned above or the S.R.Os. issued there under regardless altogether of the fact that those have been imported for being transported to or consumed in an area where neither of the enactments mentioned above or S.R.Os. issued there under are applicable. If is true that neither Central Excise Act, 1944 nor the Amendments made in the Customs Act nor the Sales Tax Act including the S.R.Os. issued under these Acts have been extended to the tribal area, but it would be absolutely insignificant when the legislature in its wisdom, has made the levy contingent only upon the import of the goods into Pakistan. Their subsequent destination is just a terra incognita for the purposes of these enactments and the S.R.Os. issued there under. In the case of Messrs Master Foam (Pvt.) Ltd. and 7 others v. Government of Pakistan and others (Supra), the Honourable Supreme Court after examining the definition of the expression `import' and considering a sting of judgments held as under:--

> "From above it is clear that right from 1963 till date the Courts in Pakistan have consistently given the word `import' its natural and ordinary meaning of `bringing into the country and have rejected the imposition of artificial constraints on it, such as those imposed by the American `doctrine of original package." It being so, we are of the view that there is no scope that the word `import' should be given a different meaning than what appears in section 3(1)(b) of the Act of 1990, especially when there is nothing in the statute to indicate that different meaning was intended by the Legislature. It appears that the Legislature, by not defining he word `import' in the Act of 1990 desired the interpretation of said word in accordance with the following principles:-

> "....When a Legislature uses in a statute a legal term, which has received a judicial `interpretation, it is to be presumed that the term has been used in the sense in which it has been judicially interpreted, unless a contrary intention appears from the statute."

6. Another paragraph which further elucidates the matter reads as under:-

> "Thus, the goods were imported into Pakistan by the appellants when they entered the territory of Pakistan and became liable to taxation accordingly. It is immaterial that ultimately they were to be transported to AJK. This is for the reason that import into Pakistan, is a distinct taxable event independent of any event following thereafter."

7. The above quoted paragraphs leave no doubt in our mind that the taxable event is import of goods, which has nothing to do with their onward transmission to an area whether settled or tribal. Therefore, the argument that where none of the Acts or the S.R.Os. issued there under has been extended to the PATA or FATA in terms of Article 247(3) of the Constitution, the respondents have no authority to levy the duty, is not tenable. It is all the more untenable, when the incidence of levy is independent of all the subsequent events. Such argument would have had some" force, had the business activity carried in the tribal area been subjected to such levy. This is what we held in the case of Messrs Lal Ghee Oil Mills (Pvt.) Ltd. v: Government of Pakistan and 6 others rendered in Writ Petition No.589 of 2005 decided on 28-4-2006 and this is what we re-affirm in the instant cases. We, thus, would not hesitate to hold that the import of goods being within the regime of the Acts mentioned above, cannot be exempted from the levy.

Peshawar High Court

8. The argument that where the goods are taken from the Seaport to the Bonded Ware House located in the tribal area, levy in any form cannot be collected under any law or S.R.O. if it has not been extended to the said area, too, has not impressed us, when levy and collection are two distinct events. The former becomes a fait accompli on the arrival of the goods at the Seaport notwithstanding the latter is done at a different stage or place. The cases of Messrs Shroof and Co. v. Municipal Corporation of Greater Bombay, 1989 Supp (1) SCC 347 and NB Sanjana v. Elphinstone Sinning and Weaving Mills, AIR 1971 SC 2039 may well be referred to in this behalf. The question with regard to refund of the duty collected, thus, does not arise in this backdrop. If at all there is any discrepancy in collection, it being related to the factual controversy can well be urged in a proper forum.

9. Having thus considered, we do not feel inclined to issue with writ asked for. We, therefore, dismiss these writ petitions along with the C.Ms.

H.B.T./7/P
Petition dismissed.

Peshawar High Court

Haji Gul --- Appellant/Petitioner (s)

Versus

APA Barra --- Respondent (s)

JUDGMENT

W.P. No. 3178/2009 Date of hearing 22.12.2009

EJAZ AFZAL KHAN, C.J.- Through this petition, petitioner Wajid Ali seeks his release on bail under 40 FCR. Mr.Iqbal Ahmad Durrani, standing counsel for the respondents, states that he has no objection to the release of the petitioner in 40 FCR. In this view of the matter, respondents are directed to release the petitioner on bail in 40 FCR, if he furnishes bail bonds in the sum of Rs.2 lac, with two sureties, each in the like amount to the satisfaction of the respondents. This petition is disposed of accordingly.

CHIEF JUSTICE

Announced on
11th March, 2010. J U D G E

Peshawar High Court

Fazal Khaliq --- Appellant/Petitioner (s)

Versus

APA --- Respondent (s)

JUDGMENT

W.P. No. 3104/2009 Date of hearing 23.12.2009

EJAZ AFZAL KHAN, C.J.- Through this petition, petitioners seek their release on bail under 40 FCR. Mr.Iqbal Ahmad Durrani, standing counsel for the respondents, states that he has no objection to the release of the petitioners in 40 FCR. In this view of the matter, respondents are directed to release the petitioners on bail in 40 FCR, if they furnish bail bonds in the sum of Rs.2 lac each, with two sureties, each in the like amount to the satisfaction of the respondents. However, for their release in other offences, petitioners have to approach the competent forum. This petition is disposed of.

CHIEF JUSTICE

Announced on
23rd December, 2009. J U D G E

Peshawar High Court

Muhammad Naeem --- Appellant/Petitioner (s)

Versus

Sabeeha Naz --- Respondent (s)

JUDGMENT

W.P.No. 3168/2009 Date of hearing 23.12.2009

EJAZ AFZAL KHAN, C.J.- Through this petition, petitioners seek their release on bail under 40 FCR. Mr.Iqbal Ahmad Durrani, standing counsel for the respondents, states that he has no objection to the release of the petitioners in 40 FCR. In this view of the matter, respondents are directed to release the petitioners on bail in 40 FCR, if they furnish bail bonds in the sum of Rs.2 lac each, with two sureties, each in the like amount to the satisfaction of the respondents. This petition is disposed of.

CHIEF JUSTICE

Announced on

23rd December, 2009. J U D G E

Peshawar High Court

CHERAT CEMENT COMPANY LIMITED---Petitioner

Versus

FEDERATION OF PAKISTAN through Secretary, Industries and Production, Ministry of Industries and Production Islamabad and 2 others---Respondents

JUDGMENT

W.P Nos.1643, 1633/1997,
49, 1540/1999, 481/2001
and 765/2003 Decided on 24th December, 2009
(2010 C L D 226 Peshawar)

(a) Pakistan Standards and Quality Control Authority Act (VI of 1996)---

Ejaz Afzal Khan, C.J. and Mazhar Alam Khan, J ----Ss.2(i)(s), 4, 8, 14, 22 & 37-Constitution of Pakistan (1973), Arts.142 & 199---Powers of the Parliament to Legislate laws---Constitutional petition---Vires of Pakistan Standards and Quality Control Authority Act, 1996-Petitioner had contended that the Parliament had no doubt power to legislate laws in respect of the matter entered in the Federal or the Concurrent Legislative List, but it had no power to legislate in respect of the matters which had not been entered in either of the Lists---Validity--Quality control did not find mention with particularity in the Fourth Schedule of the Federal or Concurrent Legislative List, but it was not an end of the matter---Parliament in view of diverse socio-economic dynamics could legislate in attending the changes around and in the International World-Since law was an instrument for bringing about healthy and wholesome changes in the society, Parliament could legislate in accordance with the day to day requirements Parliament being alive and responsive to the growing needs and other socio-economic dynamics, could not remain static and stationary in its struggle to be at par with other countries in the world, the Parliament of Pakistan had to act and interact with the

world at large and legislate accordingly-Pakistan Standards and Quality Control Authority Act, 1996 was not ultra vires.

Nishat Tek Limited v. The Federation of Pakistan and others PLD 1994 Lah.347; Messrs Nafees Dry Cleaners, Wahadat Road, Lahore v. The Government of Punjab through Secretary Law and Parliamentary Affairs Department, Lahore and another 2001 PTD 2018; Collector of Customs and others v. Sheikh Spinning Mills 1999 SCMR 1402 and Messrs Elahi Cotton Mills Ltd. and others v. Federation of Pakistan through Secretary M/o Finance, Islamabad and 6 others PLD 1997 SC 582 ref.

(b) Interpretation of statutes---

----While interpreting statute, provision could not be read in isolation and wrest meaning according to one's whim and caprice--While doing so it must be consciously sought to mould the law to serve the need of the time-While interpreting one must not act like a mechanic or a working mason having brick on brick without thought to the overall scheme--Approach or outlook should be akin to that of an architect who thought of the structure as a whole.

Isaac Ali Qazi along with Arif Raza for Petitioner.

Iqbal Mahmood, D.A.-G. for Respondents Nos. 1 and 2.

Abdul Latif Afridi for Respondent No.3.

Date of hearing: 23rd December, 2009.

JUDGMENT

EJAZ AFZAL KHAN, C.J.---By this single judgment, we propose to decide Writ Petitions Nos.1643, 1633 of 1997, 49, 1540 of 1999, 481 of 2001, 765 of 2003, wherein the petitioners have challenged

the vires of Pakistan Standards Quality Control Authority Act, 1996, on almost identical grounds.

2. Learned counsel appearing on behalf of the petitioners by referring to Article 142 of the Constitution of Islamic Republic of Pakistan, 1973, contended that the Parliament has, no doubt, power to legislate laws in respect of the matters entered in the Federal or the Concurrent Legislative List but it has no power to legislate in respect of the matters, which have not been entered in either of the Lists. The learned counsel next contended that where no authority has yet been established in terms of section 3 of the Act. S.R.O. 705 (1) of 2001 dated 10-10-2001 and the letter dated 23-1-2002, being without jurisdiction and lawful authority are liable to be struck down. Pakistan Standard 1654 of 1999, the learned counsel added, issued by the Pakistan Standard Institution, is also without lawful authority, when the said Institution stood dissolved by virtue of section 37 of the Act. The learned counsel next contended that this Standard is all the more illegal, when it has been established in violation of section 2(j)(s) of the Act, inasmuch as the persons affected by it were not taken on the Board, while drawing up the technical specification. The respondents have no power, the learned counsel further added, to impose a tax on production in the garb of fee, when they render no service in lieu thereof. The learned counsel by concluding his arguments submitted that sections 14 and 22 of the Act are also ultra vires, when they are outside the scope of Federal and Concurrent Legislative List. The learned counsel to support his contention placed reliance on the cases of Nishat Tek Limited v. The Federation of Pakistan and others PLD 1994 Lahore 347, Messrs Nafees Dry Cleaners Wahadat Road, Lahore v. The Government of Punjab through Secretary Law and Parliamentary Affairs °Department, Lahore and another 2001 PTD 2018, and Collector of Customs and others v. Sheikh Spinning Mills 1999 SCMR 1402.

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3. As against that, the learned counsel appearing on behalf of the respondents by referring to entry at serial No.59 in the Federal Legislative List, submitted that the Parliament has the power to legislate in respect of the matter incidental or ancillary to any matter enumerated in the List. The learned counsel next contended that where 153 countries including Pakistan signed the World Trade Organization and has been required to conform to the International Standards, the Parliament can legislate with regard to the matters falling within the domain of the Province, if the objects and business travel beyond the Province and that this is what the entry at serial No.30 of the Fourth Schedule refers to and that this is, what is done in India under the aegis of Bureau of Indian Standard. Most of the petitioners, the learned counsel submitted, pay what they are required to pay under the aforesaid Bureau, as is evident from the entries downloaded through the network. The learned counsel by referring to sections 4 and 8 of the Act submitted that where general direction and administration of the authority and its affairs stand vested in the Board, the Board can exercise the power and do all acts and things done by the authority notwithstanding the authority in terms of section 3 of the Act has not been established. While dealing with the argument of the learned counsel for the petitioners addressed on the strength of section 2 (j)(s), the learned counsel for the respondents contended that the petitioner was not required to be taken on the Board as it was concerned with filling of bottles and those who manufacture concentrates were consulted and taken into confidence while drawing up the technical specification and other things connected therewith. Sections 14 and 22, the learned counsel affirmed, are also within the legislative competence of the Parliament for the reasons envisaged by the entry at serial No.30 of the Federal Legislative List. The learned counsel while dealing with the argument of the learned counsel for the petitioners, vis-a-vis the vires of the Act submitted that an Act or Law can only be declared, ultra vires, if it is repugnant to and inconsistent with the fundamental rights and that where there is nothing of that sort, its vires cannot be questioned. The learned counsel to support his contention placed reliance on the case of Messrs Elahi Cotton Mills Ltd. and others v. Federation of Pakistan through, Secretary

M/o Finance, Islamabad and 6 others PLD 1997 SC 582. The learned counsel, while controverting the argument regarding fee without service, submitted that when a lot many things as enumerated in section 8 of the Act, are done by the Board, it is not correct that fee is levied without any service.

4. We have gone through the record carefully and considered the submissions of the learned counsel for the parties.

5. Granted that quality control does not find mention with particularity in the Fourth Schedule of the Federal or Concurrent Legislative List but it is not an end of the matter. Parliament in view of diverse socio-economic dynamics can legislate in attending the changes around and in the International World. Many other entries in the Federal Legislative List provide for legislation and enlarge its scope, as is evident from the entries at serial Nos.3, 25, 30, 32, 54 and 59. In case they do not, which is not so here, it would be against the spirit of the sovereignty of Parliament to cabin or confine it to Federal or Concurrent Legislative List. Since law is an instrument for bringing about healthy and wholesome changes in the society, Parliament can legislate in accordance with the day to day requirements. It being alive and responsive to the growing needs and other socio-economic dynamics cannot remain static and stationary. In its struggle to be at par with other countries in the World, the Parliament of this country has to act and inter-act with the World at large and thus legislate accordingly. Once it entered into an agreement with 153 countries, it is supposed to conform to the International Standards notwithstanding some of the products manufactured by its Industrial Units are meant for home consumption. Their standardization is nevertheless imperative and so is the legislation made by the Parliament in this behalf. It would be a step-forward and not a step-backward. Fresh legislation on this plane was all the more desirable and even necessary, when the previous law in operation required revamping

and updating in view of the changed National and International Secenario. Therefore, cannot be questioned on the basis of a pedantic or hyper-technical argument. In the case of Ailessrs Elahi Cotton Mills Ltd. and others v. Federation of Pakistan through Secretary M/o Finance, Islamabad and 6 others (supra), the apex Court while dealing with similar situation held as under:--

> "Keeping in view the above case-law and the treatises and the afore-said legal inferences drawn therefrom, we may now revert to the question of vires of impugned sections. It may again be observed that the power to levy taxes is a sine qua non for a State. In fact it is an attribute of sovereignty of a State. It is mandatory requirement of a State as it generates financial resources which are needed for running a State and for achieving the cherished goal, namely; to establish a welfare State. In this view of the matter, the Legislature enjoys plenary power to impose taxes within the framework of the Constitution. It has prima facie power to tax whom it chooses, power to exempt whom it chooses, power to impose such conditions as to liability or as to exemption as it chooses, so long as they do not exceed the mandate of the Constitution. It is also apparent that the entries in the Legislative List of the Constitution are not powers of legislation but only fields of legislative heads. The allocation of the subjects to the lists is not by way of scientific or logical definition but by way of mere simple enumeration of broad catalogue. A single tax may derive its sanction from one or more entries and many taxes may emanate from one single entry. It is needless to reiterate that it is a well-settled proposition of law that an entry in the Legislative List must be given a very wide and liberal interpretation. The word "income" is susceptible as to include not only what is in ordinary parlance it conveys or it is understood, but what is deemed to have arisen or accrued. It is also manifest that income tax is not only levied in the conventional manner i.e. by working out the

net income after adjusting admissible expenses and other items, but the same may be levied on the basis of gross receipts, expenditure etc. there are new species of income tax, namely, presumptive tax and minimum tax."

6. We, thus, do not agree with the contention of the learned counsel for the petitioners that Pakistan Standards and Quality Control Act, 1996 is ultra vires.

7. The argument that no action could be taken against the petitioners unless the authority in terms of section 3 of the Act has been established, no doubt, sounds ingenious, but when we keep in view the overall scheme in general and provisions contained in section 4 of the Act in particular, the argument appears to be void and vacuous, both legally and logically. The Board constituted under section 5 of the Act, can exercise all the powers vested in the authority. Any such exercise by the Board cannot be held unlawful, simply because such powers can also be exercised by the authority as well. We need not reiterate that we while interpreting a Statute cannot read a provision in isolation and wrest meaning according to our whim and caprice. We while doing so trust consciously seek to mould the law to serve the 'needs of the time. We must not act like a mechanic or a working mason laying brick on brick without thought to the overall scheme. Our approach or outlook should be akin to that of an architect who thinks of the structure as a whole. Only in this way, in the words of Lord Denning, we can build a system of law for the society which would be just, strong and durable. We, therefore, are least moved even by the second argument of the learned counsel for the petitioners. The other arguments, too, would lose their force, once we hold that the first two are devoid of force. Similarly the argument addressed with reference to the provisions of section 20)(s) of the Act needs not further comments, when it has been befittingly answered by the learned counsel for the respondents.

Peshawar High Court

8. The argument regarding the imposition of tax on production in the garb of market fee is also without force, when we see that numerous services are rendered by the Board under the umbrella of the Act to ensure the standardization and quality control of the products. Reference to section 8 of the Act would be quite relevant on this score. This is what is done by the Bureau of Indian Standard, where even some of the petitioners pay more than what they are required to pay under this Act for almost the same service. The cases of Nishat Tek Limited v. The Federation of Pakistan and others, Messrs Nafees Dry Cleaners, Wahadat Road, Lahore v. The Government of Punjab through Secretary Law and Parliamentary Affairs Department, Lahore and another and Collector of Customs and others v. Sheikh Spinning Mills (supra) cited by the counsel for the petitioners being distinguishable on legal and factual plane do not support their case. They rather appear to be in line with the ratio rendered in the case of Messrs Elahi Cotton Mills Ltd. and others v. Federation of Pakistan through Secretary M/o Finance, Islamabad and 6 others (supra). Even otherwise, we would not like to subscribe to the view canvassed at the Bar by the learned counsel for the petitioners, when the object behind it is to get complete emancipation from all the checks and balances which are primarily meant to ensure standardization of the products. We, thus, do not feel inclined to issue the writ asked for.

9. For the reasons discussed above, these writ petitions being without substance are dismissed.

M.H./10/P

Petitions Dismissed

Peshawar High Court

Khairullah --- Appellant/Petitioner (s)

Versus

APA --- Respondent (s)

JUDGMENT

W.P.No. 1310/2009 Date of hearing 19.01.2010

EJAZ AFZAL KHAN , C.J.- Petitioner through the instant petition has asked for the issuance of an appropriate writ treating him at par with his co-accused whose sentence of imprisonment has been reduced to the one already undergone and that of fine has also been reduced to Rs.20000/-, vide judgment dated 22-7-2009 of this court rendered in J.Writ petition No.1576 of 2009.

2. The learned counsel for the respondent does not dispute the above-stated position.

3. We have gone through the record and considered the submissions thus made.

4. Since in the same case, this court in a petition against the same impugned judgment has reduced the sentence to the one already undergone by following the judgments of the Apex Court and the provision of Section 35 of the P.P.C., we would also like to treat him alike. The sentence thus awarded to the petitioner is reduced to the one already undergone while that of fine of Rs.50000/- is also reduced to Rs.20000/- or in default to undergo two months S.I. In case the petitioner deposits the amount of fine in court today or any other working day, he be released forthwith, if not required in any other case.

CHIEF JUSTICE

Announced on
19th January.2010

J U D G E

Peshawar High Court

Zia Ullah --- Appellant/Petitioner (s)

Versus

The State --- Respondent (s)

JUDGMENT

W.P. No. 3295/2009 Date of hearing 21.01.2010

EJAZ AFZAL KHAN, C.J.- Petitioner Ziaullah was charged for the murder of deceased Bakht Rawan. A case under Section 302 PPC was registered against him at Police Station Mingora, Swat, vide FIR No.570, dated 17.4.1989. He was sent to the court of learned Sessions Judge for trial who sentenced him to imprisonment for life under Section 302(b) PPC and directed him to pay a compensation of Rs.2 lac to the legal heirs of the deceased under Section 544-A Cr.P.C., vide judgment dated 13-9-1999. He preferred an appeal against his conviction and sentence which was dismissed, vide judgment dated 4-7-2002 of this Court. Now he, through the instant petition, has asked for his release on the ground that in default of payment of compensation, he could not be detained for more than six months which he has already undergone and that the jail authorities by refusing his release are refusing to do what they are required by law to do.

2. We have gone through the record and have also considered the submissions made by the learned counsel for the parties.

3. Learned Additional Advocate General appearing on behalf of the State does not dispute the proposition so broached at the bar and rightly so because in default of payment of compensation, the convict cannot be kept in jail for more than six months. The more so, when the compensation so awarded to the legal heirs of the deceased can be recovered from him as arrears of land revenue.

4. For the reasons discussed above, this petition is allowed and the petitioner is directed to be released forthwith, if not required in any other case.

CHIEF JUSTICE

Announced on
21st January, 2010. J U D G E

Peshawar High Court

Abdul Rab --- Appellant/Petitioner (s)

Versus

Mst. Slerin Taj --- Respondent (s)

JUDGMENT

W.P. No. 2778/2009 Date of hearing 26.01.2010

EJAZ AFZAL KHAN, C.J.- Petitioners through the instant petition have questioned the order dated 5-10-2009 of the learned Additional Sessions Judge-VI, Peshawar, whereby he dismissed their application, for dismissal of the complaint filed by the respondent under Section 3 of the Illegal Dispossession Act.

2. The learned counsel appearing on behalf of the petitioners contended that once civil suits are pending between the parties and respondent according to the averments made in the complaint has left the house of her own accord, no case under Section 3 of the Illegal Dispossession Act is made out.

3. As against that, learned counsel appearing for the respondent by referring to the judgments of the civil Court, tried to canvass at the bar that the respondent has been held to be in possession of the house in dispute. Learned counsel also made reference to the pleadings of the petitioners wherein the factum of the possession with the respondent is also admitted by them.

4. We have gone through the record carefully and have also considered the submissions made by the learned counsel for the parties.

5. Whether a case under Section 3 of the Illegal Dispossession Act against the petitioners is made out in view of the facts urged by the petitioners and disputed by the respondent and vice versa, is a question which can only be determined by the trial

court after recording evidence. We, at this stage, do not feel inclined to make deeper appreciation of evidence that too in exercise of our Jurisdiction under Article 199 of the Constitution. Therefore, this petition being without merit is dismissed.

CHIEF JUSTICE

Announced on
26th Jan. 2010..

J U D G E

Peshawar High Court

Abdul Rauf --- Appellant/Petitioner (s)

Versus

SMBR --- Respondent (s)

JUDGMENT

W.P. No. 2205/2009 Date of hearing 26.01.2010

EJAZ AFZAL KHAN, C.J.- Petitioner through the instant petition has asked for the issuance of an appropriate writ declaring the order dated 26-8-2009 as having been passed without jurisdiction and lawful authority.

3. The learned counsel appearing on behalf of respondent No.5 contended that the posting and transfer being related to the terms and conditions of service can well be urged before the Departmental Authority and then before the Service Tribunal and that this court in view of the bar contained in Article 212(2) of the Constitution, cannot step in.

4. We have gone through the record carefully and have also considered the submissions made by the learned counsel for the parties.

5. Since it has consistently been held in the cases of **Miss Rukhsana Ijaz Vs Secretary Education Punjab and others (1997 SCMR 167) Ayyaz Anjum Vs Government of Punjab, Housing and Physical Planning Department through Secretary and others (1997 SCMR 169), Rafique Ahmad Chaudhry Vs. Ahmad Nawaz Malik and others (1997 SCMR 170), Peer Muhammad Vs Government of Balouchistan through Chief Secretary and others (2007 SCMR 54) and Zahid Akhtar Vs. Government of Punjab through Secretary, Local Government and Rural Department, Lahore and 2 others (PLD 1995 Supreme Court 530)** by the Honourable Supreme Court that

transfer and posting being related to the terms and conditions of service fall within the exclusive domain of the service Tribunal, High Court cannot step in to interfere with such matters. In this view of the matter, we would not like to seek byways and sideways to assume a jurisdiction which is not conferred on us by the Constitution.

6. Since learned counsel for the petitioner submits that no representation has been made to the Departmental authority against the impugned order, we by treating this petition as a representation to the Departmental authority, send it to the Senior Member Board of Revenue NWFP, for decision on merits in accordance with law.

CHIEF JUSTICE

Announced on
26th Jan. 2010.. J U D G E

Peshawar High Court

Gul Zaman --- Appellant/Petitioner (s)

Versus

Government --- Respondent (s)

JUDGMENT

W.P. No. 3435/2010 Date of hearing 28.01.2010

EJAZ AFZAL KHAN, C.J.- Petitioner through the instant petition seeks the issuance of an appropriate writ directing the respondents to release the detenues on bail. Mr.Iqbal Ahmad Durrani, standing counsel for the respondents, states that he has no objection to the release of the detenues in 40 FCR while Qamar Gul involved in criminal cases cannot be released.

2, This petition is thus allowed and the respondents are directed to release the detenues on bail in 40 FCR, provided they furnish bail bonds in the sum of Rs.2 lac each, with two sureties, each in the like amount to the satisfaction of the respondents. Since Qamar Gul detenue is also involved in criminal cases, he may, if so advised, approach the competent forum for his release. This petition is disposed of accordingly.

CHIEF JUSTICE

Announced on
28th January, 2010. J U D G E

Peshawar High Court

Muhammad Azeem --- Appellant/Petitioner (s)

Versus

Chief Engineer --- Respondent (s)

JUDGMENT

W.P No. 247/2010 Date of hearing 28.01.2010

EJAZ AFZAL KHAN, CJ.-Petitioner through the instant petition has asked for issuance of an appropriate writ declaring the order dated 01.01.2010 of respondent No.1 as being void, illegal, arbitrary, mala fide and without lawful authority.

2. We have gone through the available record carefully and considered the submissions made by the learned counsel for the petitioners.

3. Since in view of the judgments rendered in the cases of ***Miss Rukhsana Ijaz vs. Secretary, Education, Punjab & others (1997 SCMR 167); Ayyaz Anjum vs. Government of Punjab, Housing and Physical Planning Department through Secretary and others (1997 SCMR 169); Rafique Ahmad Chaudhry vs. Ahmad Nawaz Malik & others (1997 SCMR 170); Secretary Education NWFP, Peshawar and 2 others vs. Mustamir Khan & another (2005 SCMR 17) and Peer Muhammad vs. Government of Baluchistan through Chief Secretary & others (2007 SCMR 54)***, posting and transfer being related to the terms and condition of service can be urged before the departmental authority and then the learned Service Tribunal, this Court, while exercising its jurisdiction under Article 199 of the Constitution of Islamic Republic of Pakistan, can't step-in, atleast, at this stage. Since the petitioner has already filed a representation before the departmental authority, we direct respondent No.2 to

decide it in accordance with law within a fortnight. This writ petition is disposed of accordingly.

Announced.
28. 01. 2010

CHIEF JUSTICE

J U D G E

Peshawar High Court

Aurangzeb --- Appellant/Petitioner (s)

Versus

Education Ministry --- Respondent (s)

JUDGMENT

W.P No. 2886/2009 Date of hearing 28.01.2010

EJAZ AFZAL KHAN, CJ.-Petitioners through the instant petition have questioned the order dated 22.10.2009 of respondent No.5, whereby, they have been transferred from the executive posts to different schools.

2. The learned counsel appearing on behalf of the petitioners contended that when a minister can only advise the Governor, in view of the provisions contained in Article 129 of the Constitution of Islamic Republic of Pakistan, 1973, he has no power to dictate any Executive District Officer for transferring any civil servant from one post to another and that the impugned order being male fide, coram-non-judice and without lawful authority is liable to be set at naught.

3. We have gone through the available record carefully and considered the submissions made by the learned counsel for the petitioners.

4. Since in view of the judgments rendered in the cases of ***Miss Rukhsana Ijaz vs. Secretary, Education, Punjab & others (1997 SCMR 167); Ayyaz Anjum vs. Government of Punjab, Housing and Physical Planning Department through Secretary and others (1997 SCMR 169); Rafique Ahmad Chaudhry vs. Ahmad Nawaz Malik & others (1997 SCMR 170); Secretary Education NWFP, Peshawar and 2 others vs. Mustamir Khan & another (2005 SCMR 17) and Peer Muhammad vs. Government of Baluchistan through Chief Secretary & others (2007 SCMR 54)***, posting and transfer being related to the terms and condition of service can be urged before

the departmental authority and then the Service Tribunal, this Court, while exercising its jurisdiction under Article 199 of the Constitution of Islamic Republic of Pakistan, can't step-in, notwithstanding, the Hon'ble Supreme Court in case of ***Zahid Akhtar vs. Government of Punjab through Secretary, Local Government and Rural Development, Lahore & 2 others (PLD 1995 SC 530)***, condemned the phenomenon of passing orders of transfer and posting of civil servants on the dictates of the elected representatives in the following words: -

> *"We need not stress here that tamed and subservient bureaucracy can neither be helpful to Government nor it is expected to inspire public confidence in the administration. Good governance is largely dependent on an upright, honest and strong bureaucracy. Therefore, mere submission to the will of superior is not a commendable trait in a bureaucrat. Elected representatives placed as Incharge of administrative departments of Government are not expected to carry with them a deep insight in the complexities of administration. The duty of a bureaucrat, therefore, is, to apprise these elected representatives the nicety of administration and provide them correct guidance in discharge of their functions in accordance with the law. Succumbing to each and every order or direction of such elected functionaries without bringing to their notice, the legal infirmities in such orders / directions may sometimes amount to an act of indiscretion on the part of bureaucrats, which may not be justifiable on the plane of hierarchical discipline. It hardly needs to be mentioned that a Government servant is expected to comply only those orders/ directions of his superior, which are legal and within his competence. Compliance of an illegal or an incompetent direction/order can neither be justified on the plea that it came from a superior authority nor it could be defended on the*

ground that its non-compliance would have exposed the concerned Government servant to the risk of disciplinary action."

5 It is shocking to note that the Government functionaries, despite clear-cut directives of the Apex Court, pass orders of posting and transfer by behaving like pawn and plaything in the hands of Ministers, MNAs and MPAs, who have nothing to do with such matters in view of the provisions contained in Article 129 of the Constitution. Another shocking aspect of the case is that representations, filed against such orders are not heeded to despite repeated reminders.

6. We, thus, direct the respondents to pass such orders in future strictly in the interest of public service and not on any other consideration. We, while disposing of this petition also direct respondent No.2 to 4 to dispose of the representations of the petitioners as expeditiously as possible but not later than ten days.

Announced.
28. 01. 2010

CHIEF JUSTICE

J U D G E

Peshawar High Court

Gul Zameen --- Appellant/Petitioner (s)

Versus

APA --- Respondent (s)

JUDGMENT

W.P.No. 3331/2009 Date of hearing 28.01.2010

EJAZ AFZAL KHAN, C.J.- Mr.Iqbal Ahmad Durrani, learned counsel for the respondents states that though all the detenues have been detained in 40 FCR, yet one of the detenues, namely Qamar Gul is also involved in other criminal cases. In view of the statement, all the detenues are directed to be released in 40 FCR if they furnish bail bonds in the sum of Rs.2 lac each, with two sureties, each in the like amount to the satisfaction of the respondents. However, for his release in other offences, detenue Qamar Gul may, if so advised, approach the competent forum. This petition is disposed of accordingly.

CHIEF JUSTICE

Announced on
28th January, 2010. J U D G E

Mst. Ambar --- Appellant/Petitioner (s)

Versus

Government --- Respondent (s)

JUDGMENT

W.P. No. 241/2008 Date of hearing 02.02.2010

EJAZ AFZAL KHAN, C.J.- During the course of hearing, both the parties made references to certain certificates in support of their arguments. According to one set of certificates, the educational facilities for science subjects was not available at the relevant time while according to the latter it was. Though we summoned the concerned Officers who issued the said certificates, but their statements made while being examined in chief, did not clarify the dispute as the counsel for the other side wanted to cross-examine them on many scores. When this being the state of things, we are afraid this writ petition would go outside the domain of constitutional jurisdiction of this court because it while exercising Constitutional jurisdiction cannot inter into the turf of factual controversy. Learned counsel for the petitioner, who is a seasoned lawyer and conversant with the import and implications of the controversy thus cropping-up, wants to withdraw this petition with permission to approach the civil competent forum.

2. This petition is, therefore, dismissed as withdrawn. However, the petitioner, if so advised, may approach the civil competent forum.

CHIEF JUSTICE

Announced on
2nd February,2010. J U D G E

Peshawar High Court

Shah Alam Khan --- Appellant/Petitioner (s)

Versus

Government --- Respondent (s)

JUDGMENT

W.P No. 78/2010 Date of hearing 02.02.2010

EJAZ AFZAL KHAN, CJ.- Petitioner through the instant petition has asked for the issuance of an appropriate writ directing the respondents to treat him at par with M/s Sikandar Azam Sahibzada, Sher Muhammad Khan, Attaullah Khan and Muhammad Faheem Jan.

2. The learned counsel appearing on behalf of the petitioner contended that since many other Public Prosecutors have been given benefits in accordance with the notification dated 15.02.2007, petitioner couldn't be treated differently. The learned counsel next contended that another amazing aspect of this case is that even his representation has not so far been decided by the departmental authority.

3. We have gone through the available record carefully and considered the submissions made by the learned counsel for the petitioner.

4. Since the question urged before us being related to the terms and condition of service, can't be gone into by this Court while hearing a petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, all the same we can't be debarred for issuing a direction to the departmental authority to decide the representation of the petitioner urging the questions highlighted above in accordance with law within a fortnight. This petition is disposed of accordingly.

Announced.
02. 02. 2010

CHIEF JUSTICE
J U D G E

Peshawar High Court

Mst. Noushaba Nisar --- Appellant/Petitioner (s)

Versus

EDO --- Respondent (s)

JUDGMENT

W.P No. 3321/2009 Date of hearing 02.02.2010

EJAZ AFZAL KHAN, CJ.- Petitioner through the instant petition has asked for the issuance of an appropriate writ declaring the order dated 17.11.2009 of respondent No.1 as having been passed without jurisdiction and lawful authority.

2. Since the question urged before us being related to the terms and condition of service, can't be gone into by this Court while hearing a petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, we wouldn't like to come to the rescue of the petitioner atleast at this stage. Since, according to the statement of the learned counsel, the petitioner has already filed a representation before the departmental authority against the impugned order, we direct that it be disposed of as early as possible but not later than two weeks. This petition is disposed of accordingly.

Announced.
02. 02. 2010 CHIEF JUSTICE

J U D G E

Peshawar High Court

Bilal Shaukat --- Appellant/Petitioner (s)

Versus

NWFP Agricultural University --- Respondent (s)

JUDGMENT

W.P.No. 166/2010 Date of hearing 02.02.2010

EJAZ AFZAL KHAN, C.J.- During the course of hearing, both the parties made references to certain certificates in support of their arguments. According to one set of certificates, the educational facilities for science subjects was not available at the relevant time while according to the latter it was. Though we summoned the concerned Officers who issued the said certificates, but their statements made while being examination in chief, did not clarify the dispute as the counsel for the other side wanted to cross-examine them on many scores. When this being the state of things, we are afraid this writ petition goes out of the domain of constitutional jurisdiction of this court because this court while exercising its jurisdiction under the said Provision cannot enter into turf of factual controversy. Learned counsel for the petitioner who is a seasoned lawyer and conversant with the import and implications of the controversy thus cropped us before us, wants to withdraw this petition with permission to approach the civil competent forum.

2. This petition is, therefore, dismissed as withdrawn. However, the petitioner, if so advised, may approach the civil competent forum.

CHIEF JUSTICE

Announced on
2nd February,2010. J U D G E

Peshawar High Court

Miss Nadia Begum --- Appellant/Petitioner (s)

Versus

Government --- Respondent (s)

JUDGMENT

W.P No. 3018/2009 Date of hearing 03.02.2010

EJAZ AFZAL KHAN, CJ.-Petitioner through the instant petition has asked for issuance of an appropriate writ directing the respondents to pass an order regarding posting and transfer in accordance with the policy enunciated by the Government.

2. We have gone through the available record carefully and considered the submissions made by the learned counsel for the petitioner.

3. Since it has been consistently held by the Apex Court that the posting and transfer being related to the terms and condition of service can be urged before the departmental authority and then the Service Tribunal, this Court, while exercising its jurisdiction under Article 199 of the Constitution of Islamic Republic of Pakistan, can't step-in. Reference may well be made to the cases of ***Miss Rukhsana Ijaz vs. Secretary, Education, Punjab & others (1997 SCMR 167); Ayyaz Anjum vs. Government of Punjab, Housing and Physical Planning Department through Secretary and others (1997 SCMR 169); Rafique Ahmad Chaudhry vs. Ahmad Nawaz Malik & others (1997 SCMR 170); Secretary Education NWFP, Peshawar and 2 others vs. Mustamir Khan & another (2005 SCMR 17) and Peer Muhammad vs. Government of Baluchistan through Chief Secretary & others (2007 SCMR 54).*** As the representation filed by the petitioner before the departmental authority has been rejected vide order dated 12.11.2009, we by following the dictum rendered in the case of ***Muhammad Anis & others vs. Abdul Haseeb & others (PLD 1994 SC 539)***, treat this petition as an

appeal before the Tribunal and direct the office to send it thereto for decision in accordance with law. This writ petition, thus, stands disposed of.

Announced.
03. 02. 2010

CHIEF JUSTICE

J U D G E

Peshawar High Court

Abdul Aziz --- Appellant/Petitioner (s)

Versus

The State --- Respondent (s)

JUDGMENT

W.P No. 20/2010 Date of hearing 04.02.2010

EJAZ AFZAL KHAN, CJ.-Petitioners, who have been hauled up in 40 FCR, asked for the issuance of an appropriate writ directing the respondents to release them on bail.

2. The learned Additional Advocate General and standing counsel for the political authorities have no objection to the release of the petitioners, if they furnish bail bonds to the satisfaction of the Assistant Political Agent.

3. In view of what is stated above, this petition is allowed and it is directed that the petitioners be released on bail if each of them furnishes bail bonds in the sum of Rs.2,00,000/- (Rupees two lac), with two reliable sureties, each in the like amount to the satisfaction of the Assistant Political Agent.

Announced.
04. 02. 2010 CHIEF JUSTICE

J U D G E

Peshawar High Court

Jaffar --- Appellant/Petitioner (s)

Versus

The State --- Respondent (s)

JUDGMENT

W.P (No. 22/2010 Date of hearing 04.02.2010

EJAZ AFZAL KHAN, CJ.-Petitioner, who has been hauled up in 40 FCR, asked for the issuance of an appropriate writ directing the respondents to release him on bail.

2. The learned Additional Advocate General and standing counsel for the political authorities have no objection to the release of the petitioner, if he furnishes bail bonds to the satisfaction of the Assistant Political Agent.

3. In view of what is stated above, this petition is allowed and it is directed that the petitioner be released on bail if he furnishes bail bonds in the sum of Rs.2,00,000/- (Rupees two lac), with two reliable sureties, each in the like amount to the satisfaction of the Assistant Political Agent.

Announced.
04. 02. 2010 CHIEF JUSTICE

J U D G E

Peshawar High Court

Muhammad Munir --- Appellant/Petitioner (s)

Versus

The State --- Respondent (s)

JUDGMENT

W.P No. 29/2010 Date of hearing 04.02.2010

EJAZ AFZAL KHAN, CJ.-Petitioner, who has been hauled up in 40 FCR, asked for the issuance of an appropriate writ directing the respondents to release him on bail.

2. The learned Additional Advocate General and standing counsel for the political authorities have no objection to the release of the petitioner, if he furnishes bail bonds to the satisfaction of the Assistant Political Agent.

3. In view of what is stated above, this petition is allowed and it is directed that the petitioner be released on bail if he furnishes bail bonds in the sum of Rs.2,00,000/- (Rupees two lac), with two reliable sureties, each in the like amount to the satisfaction of the Assistant Political Agent.

Announced.
04. 02. 2010 CHIEF JUSTICE

J U D G E

Peshawar High Court

Said Muhammad --- Appellant/Petitioner (s)

Versus

The State --- Respondent (s)

JUDGMENT

W.P No. 28/2010 Date of hearing 04.02.2010

EJAZ AFZAL KHAN, CJ.-Petitioner, who has been hauled up in 40 FCR, asked for the issuance of an appropriate writ directing the respondents to release him on bail.

2. The learned Additional Advocate General and standing counsel for the political authorities have no objection to the release of the petitioner, if he furnishes bail bonds to the satisfaction of the Assistant Political Agent.

3. In view of what is stated above, this petition is allowed and it is directed that the petitioner be released on bail if he furnishes bail bonds in the sum of Rs.2,00,000/- (Rupees two lac), with two reliable sureties, each in the like amount to the satisfaction of the Assistant Political Agent.

Announced.
04. 02. 2010 CHIEF JUSTICE

J U D G E

Peshawar High Court

Prof: Muhammad Tariq --- Appellant/Petitioner (s)

Versus

Government of KPK --- Respondent (s)

JUDGMENT

W.P No. 3061/2009 Date of hearing 09.02.2010

EJAZ AFZAL KHAN, CJ.- Petitioner through the instant petition has asked for issuance of an appropriate writ restraining the respondents from proceeding against him, as he after his retirement on attaining superannuation, cannot be proceeded against under Fundamental Rule 54(A).

2. We have gone through the available record carefully and considered the submissions made by the learned counsel for the petitioner.

3. Since the petitioner in view of Section 2(a) of the Service Tribunal Act, 1974 falls within the definition of a civil servant, he can, urge these questions before the departmental authority and then before the Service Tribunal, therefore, this Court under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 can't step in. We, however, by following the dictum rendered in the case of ***Muhammad Anis & others vs. Abdul Haseeb & others (PLD 1994 SC 539)***, treat this petition as representation before the departmental authority and send it thereto for decision in accordance with law within a period of one month. The office is directed to do the needful. This writ petition, thus, stands disposed of.

Announced.
09. 02. 2010 CHIEF JUSTICE

J U D G E

Peshawar High Court

Farah Akhtar --- Appellant/Petitioner (s)

Versus

WAPDA --- Respondent (s)

JUDGMENT

WP.No. 1693/2006 Date of hearing 10.02.2010

EJAZ AFZAL KHAN, C.J.- By this single judgment we propose to decide W.P.No.1693/2006 (Farah Akhtar Vs. Director Education etc) and W.P.No.1704/2006 (Aamira Nasreen Vs. Director Education etc)wherein the petitioners have asked for the issuance of an appropriate writ directing the respondents to grant them two advanced increments on account of having acquired higher qualification.

2. Learned counsel appearing on behalf of the petitioner contended that once the increments were granted to the petitioners, the same could not be subsequently withdrawn. Learned counsel to support his contention, placed reliance on the cases of **Federation of Pakistan through Secretary, Ministry of Education, Govt. of Pakistan, Islamanbad and others Vs. Qamar Hussain Bhatti and others (PLD 2004 Supreme Court 77), Govt. of the Punjab through the Secretary Education and others Vs. Faqir Hussain and 5 others (2004 PLC (CS) 491)and Mrs.Farkhanda Arif, Principal, L.D.A. Model High School, Lahore Vs. The Lahore Development Authority through Director General, L.D.A.Lahore, and others (2002 P L C (C.S.) 87).**

3. As against that learned counsel appearing on behalf of the respondents contended that advance increments could not be granted to the petitioners under the law, even if at any point of time they were granted ones. The learned counsel next contended that

withdrawal of such grant could not be questioned when they were granted against the law.

4. We have gone through the record and have also considered the submissions made by the learned counsel for the parties.

5. A perusal of the written statement of the respondents filed before the Service Tribunal and then comments filed before this Court reveals that petitioners were granted two advance increments when they acquired higher qualifications. Once they were granted such increments, they could not be withdrawn subsequently. Though the learned counsel for the respondent denied the existence of any such rule or Notification providing for such grant but a look at the relevant Notification, bearing No.F.O.(R&1)/BSP-83/10-126/ 5766-5966, dated 24th August, 1983, would gainsay his this stance. When so, we have no alternative but to allow this petition and direct the respondents to grant the advance increments to the petitioners as asked for.

CHIEF JUSTICE

Announced on
10th Feb. 2010

J U D G E

Peshawar High Court

Haji Musharraf Khan --- Appellant/Petitioner (s)

Versus

CCPO --- Respondent (s)

JUDGMENT

W.P. No. 279/2010 Date of hearing 11.02.2010

EJAZ AFZAL KHAN, C.J.- Since the detenues have since been released, this petition, having become infructuous, is dismissed. However, one of the detenues stated that his release has been made on receipt of Rs.45000/-. When we confronted the learned APA, F.R. Kohat, as to how this release was made on receipt of an amount of Rs.45000/-, he replied that it was a fine imposed on the tribe. When questioned as to how imposition and recovery of fine could be confined to the persons detained, the learned APA attributed it to the time honoured practice in the area. Since the detenue wants to file an application in this behalf before the APA, we would not comment at this stage. However, the APA is directed to dispose of the said application in accordance with law.

CHIEF JUSTICE

Announced on
11th February, 2010. J U D G E

Peshawar High Court

Sawab Gul --- Appellant/Petitioner (s)

Versus

D.D.O. --- Respondent (s)

JUDGMENT

W.P No. 189/2010 Date of hearing 11.02.2010

EJAZ AFZAL KHAN, CJ.-Petitioner through the instant petition has asked for issuance of an appropriate writ declaring his transfer orders dated 29.08.2009 and 23.11.2009 being without jurisdiction and lawful authority.

2. We have gone through the available record carefully and considered the submissions made by the learned counsel for the petitioner.

3. Since in view of the judgments rendered in the cases of ***Miss Rukhsana Ijaz vs. Secretary, Education, Punjab & others (1997 SCMR 167); Ayyaz Anjum vs. Government of Punjab, Housing and Physical Planning Department through Secretary and others (1997 SCMR 169); Rafique Ahmad Chaudhry vs. Ahmad Nawaz Malik & others (1997 SCMR 170); Secretary Education NWFP, Peshawar and 2 others vs. Mustamir Khan & another (2005 SCMR 17) and Peer Muhammad vs. Government of Baluchistan through Chief Secretary & others (2007 SCMR 54),*** posting and transfer being related to the terms and condition of service can be urged before the departmental authority and then the Service Tribunal, this Court, while exercising its jurisdiction under Article 199 of the Constitution of Islamic Republic of Pakistan, can't step-in. As the representation filed by the petitioner before the departmental authority has already been rejected, we by following the dictum rendered in the case of ***Muhammad Anis & others vs. Abdul Haseeb & others (PLD 1994 SC 539)***, treat this petition as an

appeal before the Tribunal and direct the office to send it thereto for decision in accordance with law. This writ petition, thus, stands disposed of.

Announced.
11. 02. 2010

CHIEF JUSTICE

J U D G E

Peshawar High Court

Haji Rehman ---Appellant/Petitioner (s)

Versus

PA Khyber --- Respondent (s)

JUDGMENT

W.P. No. 3022/2009 Date of hearing 16.02.2010

EJAZ AFZAL KHAN, C.J.- Through this petition, petitioner seeks release of the detenue who is hauled up in 40 FCR. Mr.Iqbal Ahmad Durrani, standing counsel for the respondents, states that he has no objection to the release of the detenue in 40 FCR. In this view of the matter, respondents are directed to release the detenue on bail in 40 FCR, if he furnishes bail bonds in the sum of Rs.2 lac, with two sureties, each in the like amount to the satisfaction of the respondents. However, in case the detenue is also hauled up in other criminal cases, he may approach the competent forum. This petition is disposed of.

CHIEF JUSTICE

Announced on
16th Feb, 2010. J U D G E

Peshawar High Court

Amir Saeed etc --- Appellant/Petitioner (s)

Versus

Government --- Respondent (s)

JUDGMENT

W.P No. 924/2008 Date of hearing 16.02.2010

EJAZ AFZAL KHAN, CJ.-Petitioners through the instant petition have asked for issuance of an appropriate writ directing the respondents to implement the Notification No.FD(SO)FR/7-11/2004 dated 26.01.2008 issued by Finance Department and for declaration that notification No.FD(SO)FR/7-11/2004 dated 29.11.2008 being based on mala fide, ulterior motives and against the rights of the petitioners, is liable to be struck down.

2. We have gone through the available record carefully and considered the submissions made by the learned counsel for the parties.

3. Since the questions urged before us can be urged before the Service Tribunal in view of the judgments rendered in the cases of ***I.A. Sharwani & others vs. Government of Pakistan through Secretary, Finance Division, Islamabad & others (1991 SCMR 1041)*** **and** ***The Province of the Punjab & another vs. Kamaluddin & 30 others (PLD 1983 SC 126),*** we wouldn't like to entertain this petition. We, however, treat this writ petition as an appeal before the Service Tribunal and send it thereto for decision in accordance with law by following the dictum rendered in the case of ***Muhammad Anis & others vs. Abdul Haseeb & others (PLD 1994 SC 539)***. This writ petition, thus, stands disposed of.

Announced.
16. 02. 2010 CHIEF JUSTICE

J U D G E

Peshawar High Court

CNG Filling Station --- Appellant/Petitioner (s)

Versus

Federation of Pakistan --- Respondent (s)

JUDGMENT

W.P.No. 282/2009 Date of hearing 18.02.2010

EJAZ AFZAL KHAN, C.J.- By this single judgment, we propose to decide W.P.Nos. 282, 1364, 1829, 1995, 3003, 3008, 3014 and 3015 of 2009 and 81, 82, 83 & 84 of 2010, wherein petitioners have asked for issuance of an appropriate writ:-

(a). Declaring the levy and collection of advance income tax under Division-IV of First Schedule read with Section 235 of the Income Tax Ordinance, 2001, as being of no effect because of its being excessive, arbitrary, discriminatory and unconstitutional;

(b). Declaring that charging of Sales Tax on Electricity Bills under Section 3 of the Sales Tax Act 1990 as being of no effect because of its being excessive, arbitrary, discriminatory & unconstitutional; and

(c). Restraining the respondents from collecting the advance income tax on the amount of the petitioners' electricity bills till final decision of the titled petition and to refund the tax so far collected under Section 3 of the Sales Tax Act under the aforesaid head.

2. The learned counsel appearing on behalf of the petitioners contended that levy of income tax on the Electricity Bills of the assessee being a tax par excellence is outside the scope of Federal Legislative List, hence it is of no legal effect. Learned counsel next contended that any expenditure incurred by the

assessee at its best can be used as a measure for determining his capacity to pay the income tax. The learned counsel next contended that the provision of Section 235 of the Income Tax Ordinance, 2001 besides being confiscatory in nature is also violative of the provision of Article 24 of the Constitution of Islamic Republic of Pakistan, 1973, in as much as it has been levied on the expenditure and not on the income. The sales tax, the learned counsel submitted, on consumption of electricity under Section 3 of the Sales Tax Act, 1990, when includes sales tax in lieu of value addition made by the CNG Stations, would be tantamount to double taxation, hence it too calls for annulment.

3. As against that, learned counsel appearing on behalf of the respondents contended that the impugned provisions are well within the periphery of the Items Nos. 47 and 52 of the Federal Legislative List when construed liberally. When expenditure, the learned counsel added, is an acceptable mode for determination of the capacity of an assessee to pay, it can well be used to determine the liability of a tax payer. Learned counsel to support his contention placed reliance on the case of M/s Illahi Cotton Mills and other Vs. Federation of Pakistan & others (PLD 1997 Supreme Court - 582).

4. We have gone through the record carefully and have also considered the submissions made by the learned counsel for the parties.

5. Before we proceed ahead, it is worthwhile to see the relevant provision of the Income Tax Ordinance which reads as under:-

"235.Electricity Consumption

1). **There shall be collected advance tax at the rate specified in Part-IV of the First Schedule on the amount of electricity bill of a commercial or industrial consumer.**

2). The person preparing electricity consumption bill shall be charged advance tax under sub Section (1) in the

manner electricity consumption charges are charged.

3). **Advance tax under this Section shall not be collected from a person who produces a certificate from the commission that his income charging tax year exempt from tax.**

4). **The tax collected under this Section up to bill amount of twenty thousands rupees per month shall be minimum tax on the income of a person (other than a company). There shall be no refund of the tax collected under this section, unless the tax so collected is in excess of the amount for which the tax payer is chargeable under this Ordinance in the case of company."**

6. A perusal of the above quoted provision would reveal that advance tax is collected at the rate specified in Part-IV of the First Schedule on the amount of electricity bill of a commercial or industrial consumer. The amount collected up to the bill of Rs.20000/- per month is considered minimum tax on the income of a person other than a company. The collection effected under the former is an advance tax and the one collected up to the bill of Rs.20000/- is the minimum tax of income of such person under the latter. Another striking difference between the two is that one is refundable through adjustment against any charge of income tax while the other is not.

7. Next comes the question of Sales Tax. Its levy too cannot be held confiscatory or violative of the Constitutional provisions as

CHIEF JUSTICE

Announced on
18th February, 2010.. J U D G E

Peshawar High Court

Ghuncha Din --- Appellant/Petitioner (s)

Versus

Government of N-W.F.P --- Respondent (s)

JUDGMENT

W.P No. 406/2010 Date of hearing 18.02.2010

EJAZ AFZAL KHAN, C.J.- Petitioner through the instant petition has asked for the issuance of an appropriate writ declaring the order dated 21-1-2010 passed by the District Coordination Officer, Shangla at Alpuri, to have been passed without any jurisdiction and lawful authority.

2. Since the impugned order has been passed under the Removal from Service (Special Powers) Ordinance, 2000-01, and the petitioner can file appeal before the Departmental authority and then the Service Tribunal, we would not like to entertain this petition. However, petitioner shall not be arrested except in accordance with law. W.P. is disposed of accordingly.

CHIEF JUSTICE

Announced on
18th Febr. 2010.

J U D G E

Peshawar High Court

Gul Zada --- Appellant/Petitioner (s)

Versus

APA Bara --- Respondent (s)

JUDGMENT

W.P. No. 3354/2009 Date of hearing 18.02.2010

EJAZ AFZAL KHAN, C.J.- Through the instant petition, petitioner sought release of the detenue on bail who has been hauled up in 40 FCR. Mr..Iqbal Ahmad Durrani, learned counsel for the respondents has no objection to the release of the detenue under 40 FCR on furnishing bail bonds. Therefore, he be released in 40 FCR if he furnishes bail bonds in the sum of Rs.2 lac, with two sureties, each in the like amount to the satisfaction of the respondents. This petition is disposed of accordingly.

CHIEF JUSTICE

Announced on
18th Febr. 2010. J U D G E

Peshawar High Court

Muhammad Zahir Shah --- Appellant/Petitioner (s)

Versus

Mst. Amir Zadgai --- Respondent (s)

JUDGMENT

W.P. No. 1404/2009 Date of hearing 18.02.2010

EJAZ AFZAL KHAN, C.J.- By this single judgment, we propose to dispose of W.P.Nos. 1404, 1405 & 1406 of 2009, wherein petitioners have questioned the judgment dated 11-4-2009 passed by the learned Additional District Judge-IV, Peshawar.

2. Main contention of the learned counsel appearing for the petitioners was that the learned appellate court while setting aside the judgment of the learned Rent Controller did not consider the entire material available on record.

3. As against that learned counsel appearing on behalf of respondent contended that since the courts exercising jurisdiction in the hierarchy created under the Rent Laws cannot go deep into the disputed questions of facts, the learned appellate court rightly set aside the order passed by the Rent Controller. Learned counsel next contended that when a suit instituted by the respondent regarding the same subject matter is pending in the court, the learned appellate court committed no jurisdictional error by not going deep into the merits of the case.

4. We have gone through the record carefully and have also considered the submissions made by the learned counsel for the parties.

5. The record reveals that the learned Rent Controller after discussing the entire material on the record handed down a finding in favour of the petitioners. If at all in the view of the

learned Additional District Judge, the finding of the learned Rent Controller was not based on proper appraisal of evidence, it was required to discuss the entire material on the record. How and why he disagreed with the finding of the learned Rent Controller was not only to be dealt with but reasons were also to be recorded therefor. Mere reference to an un-registered document would not constitute a reason for reversing the finding of the court below. Why one set of evidence was accepted and the other was discarded, was to be supported with legal and logical reasons. Where the entire material has neither been considered nor discussed in the impugned judgment, we do not feel inclined to maintain it. Needless to say that the very condition for the conferment of jurisdiction on a court of law is that it should give a finding on the disputed issues after due appraisal of evidence.

6. We, therefore, allow this petition, set aside the impugned judgments and send the cases back to the learned Additional District Judge for decision in accordance with law as hinted to above after hearing the parties. Parties are directed to appear before the appellate court on 13-3-2010.

CHIEF JUSTICE

Announced on
18th Febr. 2010.

J U D G E

Peshawar High Court

Muhammad Iqbal --- Appellant/Petitioner (s)

Versus

E.D.O --- Respondent (s)

JUDGMENT

W.P No. 364/2010 Date of hearing 18.02.2010

EJAZ AFZAL KHAN, CJ.-Petitioner through the instant petition has asked for issuance of an appropriate writ directing the respondents to pass an appropriate order regarding his posting in light of the judgment dated 27.04.2007 of the NWFP Service Tribunal.

2. We have gone through the available record carefully and considered the submissions made by the learned counsel for the petitioner.

3. A perusal of the order of the Service Tribunal would reveal that it was passed on 27.04.2007. But it is strange and shocking to note that the said order has not been implemented so far despite the fact that the petitioner has been running from pillar to post for its implementation. We, thus, direct the respondents that the order passed by the Service Tribunal be implemented in its letter and spirit as early as possible. This writ petition, thus, stands disposed of.

Announced.
18. 02. 2010 CHIEF JUSTICE

J U D G E

Peshawar High Court

Saadat Khan --- Appellant/Petitioner (s)

Versus

Additional Chief Secretary --- Respondent (s)

JUDGMENT

W.P No. 2529/2009 Date of hearing 18.02.2010

EJAZ AFZAL KHAN, CJ.-Petitioner through the instant petition has asked for issuance of an appropriate writ declaring the order dated 15.09.2009 of respondent No.1 as being void, illegal, arbitrary, mala fide and without lawful authority.

2. We have gone through the available record carefully and considered the submissions made by the learned counsel for the petitioner.

3. Since in view of the judgments rendered in the cases of ***Miss Rukhsana Ijaz vs. Secretary, Education, Punjab & others (1997 SCMR 167); Ayyaz Anjum vs. Government of Punjab, Housing and Physical Planning Department through Secretary and others (1997 SCMR 169); Rafique Ahmad Chaudhry vs. Ahmad Nawaz Malik & others (1997 SCMR 170); Secretary Education NWFP, Peshawar and 2 others vs. Mustamir Khan & another (2005 SCMR 17) and Peer Muhammad vs. Government of Baluchistan through Chief Secretary & others (2007 SCMR 54)***, posting and transfer being related to the terms and condition of service can be urged before the departmental authority and then the learned Service Tribunal, this Court, while exercising its jurisdiction under Article 199 of the Constitution of Islamic Republic of Pakistan, can't step-in, atleast, at this stage. Since the petitioner has already filed a representation before the departmental authority, we direct it to decide the same

in accordance with law within a fortnight. This writ petition is disposed of accordingly.

Announced.
18. 02. 2010

CHIEF JUSTICE

J U D G E

Peshawar High Court

Munsif Khan --- Appellant/Petitioner (s)

Versus

EDO --- Respondent (s)

JUDGMENT

W.P No. 3304/2009 Date of hearing 18.02.2010

EJAZ AFZAL KHAN, CJ.-Petitioner through the instant petition has asked for implementation of the order passed by the competent authority.

2. We have gone through the available record carefully and considered the submissions made by the learned counsel for the petitioner.

3. Since the petitioner can approach the authority passing the order sought to be implemented, we, while exercising our jurisdiction under Article 199 of the Constitution of Islamic Republic of Pakistan, can't step-in, atleast, at this stage. This petition is, thus, dismissed in limine. However, the petitioner may, if so advised, approach the competent authority in this behalf.

Announced.
18. 02. 2010 CHIEF JUSTICE

J U D G E

Peshawar High Court

Mst. Lambata --- Appellant/Petitioner (s)

Versus

Government --- Respondent (s)

JUDGMENT

W.P. No. 92/2010 Date of hearing 23.02.2010

EJAZ AFZAL KHAN , C.J.- By this single judgment, we propose to dispose of W.P.Nos.90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102 & 298 of 2010 as in all these petitions, petitioners have asked for the issuance of an appropriate writ directing the respondents to issue their national Identity Cards.

2. Learned counsel appearing on behalf of the petitioners contended that when the petitioners are permanent residents of District Nowshera, respondents are bound to issue their national identity cards and that their refusal to do so would be tantamount to refusal to do what they are required by law to do.

3. Mr.Abdul Rauf, Legal Adviser, appearing on behalf of respondent No.3, submitted that credentials of the petitioners are yet to be enquired into, therefore, Identity Cards could not be issued to them.

4. We have gone through the record carefully and also considered the submissions made by the learned counsel for the parties.

5. The record reveals that the applications of the petitioners have been pending before the respondents since long but no order has so far been passed. We thus direct the respondents to pass an appropriate order, one way or the other, after enquiring into the credentials of the petitioners as early as possible.

CHIEF JUSTICE

Announced on
23rd Feb.2010 JUDGE

Peshawar High Court

Mst. Shumaila --- Appellant/Petitioner (s)

Versus

E.D.O --- Respondent (s)

JUDGMENT

W.P No. 375/2010 Date of hearing 23.02.2010

EJAZ AFZAL KHAN, CJ.-Petitioners through the instant petition have asked for the issuance of an appropriate writ directing the respondents to dispose of their applications in accordance with the posting and transfer policy, formulated by the Provincial Government and the judgment of this Court rendered in Writ Petition No.1865/2007 on 24.10.2008.

2. We have gone through the available record carefully and considered the submissions made by the learned counsel for the petitioners.

3. A perusal of the record would reveal that a good number of applications have been filed by the petitioners before the departmental authority, vis-à-vis, their posting and transfer in accordance with the policy but none of them has been decided so far despite the lapse of sufficient time. Since, many other petitions have been disposed of by issuing alike directions, we, also direct the respondents in this case to dispose of the applications of the petitioners in accordance with the policy and judgment of this Court within a fortnight. This writ petition is disposed of accordingly.

Announced.
23. 02. 2010 CHIEF JUSTICE

J U D G E

Peshawar High Court

Aftab Ali --- Appellant/Petitioner (s)

Versus

Government --- Respondent (s)

JUDGMENT

W.P No. 413/2010 Date of hearing 23.02.2010

EJAZ AFZAL KHAN, CJ.-Petitioners through the instant petition have asked for issuance of an appropriate writ directing the respondents to treat them at par with non-domiciled teaching staff which has been extended multiple benefits vide Notification bearing No.SOB/HE/1-6/Budget-2007-08 dated 22.08.2007.

2. The learned counsel appearing on behalf of the petitioners contended that the petitioners are by all means at par with the non-domiciled teaching staff, they cannot be treated differently simply because of their domiciliary credential.

3. We have gone through the available record carefully and considered the submissions made by the learned counsel for the petitioners.

4. Since the matter urged before us being related to the terms and condition of service can be urged before the departmental authority and then before the Service Tribunal, we, while exercising our constitutional jurisdiction under Article 199 of the Constitution of Islamic Republic of Pakistan, wouldn't like to step-in. The more-so, when the petitioners have already filed representations before the departmental authority. We, thus, direct the departmental authority to decide the representations of the petitioners in accordance with law within a fortnight. This writ petition is disposed of accordingly.

Announced.
23. 02. 2010 CHIEF JUSTICE

J U D G E

Peshawar High Court

Wali Muhammad --- Appellant/Petitioner (s)

Versus

IGP --- Respondent (s)

JUDGMENT

W.P No. 563/2010 Date of hearing 23.02.2010

EJAZ AFZAL KHAN, CJ.- Petitioner through the instant petition has asked for issuance of an appropriate writ directing the respondents to finalize his pension papers as he retired from the service on 09.06.2009 on attaining the age of superannuation but the needful has not been done so far.

2. We have gone through the available record carefully and considered the submissions made by the learned counsel for the petitioner.

3. Though the questions urged before us being related to the terms and condition of service can be urged before the departmental authority and then before the Service Tribunal, all the same, we would direct the respondents to finalize the pension papers of the petitioner as early as possible but not later than one month. This petition is disposed of accordingly.

Announced.
23. 02. 2010 CHIEF JUSTICE

J U D G E

Peshawar High Court

Fazal Rabbi --- Appellant/Petitioner (s)

Versus

Government of N-W.F.P --- Respondent (s)

JUDGMENT

W.P. No. 2484/2009 Date of hearing 24.02.2010

EJAZ AFZAL KHAN, C.J.- Petitioner through the instant petition has asked for the issuance of an appropriate writ directing the respondents to implement the judgment dated 10-6-2008 of the Service Tribunal.

2. Learned counsel appearing on behalf of the petitioner contended that when his appeal was allowed and the order imposing penalty on him was set aside, he was entitled to back benefits and that refusal of the respondents to do so would amount to doing what they are not required by law to do.

3. As against that learned counsel appearing on behalf of the respondents contended that petitioner has since been reinstated but since there is no express finding in the judgment providing for the grant of back benefits, the same cannot be granted automatically. The learned counsel, to support his contention, placed reliance on the case of **"Muhammad Bashir and others Vs. Chairman, Punjab Labour Appellate Tribunal, Lahore and others" (1991 S C M R 2087).**

4. We have gone through the judgment dated 10-6-2008 of the Service Tribunal carefully and have also considered the submissions made by the learned counsel for the parties.

3. A perusal of the judgment dated 10-6-2008 of the Service Tribunal would reveal that the petitioner has not been granted back benefits. Yes, he was reinstated and the order

imposing penalty on him was set aside but yet in the absence of any express verdict holding him entitled to back benefits, he cannot ask for that. The case of "Muhammad Bashir and others Vs. Chairman, Punjab Labour Appellate Tribunal, Lahore and others" (1991 S C M R 2087) may well be referred. Since he has been reinstated, we think that judgment passed by the Service Tribunal has been implemented. However, if in the subsequent enquiry, petitioner stands exonerated, he would be entitled to back benefits.

CHIEF JUSTICE

Announced on
24th Februay,2010. J U D G E

Peshawar High Court

Miss. Seerat Bano --- Appellant/Petitioner (s)

Versus

Government --- Respondent (s)

JUDGMENT

W.P No. 622/2010 Date of hearing 25.02.2010

EJAZ AFZAL KHAN, CJ.-Petitioner through the instant petition has asked for issuance of an appropriate writ declaring the transfer orders dated 26.01.2010 and 02.02.2010 of the respondents as being nullity on account of having been passed without jurisdiction and lawful authority.

2. We have gone through the available record carefully and considered the submissions made by the learned counsel for the petitioner.

3. Since in view of the judgments rendered in the cases of ***Miss Rukhsana Ijaz vs. Secretary, Education, Punjab & others (1997 SCMR 167); Ayyaz Anjum vs. Government of Punjab, Housing and Physical Planning Department through Secretary and others (1997 SCMR 169); Rafique Ahmad Chaudhry vs. Ahmad Nawaz Malik & others (1997 SCMR 170); Secretary Education NWFP, Peshawar and 2 others vs. Mustamir Khan & another (2005 SCMR 17) and Peer Muhammad vs. Government of Baluchistan through Chief Secretary & others (2007 SCMR 54),*** posting and transfer being related to the terms and condition of service can be urged before the departmental authority and then before the Service Tribunal, this Court, while exercising its jurisdiction under Article 199 of the Constitution of Islamic Republic of Pakistan, can't step-in. We, however, by following the dictum rendered in the case of ***Muhammad Anis & others vs. Abdul Haseeb & others (PLD 1994 SC 539)*** treat this petition as representation before the departmental authority and direct the office to send it thereto for

decision in accordance with law. This petition, thus, stands disposed of.

Announced.
25. 02. 2010

CHIEF JUSTICE

J U D G E

Peshawar High Court

Mst. Nadia Gohar --- Appellant/Petitioner (s)

Versus

Government --- Respondent (s)

JUDGMENT

W.P No. 2938/2009 Date of hearing 25.02.2010

EJAZ AFZAL KHAN, CJ.- Petitioner through the instant petition has asked for the issuance of an appropriate writ directing the respondents to pay their salaries from July, 2006 to December, 2006.

2. We have gone through the available record carefully and considered the submissions made by the learned counsel for the petitioners.

3. Since the question urged before us can well be urged before the departmental authority and then before the Service Tribunal, we wouldn't like to intervene while hearing a petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973. However, we instead dismissing the instant petition treat it as representation before the departmental authority and direct the office to send it thereto for decision in accordance with law as early as possible but not later than one month. This writ petition is, thus, disposed of.

Announced.
25. 02. 2010 CHIEF JUSTICE

J U D G E

Peshawar High Court

Munawar Khan --- Appellant/Petitioner (s)

Versus

Managing Director --- Respondent (s)

JUDGMENT

W.P No. 524/2010 Date of hearing 02.03.2010

EJAZ AFZAL KHAN, CJ.-Petitioner through the instant petition has asked for issuance of an appropriate writ declaring the order dated 26.08.2009 of respondent No.2 as being void, illegal, arbitrary, mala fide and without lawful authority.

2. We have gone through the available record carefully and considered the submissions made by the learned counsel for the petitioner.

3. Since the questions urged before us being related to the terms and condition of service, can't be gone into by this Court while hearing a petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, we wouldn't like to come to the rescue of the petitioner atleast at this stage. Since the petitioner has already filed a representation before the departmental authority, we direct it to decide the same in accordance with law within a fortnight. This writ petition is disposed of accordingly.

Announced.
02. 03. 2010 CHIEF JUSTICE

J U D G E

Peshawar High Court

Irfanullah --- Appellant/Petitioner (s)

Versus

Government --- Respondent (s)

JUDGMENT

W.P No. 583/2010 Date of hearing 02.03.2010

EJAZ AFZAL KHAN, CJ.-Petitioner through the instant petition has asked for issuance of an appropriate writ directing the respondents to decide his appeals, pending before them, in accordance with law.

2. The learned counsel appearing on behalf of the petitioner contended that the petitioner made various appeals before the departmental authority but none of them has been decided so far.

3. We have gone through the available record carefully and considered the submissions made by the learned counsel for the petitioner.

4. It is strange to note that various appeals sent to the departmental authority even through the covering letters have not been decided so far. We, thus, direct the respondents to decide the appeals of the petitioner in accordance with law as early as possible but not later than one month. This writ petition is disposed of accordingly.

Announced.
02. 03. 2010 CHIEF JUSTICE

J U D G E

Peshawar High Court

Muhammad Murtaza --- Appellant/Petitioner (s)

Versus

The State --- Respondent (s)

JUDGMENT

W.P. No. 587/2010 Date of hearing 04.03.2010

EJAZ AFZAL KHAN, C.J.- Petitioner through the instant petition has asked for his release on bail on the ground that he has almost served out the entire sentence and that his detention in jail would amount to unlawful confinement.

2. As against that, learned counsel appearing on behalf of the respondents states that petitioner has not asked for his release on bail, indeed he has asked for the suspension of his sentence which cannot be granted in the circumstances, the more so, when many other persons similarly placed are in jail and serving out the rigours of their sentence.

3. We have gone through the record carefully and have also considered the submissions made by the learned counsel for the parties.

4. Since the petitioner has served out a greater chunk of his imprisonment, we do not see any justification to keep him in Jail that too when his appeal cannot be heard in near future.

5. For the reasons discussed above, this petition is allowed and it is directed that the petitioner be released on bail if he furnishes bail bonds in the sum of Rs.Two lac, with two sureties, each in the like amount to the satisfaction of the Judge Accountability Court concerned.

CHIEF JUSTICE

Announced on
4th March,, 2010. J U D G E

Peshawar High Court

Tariq Ahmad --- Appellant/Petitioner (s)

Versus

PPO --- Respondent (s)

JUDGMENT

W.P No. 3441/2009 Date of hearing 04.03.2010

EJAZ AFZAL KHAN, CJ.-Petitioners through the instant petition has asked for issuance of an appropriate writ directing the respondents No.1 & 2 to implement the standing orders granting the benefits of promotion to the next higher rank including TA/DA in accordance with rules framed therein.

2. We have gone through the available record carefully and considered the submissions made by the learned counsel for the petitioners.

3. Since the questions urged before us being related to the terms and condition of service, can't be gone into by this Court while hearing a petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, we wouldn't like to come to the rescue of the petitioners, atleast, at this stage. Since the petitioners have already filed a representation before the departmental authority, we direct it to decide the same in accordance with law within a month. This writ petition is disposed of accordingly.

Announced.
04. 03. 2010 CHIEF JUSTICE

J U D G E

Peshawar High Court

Mian Ulfatullah --- Appellant/Petitioner (s)

Versus

NAB --- Respondent (s)

JUDGMENT

W.P. No. 517/2010 Date of hearing 09.03.2010

EJAZ AFZAL KHAN, C.J.- Petitioner through the instant petition has asked for his release on bail on the ground that he has almost served out half of his entire sentence and that the sentence is short and there is no prospect of early hearing of his appeal in near future.

2. As against that, learned counsel appearing on behalf of the respondents states that instead of granting bail to the petitioner , his main appeal be fixed at an early date as many other persons similarly placed are in jail and serving out the rigours of their sentence.

3. We have gone through the record carefully and have also considered the submissions made by the learned counsel for the parties.

4. Since the petitioner has served out a greater chunk of his imprisonment, we do not see any justification to keep him in Jail that too when his appeal cannot be heard in near future.

5. For the reasons discussed above, this petition is allowed and it is directed that the petitioner be released on bail if he furnishes bail bonds in the sum of Rs.Three lac, with two sureties, each in the like amount to the satisfaction of the Judge Accountability Court concerned.

CHIEF JUSTICE

Announced on
9th March, , 2010. J U D G E

Peshawar High Court

Muhammad Ali --- Appellant/Petitioner (s)

Versus

The State --- Respondent (s)

JUDGMENT

W.P.No. 46/2010 Date of hearing 09.03.2010

EJAZ AFZAL KHAN, C.J.- Petitioner through the instant petition has asked for his release on bail on the ground that he has almost served out half of his entire sentence and that the sentence is short and there is no prospect of early hearing of his appeal in near future.

2. As against that, learned counsel appearing on behalf of the respondents states that instead of granting bail to the petitioner , his main appeal be fixed at an early date as many other persons similarly placed are in jail and serving out the rigours of their sentence.

3. We have gone through the record carefully and have also considered the submissions made by the learned counsel for the parties.

4. Since the petitioner has served out a greater chunk of his imprisonment, we do not see any justification to keep him in Jail that too when his appeal cannot be heard in near future.

5. For the reasons discussed above, this petition is allowed and it is directed that the petitioner be released on bail if he furnishes bail bonds in the sum of Rs.Three lac, with two sureties, each in the like amount to the satisfaction of the Judge Accountability Court concerned.

CHIEF JUSTICE

Announced on
9th March, , 2010. J U D G E

Peshawar High Court

Javed Anwar --- Appellant/Petitioner (s)

Versus

Government --- Respondent (s)

JUDGMENT

W.P. No. 1677/2006 Date of hearing 10.03.2010

EJAZ AFZAL KHAN, C.J.- Petitioner through the instant petition has questioned the order dated 21-8-2001 of respondent No.1 whereby he was removed from service.

2. Learned counsel appearing on behalf of the petitioner contended that where order passed is without jurisdiction and lawful authority, this court can strike it down notwithstanding petitioner has been provided a right of appeal under Section 10 of the Removal from Service (Special Powers) Ordinance, 2000 as the petitioner being an employee of a statutory body created by the Federal Statute was well beyond the power and competence of respondent No.1. Learned counsel next contended that he has been made a shuttle cock because his appeal was returned by the Federal Service Tribunal without application of mind on the strength of the judgment rendered in the cases reported as "**Muhammad Mubeen us Salam and others Vs. Federation of Pakistan through Secretary, Ministry of Defence and others (PLD 2006 Supreme Court 602) and "Muhammad Idrees Vs. Agricultural Development Bank of Pakistan and others" (P L D 2007 Supreme Court – 681).**

3. Learned counsel appearing on behalf of the respondents by referring to Section 10 of the Ordinance contended that where right of appeal has been provided to the petitioner before the Federal Services Tribunal, this court cannot assume jurisdiction.

4. We have gone through the evidence carefully and have also considered the submissions made by the learned counsel for the parties.

5. Before we proceed to discuss the case, it is worthwhile to refer to Section 10 of the Ordinance which reads as under :-

> "**Appeal.-** Notwithstanding any thing contained in any other law for the time being in force, any person aggrieved by any final order under Section 9 may, within thirty days of the order, prefer an appeal to the Federal Service Tribunal established under the Service Tribunal Act, 1973(LXX of 1973)."

Another relevant provision which also merits reference is Section 11 of the Ordinance which also runs as under:-

> "**Ordinance to override other laws.-** The provisions of this Ordinance shall have effect notwithstanding anything to the contrary contained in the Civil Servants Act, 1973 (LXX of 1973), and the rules made thereunder and any other law for the time being in force."

6. A perusal of the above quoted provision would reveal that any person who is removed under the Ordinance can file appeal before the Service Tribunal notwithstanding any law for the time being in force. The other Section quoted above reveals that the provisions of this Ordinance have overriding effect on all the other laws, when so we are afraid we cannot entertain this petition. According to the learned counsel for the petitioner, the order of removal has been passed by a person who has no jurisdiction altogether to meddle in this affair. Though Federal Service Tribunal returned the appeal on the strength of the judgment cited above, but it appears to be without justification because none of the provisions of the Ordinance mentioned above has been declared either ultra vires or against law. We, therefore,

instead of dismissing this petition treat it as an appeal before the Federal Service Tribunal and send it thereto by following judgment of **Muhammad Anis and others Vs. Abdul Haseeb and others (P L D 1994 Supreme Court 539)**for decision in accordance with law. File of this case be sent to the Federal Service tribunal as early as possible but not later than one week. Parties are directed to appear before the Federal service Tribunal on 16-4-2010.

CHIEF JUSTICE

Announced on
10th March, 2010. J U D G E

Peshawar High Court

Sher Shah --- Appellant/Petitioner (s)

Versus

DPO --- Respondent (s)

JUDGMENT

W.P No. 599/2010 Date of hearing 10.03.2010

EJAZ AFZAL KHAN, CJ.-Petitioner through the instant petition has asked for the issuance of an appropriate writ directing the respondents to reinstate him with all back benefits.

2. We have gone through the available record carefully and considered the submissions made by the learned counsel for the petitioner.

3. Since the petitioner has an adequate remedy by filing an appeal before the departmental authority and then before the Service Tribunal, we wouldn't like to step-in while hearing a petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973. As the petitioner has already filed a representation before the departmental authority, we, while disposing of this petition, direct it to decide the same through a reasoned and speaking order as early as possible but not later than one month. This petition is disposed of accordingly.

Announced.
10. 03. 2010 CHIEF JUSTICE

J U D G E

Peshawar High Court

Nisar Ullah --- Appellant/Petitioner (s)

Versus

Government --- Respondent (s)

JUDGMENT

W.P No. 781/2010 Date of hearing 10.03.2010

EJAZ AFZAL KHAN, CJ.-Petitioners through the instant petition have question the order dated 22.01.2010 of respondent No.4, whereby, he has been removed from service. He has also asked for the issuance of an order restraining the respondents from arresting him except in accordance with law.

2. We have gone through the available record carefully and considered the submissions made by the learned counsel for the petitioner.

3. Since the order questioned before us can well be questioned before the departmental authority and then before the Service Tribunal, we can't step-in. However, it is observed that the petitioner shall not be arrested except in accordance with law. This writ petition is disposed of accordingly.

Announced.
10. 03. 2010 CHIEF JUSTICE

J U D G E

Peshawar High Court

Khial Muhammad --- Appellant/Petitioner (s)

Versus

Government --- Respondent (s)

JUDGMENT

W.P.No. 1313/2009 Date of hearing 10.03.2010

EJAZ AFZAL KHAN, C.J.- Through the instant petition, petitioner has asked for the issuance of an appropriate writ directing the respondents to consider him against the vacancies falling within the quota of retired government employees' sons.

2. Learned counsel appearing on behalf of the petitioner contended that when the District Government is successor of District Council in view of the provision contained in Section 180(b) of the Local Government Ordinance, 2001, it is legally bound to discharge all the liabilities of adjusting the retired employees sons against the vacancies falling within the quota meant therefor.

3. Learned counsel appearing on behalf of the other respondents do not dispute the aforestated position. However, learned counsel appearing on behalf of the District Government contended that so far no vacancy is available but if and when any occurs, the petitioner would be adjusted against the one meant for retired Government employees' sons.

4. In this view of the matter, we allow this petition and direct the District Government to adjust the petitioner if and when any vacancy occurs. This petition is disposed of.

CHIEF JUSTICE

Announced on
10th March, 2010. J U D G E

Peshawar High Court

Fazal Rabbi --- Appellant/Petitioner (s)

Versus

APA --- Respondent (s)

JUDGMENT

W.P. No. 879/2010 Date of hearing 11.03.2010

EJAZ AFZAL KHAN, C.J.- Through the instant petition, petitioner has asked for his release on the ground that he has been hauled up without any rhyme or reason.

2. Learned counsel appearing on behalf of the respondents states that the case against he petitioner is in the phase of investigation, therefore, nothing can be said so far.

3. We have gone through the record and have considered the submissions made by the learned counsel for the parties.

4. Be all that as it may, when the petitioner can approach the competent forum and get remedy, we would not like to step in at this stage. However, it is directed that the application of the petitioner be disposed of within 10 days if and when moved. This petition is thus disposed of.

CHIEF JUSTICE

Announced on
11th March, 2010. J U D G E

Peshawar High Court

Shafiqa Mahmood --- Appellant/Petitioner (s)

Versus

Government --- Respondent (s)

JUDGMENT

W.P. No. 3223/2009 Date of hearing 11.03.2010

EJAZ AFZAL KHAN, C.J.- Petitioner Shafiqa Mahmood through the instant petition has asked for the issuance of an appropriate writ directing the respondents to consider her for admission in Fatima Jinnah Medical College, Lahore.

2. Learned counsel appearing on behalf of the petitioner contended that where petitioner has qualified the requisite education from the backward area and has acquired better merit, she is required to be considered for admission.

3. Learned counsel appearing on behalf of the respondents contended that since the petitioner opted for admission in Fatima Jinnah Medical College as 4th preference, she cannot be considered. He next contended that petitioner's case cannot be considered altogether when she has not annexed with the Proforma the certificate of the location of the Institution she acquired education from.

4. We have gone through the record carefully and have also considered the submissions made by the learned counsel for the parties.

5. The table produced by the learned counsel for the respondents shows that the petitioner has acquired the required education from the backward area. When so failure to mention the location of the institution cannot be construed to her detriment that too when the content of the requisite certificate annexed with the

writ petition has not been disputed by the respondents. The argument that the petitioner opted for Fatima Jinnah Medical College, Lahore, as 4th preference too cannot impede her admission in the said College when she deserves it on account of her better merit. We, therefore, allow this petition and direct the respondents to consider her for admission in the Fatima Jinnah Medical College, Lahore. This petition is thus disposed of.

CHIEF JUSTICE

Announced on
11th March, 2010.

J U D G E

Peshawar High Court

Hirat Wali --- Appellant/Petitioner (s)

Versus

Director Education --- Respondent (s)

JUDGMENT

W.P No. 2854/2009 Date of hearing 11.03.2010

EJAZ AFZAL KHAN, CJ.-Petitioner through the instant petition has asked for issuance of an appropriate writ directing the respondents to transfer him from the place of his posting where he has been serving for last ten years.

2. We have gone through the available record carefully and considered the submissions made by the learned counsel for the petitioner.

3. Since in view of the judgments rendered in the cases of ***Miss Rukhsana Ijaz vs. Secretary, Education, Punjab & others (1997 SCMR 167); Ayyaz Anjum vs. Government of Punjab, Housing and Physical Planning Department through Secretary and others (1997 SCMR 169); Rafique Ahmad Chaudhry vs. Ahmad Nawaz Malik & others (1997 SCMR 170); Secretary Education NWFP, Peshawar and 2 others vs. Mustamir Khan & another (2005 SCMR 17) and Peer Muhammad vs. Government of Baluchistan through Chief Secretary & others (2007 SCMR 54)***, posting and transfer being related to the terms and condition of service can be urged before the departmental authority and then before the learned Service Tribunal, this Court, while exercising its jurisdiction under Article 199 of the Constitution of Islamic Republic of Pakistan, can't step-in, atleast, at this stage. Since the petitioner has already filed an application before the departmental authority, we direct it to decide

the same in accordance with law as early as possible but not later than one month. This writ petition is disposed of accordingly.

Announced.
11. 03. 2010

CHIEF JUSTICE

J U D G E

Peshawar High Court

Dr. Syed Luqman Ahmad --- Appellant/Petitioner (s)

Versus

Government --- Respondent (s)

JUDGMENT

W.P No. 779/2011 Date of hearing 15.03.2010

EJAZ AFZAL KHAN, CJ.-Petitioner through the instant petition has asked for the issuance of an appropriate writ declaring that the orders dated 15.02.2011 and 03.03.2011 of respondent No.2, being nullity in the eye of law are of no effect whatever.

2. We have gone through the available record carefully and considered the submissions made by the learned counsel for both the petitioner.

3. Since the matter in essence and in substance being related to the terms and conditions of service can well be urged before the departmental authority in the first instance and then before the Service Tribunal, this Court, while exercising its jurisdiction under Article 199 of the Constitution of Islamic Republic of Pakistan, can't intervene. We, while disposing of this writ petition, treat it as a representation before the departmental authority by following the dictum rendered in the case of ***Muhammad Anis & others vs. Abdul Haseeb & others (PLD 1994 SC 539)*** and direct the office to send it to the Chief Secretary for decision in accordance with law within a month. This writ petition, thus, stands disposed of.

Announced.
15. 03. 2010 CHIEF JUSTICE

J U D G E

Peshawar High Court

Adam Khel --- Appellant/Petitioner (s)

Versus

Secretary Home Peshawar --- Respondent (s)

JUDGMENT

W.P.No. 560/2010 Date of hearing 16.03.2010

EJAZ AFZAL KHAN, C.J.- Mr.Iqbal Ahmad Durrani, standing counsel for the respondents, states that the detenue is also hauled up in many other criminal cases, 40 FCR apart. However, he has no objection if the detenue is released on bail in 40 FCR. In this view of the matter, respondents are directed to release the detenue on bail in 40 FCR, if he furnishes bail bonds in the sum of Rs.2 lac each, with two sureties, each in the like amount to the satisfaction of the respondents. However, for his release in other offences, he has to approach the competent forum. This petition is, thus, disposed of.

CHIEF JUSTICE

Announced on
16th March,2010 J U D G E

Salim Jan --- Appellant/Petitioner (s)

Versus

The State --- Respondent (s)

JUDGMENT

W.P. No. 3375/2009 Date of hearing 17.03.2010

EJAZ AFZAL KHAN, C.J.- Petitioner through the instant petition has asked for his release on bail on the ground that the sentence is short and appeal is not likely to be fixed in near future. Learned Special Prosecutor appearing for the NAB opposed the grant of bail and insisted on the early hearing of the appeal.

2. We have gone through the record carefully and have also considered the submissions made by the learned counsel for the parties.

3. The package offered by the respondents is quite attractive in terms of disposal but since co-convict of the petitioner has already been allowed bail by this court in view of short sentence and the principle of consistency, petitioner is also admitted to bail if he furnishes bail bonds in the sum of Rs.One lac, with two sureties, each in the like amount, to the satisfaction of the Additional Registrar of this Court.

CHIEF JUSTICE

Announced on
17th March, ,2010. J U D G E

Peshawar High Court

Munir Ilyas --- Appellant/Petitioner (s)

Versus

General Manager --- Respondent (s)

JUDGMENT

W.P. No. 2473/2009 Date of hearing 18.03.2010

EJAZ AFZAL KHAN, C.J.- The only controversy surviving for the adjudication of this court was that how the amount received by the petitioner as pensionary benefits was to be returned on his re-instatement. The petitioner, appearing himself, suggested that either the amount he is to receive as back benefits be adjusted against the amount of pensionary benefits or the same be deducted from his salary in installments. Learned counsel appearing on behalf of respondents accepted the first option.

2. In this view of the matter, this petition is disposed of.

CHIEF JUSTICE

Announced on
18th Mar.,2010. J U D G E

Peshawar High Court

Javed --- Appellant/Petitioner (s)

Versus

Government --- Respondent (s)

JUDGMENT

W.P No. 676/2010 Date of hearing 18.03.2010

EJAZ AFZAL KHAN, CJ.- Petitioner through the instant petition has asked for the issuance of an appropriate directing respondent No.2 to nominate him in the intermediate college course.

2. Since the matter urged before us being intra departmental can well be decided by the department itself, we, wouldn't like to interfere. However, we, while disposing of this petition, direct the competent authority to pass an appropriate order in accordance with law within a fortnight after hearing the petitioner. The office is directed to send it thereto within three days.

Announced.
18. 03. 2010

CHIEF JUSTICE

J U D G E

Peshawar High Court

Syed Mausam Shah --- Appellant/Petitioner (s)

Versus

Government --- Respondent (s)

JUDGMENT

W.P No. 821/2010 Date of hearing 18.03.2010

EJAZ AFZAL KHAN, CJ.-Petitioner through the instant petition has asked for issuance of an appropriate writ declaring the order dated 20.01.2010 of respondent No.1 as being void, illegal, arbitrary, mala fide and without lawful authority.

2. We have gone through the available record carefully and considered the submissions made by the learned counsel for the petitioner.

3. Since the questions urged before us being related to the terms and condition of service can well be urged before the departmental authority and then before the Service Tribunal, we, while hearing a petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, can't issue the writ asked for. We, however, by following the dictum rendered in the case of ***Muhammad Anis & others vs. Abdul Haseeb & others (PLD 1994 SC 539)*** treat this petition as a representation before the departmental authority and direct the office to send it thereto for decision, within a fortnight, in accordance with law. We would, however, direct the release of the salary of the petitioner as it appears to have been stopped without justification, that too, when inquiry is yet to be initiated. This petition, thus, stands disposed of.

Announced.
18. 03. 2010 CHIEF JUSTICE

J U D G E

Peshawar High Court

Mst. Azra Khatoon --- Appellant/Petitioner (s)

Versus

Mst. Sajida Malik --- Respondent (s)

JUDGMENT

W.P No. 1003/2010 Date of hearing 18.03.2010

EJAZ AFZAL KHAN, CJ.- Intervention of this Court is sought through the instant representation.

2. Since the questions urged in the representation being related to the terms and conditions of service, can well be urged before the departmental authority and then before the Service Tribunal, we wouldn't like to step-in. However, we, in the circumstances of the case, direct the respondents to decide the questions urged therein, within a fortnight, in accordance with law. The office is directed to send it thereto within three days. This lis, thus, stands disposed of.

Announced.
18. 03. 2010 CHIEF JUSTICE

J U D G E

Peshawar High Court

Yousaf Shah --- Appellant/Petitioner (s)

Versus

EDO --- Respondent (s)

JUDGMENT

W.P No. 686/2010 Date of hearing 24.03.2010

EJAZ AFZAL KHAN, CJ.-Petitioners through the instant petition have asked for the issuance of an appropriate writ directing the respondents to dispose of their applications in accordance with the posting and transfer policy, formulated by the Provincial Government and the judgment of this Court rendered in Writ Petition No.1865/2007 on 24.10.2008.

2. We have gone through the available record carefully and considered the submissions made by the learned counsel for the petitioners.

3. A perusal of the record would reveal that a good number of applications have been filed by the petitioners before the departmental authority, vis-à-vis, their posting and transfer in accordance with the policy but none of them has been decided so far despite the lapse of sufficient time. Since, many other petitions have been disposed of by issuing alike directions, we, also direct the respondents in this case to dispose of the applications of the petitioners in accordance with the policy and judgment of this Court within a fortnight. This writ petition is disposed of accordingly.

Announced.
24. 03. 2010 CHIEF JUSTICE

J U D G E

Peshawar High Court

Malik Muhammad Shafi --- Appellant/Petitioner (s)

Versus

KPK Assistant Collector --- Respondent (s)

JUDGMENT

W.P.No. 2192/2009 Date of hearing 25.03.2010

EJAZ AFZAL KHAN, C.J.- The reason which prevailed with the respondents for declining the grant of foreign Scholarship to the petitioner was that he was awarded an indigenous scholarship but he did not avail that.

2. The petitioner questioning the aforesaid reason contended that the indigenous scholarship could not be availed because the supervisor was not available and that he intimated the University as well as the Higher Education Commission well in time about this. There was, according to him, a delay in return of the amount but that too can not be attributed to him as this was to be returned by the focal person.

3. We have gone through the material brought on file carefully and have also considered the submissions made by the learned counsel for the parties.

4. The record reveals that the petitioner informed the Director on 17-4-2007 that he could not utilize the scholarship and the budget therefor because of some personal reasons and that the indigenous scholarship so awarded be cancelled. Not only that it was processed by the concerned quarters and finally approved by the Vice Chancellor but the focal person was also taken on the board in this behalf as is clear from the letter dated 18-4-2007. When this being the case, the reason weighing with the respondents cannot be held to be well founded. The petitioner whose case is clearly and squarely covered by the relevant

framework, cannot be declined the aforesaid Scholarship. We thus allow this petition and direct the respondents to do the needful on getting a proper bond and guarantee from the petitioner duly executed by the persons who are men of means and property.

CHIEF JUSTICE

Announced on
25th March,2010. J U D G E

Peshawar High Court

Muhammad Javed --- Appellant/Petitioner (s)

Versus

Government --- Respondent (s)

JUDGMENT

W.P No. 577/2010 Date of hearing 25.03.2010

EJAZ AFZAL KHAN, CJ.-Since the questions urged before us, being related to the terms and conditions of service including the vires of the rules, can well be urged before the Service Tribunal in view of the judgment rendered in the case of ***I.A. Sharwani & others vs. Government of Pakistan through Secretary, Finance Division, Islamabad & others (1991 SCMR 1041),*** we wouldn't like to entertain this petition. We, instead of dismissing the writ petition, by following the dictum rendered in the case of ***Muhammad Anis & others vs. Abdul Haseeb & others (PLD 1994 SC 539),*** treat it as an appeal before the Service Tribunal and direct the office to send it thereto for decision in accordance with law. This writ petition, thus, stands disposed of.

Announced.
25. 03. 2010 CHIEF JUSTICE

J U D G E

Peshawar High Court

Dr. Muhammad Ismail --- Appellant/Petitioner (s)

Versus

Government --- Respondent (s)

JUDGMENT

W.P No. 784/2010 Date of hearing 30.03.2010

EJAZ AFZAL KHAN, CJ.-Petitioners through the instant petition have asked for issuance of an appropriate writ declaring the order dated 12.01.2010 of respondent No.1, as being void, illegal, arbitrary, mala fide and without lawful authority.

2. We have gone through the available record carefully and considered the submissions made by the learned counsel for the petitioners.

3. Since the questions urged before us being related to the terms and condition of service can well be urged before the departmental authority and then before the Service Tribunal, we, while exercising powers under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, can't issue the writ asked for. As the petitioners have already filed representations before the departmental authority, we direct it to decide the same in accordance with law within a week. This writ petition is disposed of accordingly.

Announced.
30. 03. 2010 CHIEF JUSTICE

J U D G E

Peshawar High Court

Dr. Abdul Qadeer --- Appellant/Petitioner (s)

Versus

MS (MKD) --- Respondent (s)

JUDGMENT

W.P No. 902/2010 Date of hearing 30.03.2010

EJAZ AFZAL KHAN, CJ.-Petitioner through the instant petition has asked for issuance of an appropriate writ declaring the orders dated 02.01.2010 and 12.02.2010 of respondent No.1, as being void, illegal, arbitrary, mala fide and without lawful authority.

2. We have gone through the available record carefully and considered the submissions made by the learned counsel for the petitioner.

3. Since the questions urged before us being related to the terms and condition of service can well be urged before the departmental authority and then before the Service Tribunal, we, while exercising powers under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, can't issue the writ asked for. As the petitioner has already filed a representation before the departmental authority, we direct it to decide the same in accordance with law within a fortnight. This writ petition is disposed of accordingly.

Announced.
30. 03. 2010 CHIEF JUSTICE

J U D G E

Peshawar High Court

Gul Dawat --- Appellant/Petitioner (s)

Versus

EDO --- Respondent (s)

JUDGMENT

W.P. No. 2034/2008 Date of hearing 31.03.2010

EJAZ AFZAL KHAN, C.J.- Petitioners who passed the required qualification were appointed as Dispensers, vide orders dated 31-10-1985, 15-11-1989, 23-11-1989, 7-1-1990, 8-1-1990, 22-4-1990 and 23-4-1990. As at the relevant time, the posts of Dispensers were not available, they were adjusted against the posts of Health Technicians and Incharge Nurse. Despite the fact that vacancies of Dispensers have been occurring from time to time but fate of the petitioners was not decided for one reason or the other, notwithstanding in principle it was decided that they shall be adjusted against the vacancies of the Dispensers as and when they occur. Even the Cabinet decided to do the needful but due to the intervention of those who wielded influence in the lounges of power could not let it materialize. Admittedly, now the vacancies of Dispensers are available but the respondents again for one pretext or another resort to delaying tactics.

2. Today this case was argued at length by the learned counsel for the petitioners reiterating the facts mentioned above. When we confronted the learned DAG with the situation emerging in the case, he replied that the file is with the Director General Health and it would be finalized in due course. We are at loss to understand the meanings of the expression "due course" which has not come to an end even after the span of two and a half decades. We, therefore, without entering into unnecessary intricacies, direct the respondents to adjust the petitioners against the vacancies of Dispensers. This petition is, thus, disposed of.

CHIEF JUSTICE

Announced on
31st March, 2010 J U D G E

Peshawar High Court

Khair ul Amin --- Appellant/Petitioner (s)

Versus

Director --- Respondent (s)

JUDGMENT

W.P No. 110/2010 Date of hearing 31.03.2010

EJAZ AFZAL KHAN, CJ.-Petitioner through the instant petition has asked for issuance of an appropriate writ declaring the order dated 27.08.2009 of respondent No.2 is of no effect for having been passed without jurisdiction and lawful authority.

2. We have gone through the available record carefully and considered the submissions made by the learned counsel for the petitioner.

3. The record reveals that the impugned action was taken against the petitioner under the Removal of Service (Special Power Ordinance), 2000. When so, the petitioner can file a representation before the departmental authority and then before the Federal Service Tribunal under Section 10 of the said Ordinance, therefore, we, while exercising powers under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, can't issue the writ asked for. Since the petitioner has already filed a representation before the departmental authority, we direct it to decide the same in accordance with law within a month. This petition is disposed of accordingly.

Announced.
31. 03. 2010 CHIEF JUSTICE

J U D G E

Peshawar High Court

Fayyaz Khan --- Appellant/Petitioner (s)

Versus

Director --- Respondent (s)

JUDGMENT

W.P No. 115/2010 Date of hearing 31.03.2010

EJAZ AFZAL KHAN, CJ.-Petitioner through the instant petition has asked for issuance of an appropriate writ declaring the order dated 27.08.2009 of respondent No.2 is of no effect for having been passed without jurisdiction and lawful authority.

2. We have gone through the available record carefully and considered the submissions made by the learned counsel for the petitioner.

3. The record reveals that the impugned action was taken against the petitioner under the Removal of Service (Special Power Ordinance), 2000. When so, the petitioner can file a representation before the departmental authority and then before the Federal Service Tribunal under Section 10 of the said Ordinance, therefore, we, while exercising powers under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, can't issue the writ asked for. Since the petitioner has already filed a representation before the departmental authority, we direct it to decide the same in accordance with law within a month. This petition is disposed of accordingly.

Announced.
31. 03. 2010 CHIEF JUSTICE

J U D G E

Peshawar High Court

Gul Malook --- Appellant/Petitioner (s)

Versus

Government of KPK --- Respondent (s)

JUDGMENT

W.P.No. 54/2010 Date of hearing 31.03.2010

EJAZ AFZAL KHAN, C.J.- Petitioner through the instant writ petition has questioned the order dated 21-1-2010 of the DCO, Shangla at Alpuri, whereby he has been removed from service. He has also asked for the issuance of an order restraining the respondents from arresting him except in accordance with law.

2. Since the order questioned before us can well be questioned before the departmental Authority and then before the Service Tribunal, we cannot step in. However, it is observed that the petitioner shall not be arrested except in accordance with law. This writ petition is disposed of accordingly.

CHIEF JUSTICE

Announced on
31st March, 2010 J U D G E

Peshawar High Court

Gul Zarin --- Appellant/Petitioner (s)

Versus

The State --- Respondent (s)

JUDGMENT

W.P. No. 792/2010 Date of hearing 01.04.2010

EJAZ AFZAL KHAN, C.J.- Petitioner through the instant petition has asked for the issuance of an appropriate writ directing the respondents to release the detenue forthwith. Learned Counsel appearing on behalf of respondents states that he has no objection if an order directing release of the detenue is made in 40 FCR. In this view of the matter, respondents are directed to release the detenue in 40 FCR if he furnishes bail bonds in the sum of Rs.2 lac, with two sureties, each in the like amount to the satisfaction of the respondents. As far as detention of the detenue under Section 21 FCR or any other provision of law is concerned, the detenue may, if so advised, move an application before the competent forum in this behalf which is directed to dispose it of within seven days of its receipt.

CHIEF JUSTICE

Announced on
Ist April, 2010. J U D G E

Peshawar High Court

Sajid Naeem --- Appellant/Petitioner (s)

Versus

Mst. Saeeda --- Respondent (s)

JUDGMENT

W.P. No. 1807/2007 Date of hearing 06.04.2010

EJAZ AFZAL KHAN, C.J.- Petitioner through the instant petition has questioned the judgment and decree dated 31-5-2007 of learned Additional District Judge-IV, Kohat, whereby he decreed the claim of the respondent for dowry articles.

2. The learned counsel appearing on behalf of the petitioner contended that where nothing was brought on record to give details of the articles given in dowry and the price thereof, the court could not have proceeded on assumptions and that the impugned judgment being based on no evidence is liable to be set at naught. The learned counsel in support of his contention placed reliance on the case of "**Umar Farooq Vs Mehnaz Iftikhar etc. (NLR 2007 Civil 105)"**.

3. As against that learned counsel appearing on behalf of the respondent by reading out the evidence of the respondent contended that once it was deposed to by the witnesses examined by the respondent that the dowry articles mentioned in the list Ex.PW.2/1 were given to the petitioner and it was not seriously disputed in the cross-examination, it shall be deemed to have been admitted and that the finding being based on proper appraisal of evidence is not open to any exception.

4. We have gone through the record carefully and have considered the submissions made by the learned counsel for the parties.

5. Though we may not feel happy the way the learned Additional District Judge worked out the value of the dowry articles, yet the fact remains that the list produced and exhibited by the respondent in the court was not at all questioned during the course of cross-examination. Similarly, none of the articles mentioned in the list was disputed by the other side. When so, we do not think it would be just and proper to re-open the settled issue on a purely technical ground. The judgment cited at the Bar, against this backdrop, does not appear to be germane to the case in hand.

6. For the reasons discussed above, this petition being devoid of any substance is dismissed.

CHIEF JUSTICE

Announced on
6th April, 2010.

J U D G E

Peshawar High Court

Muhammad Tahir --- Appellant/Petitioner (s)

Versus

District Officer Public Health --- Respondent (s)

JUDGMENT

W.P.No. 2598/2009 Date of hearing 06.04.2010

EJAZ AFZAL KHAN, C.J.- Petitioner through the instant petition has asked for the issuance of an appropriate writ directing the respondents to give him all the back benefits he was entitled to get if he had been given a chance to work in the next higher grade on acting charge basis.

2. The learned counsel appearing on behalf of the petitioner contended that though the petitioner lacked required length of service for being promoted to the next higher grade, all the same, he was eligible to be promoted to the same on acting charge basis when he was not promoted, learned counsel added, without any legal and moral justification, he would be entitled to all back benefits.

3. As against that learned DAG appearing on behalf of the respondents contended that the dispute urged before this court is not of fitness or otherwise of the petitioner to be promoted to the next higher grade but of eligibility which can well be urged before the Service Tribunal.

4. We have gone through the record carefully and have also considered the submissions made by the learned counsel for the parties.

5. The impugned order reveals that the petitioner was not considered for promotion to the next higher grade even on acting charge basis on account of lack of required length of service.

The dispute thus emerging in essence would be one of eligibility and not fitness or otherwise of the petitioner to be promoted to the next higher grade. When so, we cannot step in. However, while parting with the matter, we treat this petition as an appeal before the Service Tribunal and direct the office to send it thereto for decision in accordance with law.

CHIEF JUSTICE

Announced on
6th April, 2010.

J U D G E

Peshawar High Court

Muhammad Rasool --- Appellant/Petitioner (s)

Versus

Government --- Respondent (s)

JUDGMENT

W.P No. 906/2010 Date of hearing 07.04.2010

EJAZ AFZAL KHAN, CJ.-Petitioner through the instant petition has questioned the order dated 23.12.2009 of respondent No.3, whereby, he has been directed to perform his duties on the station, he was working before the issuance of the order dated 19.12.2008.

2. We have gone through the available record carefully and considered the submissions made by the learned counsel for the petitioner.

3. Since in view of the judgments rendered in the cases of ***Miss Rukhsana Ijaz vs. Secretary, Education, Punjab & others (1997 SCMR 167); Ayyaz Anjum vs. Government of Punjab, Housing and Physical Planning Department through Secretary and others (1997 SCMR 169); Rafique Ahmad Chaudhry vs. Ahmad Nawaz Malik & others (1997 SCMR 170); Secretary Education NWFP, Peshawar and 2 others vs. Mustamir Khan & another (2005 SCMR 17) and Peer Muhammad vs. Government of Baluchistan through Chief Secretary & others (2007 SCMR 54),*** posting and transfer being related to the terms and condition of service can well be urged before the departmental authority and then before the Service Tribunal, this Court, while exercising its jurisdiction under Article 199 of the Constitution of Islamic Republic of Pakistan, can't step-in. We, however, by following the dictum rendered in the case of ***Muhammad Anis & others vs. Abdul Haseeb & others (PLD 1994 SC 539)*** treat this petition as an appeal before the Service

Tribunal and direct the office to send it thereto for decision in accordance with law. This petition, thus, stands disposed of.

Announced.
07. 04. 2010

CHIEF JUSTICE

J U D G E

Peshawar High Court

Gul Feroz --- Appellant/Petitioner (s)

Versus

EDO --- Respondent (s)

JUDGMENT

W.P No. 1175/2010 Date of hearing 07.04.2010

EJAZ AFZAL KHAN, CJ.-Petitioner through the instant petition has questioned the order dated 22.03.2010, whereby, his transfer order dated 19.12.2009 from Government Middle School, Sheratkal to Government Higher Secondary School, Wari was cancelled, on the ground that the competent authority has passed this order without seeing the decision given by this Court in Writ Petition No.36/2010 decided on 10.02.2010.

2. We have gone through the available record carefully and considered the submissions made by the learned counsel for the petitioners.

3. Since posting and transfer being related to the terms and condition of service can be urged before the departmental authority and then before the Service Tribunal, this Court, while exercising its jurisdiction under Article 199 of the Constitution of Islamic Republic of Pakistan, can't step-in. As the petitioner has already filed a representation before the departmental authority, we would direct it to decide the same in accordance with law within a fortnight. However, it may also be appreciated that in the order dated 10.02.2010, we didn't set aside any order. We, indeed, directed the departmental authority to decide the representation filed by the petitioner in that case. This writ petition is disposed of accordingly.

Announced.
07. 04. 2010 CHIEF JUSTICE

J U D G E

Peshawar High Court

Ahmad Din --- Appellant/Petitioner (s)

Versus

The State --- Respondent (s)

JUDGMENT

W.P (HC) No. 2113/2009 Date of hearing 07.04.2010

EJAZ AFZAL KHAN, CJ.- Petitioner through the instant petition has asked for the issuance of an appropriate writ directing the respondents to produce the detenue in the Court and to show under what law and authority, he has been hauled up.

2. The learned Deputy Attorney General states that as per para-wise comments, submitted on behalf of Secretary Defence, the detenue is not in their custody. The DSP (Investigation), D.I.Khan also states that he neither arrested the detenue nor ever detained him. When this being the state of things, we are afraid, we can't issue the writ asked for. This petition being without substance is, thus, dismissed. However, the petitioner may, if so advised, after getting some ink-link about the later fate of the detenue, file a fresh petition.

Announced.
07. 04. 2010 CHIEF JUSTICE

J U D G E

Peshawar High Court

Faiz Muhammad --- Appellant/Petitioner (s)

Versus

Government --- Respondent (s)

JUDGMENT

W.P.No. 916/2010 Date of hearing 08.04.2010

EJAZ AFZAL KHAN, C.J.- Petitioner through the instant petition has questioned the advertisement appearing in the Daily "Aaj" of 10th March, 2010 and the Notification dated 25th March, 2010 whereby 75% quota of the vacancies to be filled by promotion has been reduced to 30%.

2. Since the question urged before us can well be urged before the Service Tribunal in view of the judgment rendered in the case of **"I.A.Sherwani and others Vs. Government of Pakistan through Secretary, Finance Division Isalamabad and others etc." (1991 SCMR 1041),** we would not like to step in. However, instead of dismissing this petition, we would treat it as an appeal before the Service Tribunal and send it thereto for decision in accordance with law.

CHIEF JUSTICE

Announced on
8th April, 2010. J U D G E

Peshawar High Court

Farman Ali --- Appellant/Petitioner (s)

Versus

The State --- Respondent (s)

JUDGMENT

W.P. No. 265/2010 Date of hearing 13.04.2010

EJAZ AFZAL KHAN, C.J.- Petitioner through the instant petition has asked for the issuance of an appropriate writ directing the respondents to release the detenue who is hauled up in a case under Sections 400/401 PPC.

2. The learned counsel appearing on behalf of the petitioner contended that if at all the detenue was required in the cases as mentioned above, he could not have been removed to the tribal area without complying with the provision of Section 86-A Cr.P.C. and that the very arrest, removal and detention of the detenue being against law and the Constitution, is liable to be set at naught.

3. The learned counsel appearing on behalf of the respondents submitted that the detenue was never arrested from the settled area, and that he was taken into custody by the Armed Forces acting in aid of civil administration and handed over to the respondent, therefore, compliance with the provision of Section 86-A Cr.P.C. was not called for. The learned counsel next contended that when the Jirga has since been constituted and the trial can be concluded within a short span of time, it would not be proper for this court to intervene at this stage. The detenue, the learned counsel concluded, can even be released on bail if he moves the competent forum.

4. We have gone through the record carefully and also considered the submissions made by the learned counsel for the parties.

5. A perusal of the record does not clearly show that the detenue was arrested from the settled area. The learned counsel for the respondents stated at the bar that the detenue was arrested by the Armed Forces acting in aid of the civil administration. Therefore, in such situation we do not think compliance of the provision of Section 86-A Cr.P.C. would be called for, the more so, when it is not disputed that the detenue was taken into custody by the Armed Forces acting in aid of civil administration. Since the Jirga has already been constituted as per statement of the learned counsel for the respondents, what we can do at the moment is to direct the APA Bara Khyber Agency to conclude the trial within one month positively. Respondents are also directed to consider the application of the detenue for bail and decide it within a week, as and when moved. This petition is, thus, disposed of.

CHIEF JUSTICE

Announced on
13th April. 2010.

J U D G E

Peshawar High Court

Muhammad Sadiq --- Appellant/Petitioner (s)

Versus

Barkatullah --- Respondent (s)

JUDGMENT

W.P. No. 2777/2009 Date of hearing 13.04.2010

EJAZ AFZAL KHAN, C.J.- Petitioner through the instant petition has asked for the issuance of an appropriate writ directing the respondents to re-instate him as the order terminating his services has been passed without giving him an option of hearing.

2. The learned counsel appearing on behalf of the respondents contended that the petitioner was given an option of hearing, and that order terminating his services being passed after proper inquiry is not open to any exception.

3. We have gone through the record carefully and also considered the submissions made by the learned counsel for the parties.

4. Since the impugned order can be questioned through an appeal under Section 190 of the Local Government Ordinance before the departmental authority, we would not like to step in at this stage. We thus instead of dismissing this petition, treat it as an appeal before the Departmental Authority by following the judgment rendered in the case of **"Muhammad Anis and others Vs. Abdul Haseeeb and others (PLD 1994 Supreme Court 539)** and send it thereto for decision in accordance with law within one months.

CHIEF JUSTICE

Announced on
13th April. 2010. J U D G E

Peshawar High Court

Muhammad Javed --- Appellant/Petitioner (s)

Versus

SHO --- Respondent (s)

JUDGMENT

W.P. No. 1134/2010 Date of hearing 13.04.2010

EJAZ AFZAL KHAN, C.J.- Petitioner through the instant petition has asked for the issuance of an appropriate writ directing the respondents to release the detenue who being 12 years old cannot have any hand in the commission of crimes like Sections 400/401 PPC.

2. Learned counsel appearing on behalf of the respondents states that in case the contention of the petitioner turns out to be correct, he shall be released on bail if and when he moves an application for the said purpose. In this view of the matter, we direct the respondents to pass an appropriate order on the application of the detenue if and when moved. This petition is thus disposed of.

CHIEF JUSTICE

Announced on
13th April. 2010. J U D G E

Peshawar High Court

Fazal Jamal --- Appellant/Petitioner (s)

Versus

Government of N-W.F.P --- Respondent (s)

JUDGMENT

W.P. No. 3087/2009 Date of hearing 14.04.2010

EJAZ AFZAL KHAN, C.J.- According to the information filed by respondent No.1, the detenue is not with any of the agencies. The SHO concerned has already stated before the court on 22-12-2009 that he never arrested the detenue. Respondents Nos.2, 4 to 8 have already been relieved by this court on 14-1-2010. In the circumstances, the writ petition asked for cannot be issued. The learned counsel for the petitioner in this state of things wants to withdraw this petition with permission to file fresh one, if need be. Order accordingly.

CHIEF JUSTICE

Announced on
14th April, 2010.

J U D G E

Peshawar High Court

Hassan Ali --- Appellant/Petitioner (s)

Versus

Government --- Respondent (s)

JUDGMENT

W.P. No. 2024/2009 Date of hearing 14.04.2010

EJAZ AFZAL KHAN, C.J.- Petitioners through the instant petition have asked for the issuance of an appropriate writ directing the respondents to decide their representations in the light of the posting and transfer policy which was re-affirmed by this court in the judgment dated 24-10-2008.

2. Learned AAG appearing on behalf of the respondents states that when the representations have been filed by the petitioners, respondents are bound to pass an order thereon in the light of the policy formulated qua posting and transfer. When so, we direct the respondents to pass an appropriate order on the representations of the petitioners, as hinted to above. This petition is, thus, disposed of.

CHIEF JUSTICE

Announced on
14th April. 2010. J U D G E

Peshawar High Court

Arshad Moeen --- Appellant/Petitioner (s)

Versus

Government of KPK --- Respondent (s)

JUDGMENT

W.P.No. 1173/2009 Date of hearing 20.04.2010

EJAZ AFZAL KHAN, C.J.- Petitioner through the instant petition has asked for the issuance of an appropriate writ directing the respondents to appoint him against the vacancies of PST in the Union Council Sabir Ahbad, on the ground that in fact there were as many 9 vacancies but four were concealed. The respondents in their comments stated that there were as many as five vacancies which have been filled up in accordance with the policy.

2. We have gone through the record carefully and also considered the submissions made by the learned counsel for the parties.

3. The learned counsel appearing on behalf of the petitioner could not refer to any document showing that there were as many as 9 vacancies at the relevant time. Yes a vacancy has been filled by transfer but that too would not serve the purpose of the petitioner as he did not acquire that position on merit as could call for his adjustment. When this being the case, we do not think a case for the issuance of a writ asked for has been made out. This writ petition, being without any substance, is, thus, dismissed.

CHIEF JUSTICE

Announced on
20th April. 2010. J U D G E

Peshawar High Court

Gul Zada --- Appellant/Petitioner (s)

Versus

APA --- Respondent (s)

JUDGMENT

W.P.No. 959/2010 Date of hearing 20.04.2010

EJAZ AFZAL KHAN, C.J.- Through this petition, petitioner Gul Zada seeks release of the detenues, namely, Umar lDaraz, Rafiq Khan and Hamid Khan, on bail under 40 FCR. Mr.Iqbal Ahmad Durrani, standing counsel for the respondents, states that he has no objection to the release of the detenues in 40 FCR. In this view of the matter, respondents are directed to release the detenues on bail in 40 FCR, if they furnish bail bonds in the sum of Rs.2 lac each, with two sureties, each in the like amount to the satisfaction of the respondents. This petition is disposed of accordingly.

CHIEF JUSTICE

Announced on
20th April, 2010. J U D G E

Peshawar High Court

Sareer Ahmad --- Appellant/Petitioner (s)

Versus

PIA --- Respondent (s)

JUDGMENT

W.P. No. 1420/2009 Date of hearing 20.04.2010

EJAZ AFZAL KHAN, C.J.- Petitioner through the instant petition has asked for the issuance of an appropriate writ declaring that the order dated 4-6-2009 transferring him from Peshawar to Karachi for being without jurisdiction and lawful authority is of no effect.

2. Learned counsel appearing on behalf of the petitioner contended that once the petitioner has been transferred to Peshawar vide order dated 21-5-2007, he could not be transferred to Karachi without his request and before the expiration of five years. The learned counsel to support his contention referred to the provision numbered as 40.03.03 in Chapter-XL of Personnel Policies Manual regulating the Transfer of the employees of the Pakistan International Airlines Corporation.

3. The learned counsel appearing on behalf of the respondents contended that if posting and transfer is left to the request of the employees, then God knows what would become of this Institution, but, in fact, this is not the case if seen in the light of Chapter-VII(1) of the Pakistan International Airlines Aircraft Engineers Service Rules 2001, which clearly provides that the posting and transfer is to be made on the basis of qualification, experience and usefulness of the Aircraft Engineers and that the normal domestic posting and transfer will be for a duration of one year or as may be determined by the competent authority.

4. We have gone through the record carefully and also considered the submissions made by the learned counsel for the parties.

5. Before we proceed ahead, it would be worthwhile to refer to the relevant portion of the provision referred to above which reads as under:-

> "**Transfer from Domestic Stations to Karachi**
>
> All employees in Pay Group II and IV at domestic stations will be considered for transfer and posting to Karachi after completing tenure of 5 years and above. As a rule, every employee at domestic stations will be considered for posting back to Karachi after completing or having completed 5 years' tenure. The order of merit for transfer from domestic stations to Karachi will be, higher the number of years of posting, earlier the transfer and release from the station. Employees who are due for retirement in the next 3 years will, however, be left over to complete the service till superannuation."

6. A look at the aforesaid provision would reveal that as a rule every employee of domestic stations would be considered for posting back to Karachi after completing or having completed 5 years' tenure. This provision is equally applicable even to the Aircraft Engineers, when viewed in the light of 40.04 of the same Chapter. When so we do not understand how the petitioner could be transferred in disregard of the said provisions. Granted that this policy or any regulation made by Pakistan International Airlines Corporation does not enjoy the statutory sanction but any policy or rule made by them could not be arbitrarily deviated from or unilaterally violated. Such policy or rule, being in the nature of a contract, have a binding force on the parties unless suitably amended or changed. The case of "**Nighat Yasmin Vs. Pakistan International Airlines Corporation, Karachi and another (2004 SCMR 120)** may well be referred to in this behalf.

7. Having thus considered in this backdrop, we do not think the order impugned can be sustained under any canons of law and propriety. We, therefore, allow this petition and set aside the order impugned herein.

CHIEF JUSTICE

Announced on
20th April. 2010.

J U D G E

Peshawar High Court

Dr. Syed Imran Ali Shah --- Appellant/Petitioner (s)

Versus

Government --- Respondent (s)

JUDGMENT

W.P No. 927/2010 Date of hearing 20.04.2010

EJAZ AFZAL KHAN, CJ.-Petitioner through the instant petition has asked for issuance of an appropriate writ declaring the order dated 20.12.2005 of respondent No.2 as of no effect for having been passed without jurisdiction and lawful authority.

2. We have gone through the available record carefully and considered the submissions made by the learned counsel for the petitioner.

3. The record reveals that the impugned action was taken against the petitioner under the N.-W.F.P. Removal from Service (Special Powers) Ordinance, 2000. When so, the petitioner can file a representation before the departmental authority and then appeal before the Service Tribunal under Section 10 of the said Ordinance. We, therefore, while exercising powers under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, can't issue the writ asked for. Since the petitioner has already filed a representation before the departmental authority, we direct it to decide the same in accordance with law within a month. This petition is, thus, disposed of.

Announced.
20. 04. 2010 CHIEF JUSTICE

J U D G E

Peshawar High Court

Shoaibullah Cheema --- Appellant/Petitioner (s)

Versus

NAB --- Respondent (s)

JUDGMENT

W.P. No. 645/2010 Date of hearing 21.04.2010

EJAZ AFZAL KHAN, C.J.- Petitioner through the instant petition has asked for the custody of the vehicle, bearing Registration No. LRK 9456 Suzuki Cultus, which has been retained by the National Accountability Bureau in connection with a Reference pending against him in the National Accountability Court-II, Peshawar.

2. As against that learned counsel appearing on behalf of the NAB contended that since the petitioner is proceeded against for amassing huge assets running in billions, release of the vehicle to him in the case would deprive the NAB of the assets which could be confiscated at the end of the day.

3. We have gone through the record carefully and have also considered the submissions made by the learned counsel for the parties.

4. Since many other assets are already frozen, we do not think, release of the vehicle to the petitioner would bring the heaven to the earth, that too, when a person defending so serious charges is required to have access to the court thorough some vehicle. We, thus, allow this petition and direct release of the vehicle to the petitioner provided he furnishes bonds in the sum of Rs.Five lac, with two sureties, each in the like amount to the satisfaction of the Judge Accountability Court concerned.

CHIEF JUSTICE

Announced on
21st April, , 2010. J U D G E

Peshawar High Court

Waqar --- Appellant/Petitioner (s)

Versus

The State --- Respondent (s)

JUDGMENT

W.P.No. 596/2009 Date of hearing 22.04.2010

EJAZ AFZAL KHAN , C.J.- Appellant was tried in a case registered against him and others under sections 302/449/436/148/149 PPC, vide FIR No. 568, dated 6-9-2008 of Police Station Rustam, District Mardan, by the learned Additional Sessions Judge-III, Mardan, who on its end, sentenced him as under :-

- Imprisonment for life under Section 302(b) PPC with payment of compensation of Rs.one lac, in terms of Section 544-A Cr.P.C. or in default to undergo SI for six months.
- Five years R.I. under Sections 436 read with section 449 PPC with payment of fine of Rs.5000/- or in default to undergo SI for two months.

Both the sentences were ordered to run concurrently with benefit of section 382-B Cr.P.C, vide judgment dated 26-11-2009. Hence, this appeal.

2. During the pendency of this appeal, elders of the locality intervened to patch-up the matter. Their efforts bore fruit and culminated in the settlement through Deed dated 6-4-2010 Ex.CW.1/1. The legal heirs of the deceased made a joint statement testifying to the genuineness of the patch-up and correctness of the Deed Ex.CW.1/1. The elders of the locality also made a joint statement in the court in this behalf wherein they affirmed the genuineness of the compromise and expressed no reservation to the acceptance of the appeal and acquittal of the appellant. Miss S.Naz

Muhammadzai, learned counsel appearing on behalf of the State, stated that when there is a peace between the parties, even Qazi cannot figure any where, all the same, it be taken notice of that some of the offences appellant has been convicted are non-compoundable.

3. We have gone through the record carefully and also considered the submissions made by the learned counsel for the parties.

4. Once we have no doubt as to the genuineness of the patch-up, we do not think the fact that the offence is non-compoundable can create any hurdle in the way of acceptance of appeal. We thus allow this appeal, set aside the convictions and the sentences recorded by the learned trial Court and acquit the appellant of the charges. He be set free forthwith, if not required in any other case.

CHIEF JUSTICE

Announced on
22nd April.2010

J U D G E

Peshawar High Court

Abdul Rehman --- Appellant/Petitioner (s)

Versus

PA --- Respondent (s)

JUDGMENT

W.P. No. 1221/2010 Date of hearing 27.04.2010

EJAZ AFZAL KHAN, C.J.- The main grievance of the learned counsel for the petitioner was that despite direction of this court and despite application before the APA, no order has so far been passed. The learned counsel appearing on behalf of the respondents in the first instance contended that no such application has been made, therefore, the desired order could not be passed. However, he assures that such order would be passed if and when an application is made in this behalf. The petition is disposed of accordingly.

CHIEF JUSTICE

Announced on
27th April, 2010. J U D G E

Peshawar High Court

Obaidullah Abid --- Appellant/Petitioner (s)

Versus

Haji Mehran Shah --- Respondent (s)

JUDGMENT

W.P. No. 2154/2009 Date of hearing 27.04.2010

EJAZ AFZAL KHAN, C.J.- Petitioner through the instant petition has questioned the order dated 16-7-2009 of the learned Additional Sessions Judge-XI, Peshawar, whereby he dismissed the complaint of the petitioner.

2. The learned counsel appearing on behalf of the parties referred to many documents in support of their contentions but it would be rather dangerous to comment on any of them at this stage. However, the record reveals that the matter has not been decided after making a proper enquiry and after giving both the parties a chance to vindicate their respective stance. We, therefore, without entering into unnecessary details lest it prejudices the case of either of the parties, would allow this petition, set aside the impugned order and send the case back to the learned trial Judge for decision afresh after recording the evidence.

CHIEF JUSTICE

Announced on
27th April, 2010. J U D G E

Peshawar High Court

Mateen Khan --- Appellant/Petitioner (s)

Versus

Government of Pakistan Secretary Interior --- Respondent (s)

JUDGMENT

W.P No. 495/2010 Date of hearing 28.04.2010

EJAZ AFZAL KHAN, CJ.- Petitioner through the instant petition has asked for the issuance of an appropriate writ directing respondents No.2 to issue his CNIC as particulars have already been verified twice.

2. The learned counsel appearing on behalf of the respondents contended that no verification has so far been received as to the antecedents of the petitioner and that the appropriate order in this behalf shall be made on receipt thereof.

3. We have gone through the available record carefully and considered the submissions made by the learned counsel for the parties.

4. Since, as per statement of the learned counsel for the respondents, the verification of the antecedents of the petitioner hasn't been received so far, the CNIC couldn't be issued. However, we direct the respondents to pass an appropriate order on the application of the petitioner within a month on receipt of verification. This petition is, thus, disposed of.

Announced.
28. 04. 2010 CHIEF JUSTICE

J U D G E

Peshawar High Court

Mst. Sana Rashad --- Appellant/Petitioner (s)

Versus

Mian Tanseem ur Rehman --- Respondent (s)

JUDGMENT

W.P No. 1418/2010 Date of hearing 28.04.2010

EJAZ AFZAL KHAN, CJ.- Petitioner through the instant petition has questioned the order dated 12.03.2010 of the learned Sessions Judge, Peshawar, whereby, he gave a right to respondent No.2 to visit her house twice a week on mutually agreed days to take the children to the house of the said respondent for visitation with respondent No.1 on the ground that the order so passed has become a source of agony for the petitioner and that it be suitably modified.

2. We have gone through the available record carefully and considered the submissions made by the learned counsel for the petitioner.

3. Since, neither the order nor the observations made therein can be said to have been passed without jurisdiction and lawful authority, we would not like to intervene, atleast, at this stage.

4. For the reasons disused above, this petition being without substance is dismissed in limine.

Announced.
28. 04. 2010 CHIEF JUSTICE

J U D G E

Peshawar High Court

Muhammad Sher --- Appellant/Petitioner (s)

Versus

Government --- Respondent (s)

JUDGMENT

W.P. No. 1702/2009 Date of hearing 04.05.2010

EJAZ AFZAL KHAN, C.J.- Petitioner through the instant petition has asked for the issuance of a writ directing the respondents to appoint him against he post of Class-IV on the ground that the property whereon the School had been constructed was donated by his father and that it was agreed upon amongst the elders of the locality that he shall be adjusted in case any such vacancy occurs.

2. The learned AAG assisted by Miss Sarwat Jahan, Directress Schools, contended that the agreement arrived at between the elders of the locality cannot bind the respondents and that petitioner cannot apportion any blame on the respondent when he himself did not appear before the competent authority.

3. We have gone through the record carefully and have also considered the submissions made by the learned counsel for the parties.

4. Though an agreement was arrived at amongst the elders of the locality that a member from the family of Gul Rang Shah (father of the petitioner) shall be adjusted if and when any vacancy of Class-IV occurs, but this agreement being between the elders of the locality cannot bind the department. Inspite of all this, petitioner could have been considered for appointment against the post of Class-IV but when he himself did not appear before the competent authority on the date advertised in the Newspaper, he cannot now apportion any blame on the respondent. In such

circumstances we do not think a writ asked for can be issued. However, we direct the respondents to consider the petitioner in this backdrop for appointment against the post of Class-IV if and when any vacancy occurs. The writ petition is, thus, dismissed.

CHIEF JUSTICE

Announced on
4th May, 2010.

J U D G E

Peshawar High Court

Muhammad Sabeeh --- Appellant/Petitioner (s)

Versus

Government --- Respondent (s)

JUDGMENT

W.P No. 881/2010 Date of hearing 04.05.2010

EJAZ AFZAL KHAN, CJ.-Since the questions urged before us, being related to the terms and conditions of service including the vires of the rules, can well be urged before the Service Tribunal in view of the judgment rendered in the case of ***I.A. Sharwani & others vs. Government of Pakistan through Secretary, Finance Division, Islamabad & others (1991 SCMR 1041),*** we wouldn't like to entertain this petition. We, instead of dismissing the writ petition, by following the dictum rendered in the case of ***Muhammad Anis & others vs. Abdul Haseeb & others (PLD 1994 SC 539),*** treat it as an appeal before the Service Tribunal and direct the office to send it thereto for decision in accordance with law. This writ petition, thus, stands disposed of.

Announced.
04. 05. 2010 CHIEF JUSTICE

J U D G E

Peshawar High Court

Sakhi Jan --- Appellant/Petitioner (s)

Versus

Islamia College --- Respondent (s)

JUDGMENT

W.P No. 1378/2010 Date of hearing 04.05.2010

EJAZ AFZAL KHAN, CJ.-Petitioners through the instant petition have asked for the issuance of an appropriate writ directing the respondents to grant them BPS-21 in consonance with the decision of the syndicate.

2. We have gone through the available record and considered the submissions made by the learned counsel for the petitioners.

3. When we confronted the learned counsel for the petitioners as to how could the petitioners file a writ petition in this Court when they are having a remedy under Section 39 of the University of Peshawar Act, 1974, he replied that appeals filed by the petitioners, despite the lapse of sufficient time, haven't been decided so far. When so, we wouldn't like to step-in at this stage by encouraging bypass of a statutory forum. However, we, while disposing of this petition, would direct the respondents to decide the appeals of the petitioners within a month positively. The petitioners would be at liberty to file a fresh petition, if they fail to get the desired redress from the forum mentioned above.

Announced.
04. 05. 2010 CHIEF JUSTICE

J U D G E

Peshawar High Court

Abdul Rahim --- Appellant/Petitioner (s)

Versus

Chief Secretary --- Respondent (s)

JUDGMENT

W.P No. 1381/2010 Date of hearing 04.05.2010

EJAZ AFZAL KHAN, CJ.-Petitioner through the instant petition has asked for the issuance of an appropriate writ directing the respondents to consider him for the post of Tehsildar in BPS-16 in accordance with the relevant rules.

2. We have gone through the available record carefully and considered the submissions made by the learned counsel for the petitioner.

3. Since at the moment, no Departmental Promotion Committee is being constituted, we don't think that the petitioner has any cause of grievance. However, if a junior to the petitioner has been appointed by transfer, he can take his grievance to the competent authority. As the petitioner has already approached the competent authority in this behalf by moving an application, we would direct the authority to pass an appropriate order thereon within a month. This petition is, thus, disposed of.

Announced.
04. 05. 2010 CHIEF JUSTICE

J U D G E

Peshawar High Court

Mehboob Ali --- Appellant/Petitioner (s)

Versus

PPO --- Respondent (s)

JUDGMENT

W.P No. 1476/2010 Date of hearing 04.05.2010

EJAZ AFZAL KHAN, CJ.-Petitioner through the instant petition has asked for the issuance of an appropriate writ directing the respondents to re-examine his case and select him for the Intermediate School Course.

2. We have gone through the available record carefully and considered the submissions made by the learned counsel for the petitioner.

3. Since the questions urged before us being related to the terms and condition of service can well be urged before the departmental authority and then before the Service Tribunal, we, while hearing a petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, can't issue the writ asked for. We, however, by following the dictum rendered in the case of ***Muhammad Anis & others vs. Abdul Haseeb & others (PLD 1994 SC 539)*** treat this petition as a representation before the departmental authority and direct the office to send it thereto for decision, within a month, in accordance with law. This petition, thus, stands disposed of.

Announced.
04. 05. 2010 CHIEF JUSTICE

J U D G E

Peshawar High Court

Muhammad Ajmal --- Appellant/Petitioner (s)

Versus

Government --- Respondent (s)

JUDGMENT

W.P. No. 325/2010 Date of hearing 06.05.2010

EJAZ AFZAL KHAN, C.J.- Petitioner Muhammad Ajmal and respondent No.4 Zahid Sajjad applied for admission. The latter acquired better merit in the entry test but was debarred for one year on account of his failure to intimate the Gomal Medical College about his intention not to avail the admission in the Session 2008-2009. The petitioner was thus admitted against the said seat. But when respondent No.4 was admitted pursuant to the judgment of this Court given in a writ petition, petitioner was dropped. Hence, this petition.

2. The learned counsel for the parties argued this case at length. During the course of arguments when we asked whether the petitioner who has developed a legitimate expectancy in the circumstances of the case, could be adjusted in the class, the learned counsel for the respondents asked for time. Today, he informed the court that there is a vacant seat in the Bannu Medical College where against the petitioner can be adjusted particularly when it is to go waste otherwise.

3. In this view of the matter, we allow this petition and direct the respondents to allow admission to the petitioner against the seat mentioned above.

CHIEF JUSTICE

Announced on
6th May 2010. J U D G E

Peshawar High Court

Sher Ali --- Appellant/Petitioner (s)

Versus

APA --- Respondent (s)

JUDGMENT

W.P. No. 520/2010 Date of hearing 06.05.2010

EJAZ AFZAL KHAN, C.J.- Through the instant petition, petitioner has asked for the issuance of an appropriate writ directing the respondents to release him on the ground that the offence he is charged with is not triable by the council of elders constituted under the FCR. Reliance was placed on the case of **Habibullah Khan Vs. The State and another (PLD 1964 Peshawar - 212).**

2. The learned counsel appearing on behalf of the respondents contended that though the petitioner being an employee of the Utility Stores Corporation can be treated as a public servant for the purpose of Criminal Law Amendment Act 1958, nonetheless he can be tried by the council of elders constituted under the FCR that too when the offence has also been committed within the regime of the FCR.

3. We have gone through the record carefully and considered the submissions made by the learned counsel for the parties.

4. Once it is not disputed that the petitioner being an employee of the Utility Stores Corporation has to be nabbed, and interrogated by the Federal Agency and tried by the Special Court constituted under the Criminal Law Amendment Act, 1958 his detention cannot be justified under any canons of law and propriety. Reference may be made to the judgment rendered in the case of **Habibullah Khan Vs. The State and another** supra. We thus allow this petition and direct the respondents to release the

petitioner forthwith, if not required in any other case. However, the Utility Stores Corporation would be at liberty to proceed against the petitioner before the competent forum in accordance with the law hinted to above.

CHIEF JUSTICE

Announced on
6th May 2010.

J U D G E

Peshawar High Court

WAPDA hydro Electric --- Appellant/Petitioner (s)

Versus

Chief Executive --- Respondent (s)

JUDGMENT

W.P No. 870/2009 Date of hearing 06.05.2010

EJAZ AFZAL KHAN, CJ.-Petitioners through the instant petition have asked for issuance of an appropriate writ declaring the order dated 06.04.2009 of respondent No.4 as of no effect for having been passed without jurisdiction and lawful authority.

2. We have gone through the available record carefully and considered the submissions made by the learned counsel for the petitioners.

3. Since the dispute urged before us being related to the terms and condition of service can well be urged before the Service Tribunal, we, while hearing a petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, can't issue the writ asked for. We, instead of dismissing the writ petition, by following the dictum rendered in the case of ***Muhammad Anis & others vs. Abdul Haseeb & others (PLD 1994 SC 539),*** treat it as an appeal before the Federal Service Tribunal and direct the office to send it thereto for decision in accordance with law. This writ petition, thus, stands disposed of.

Announced.
06. 05. 2010 CHIEF JUSTICE

J U D G E

Peshawar High Court

Maqbali & Muhammad Karim --- Appellant/Petitioner (s)

Versus

The State Respondent (s)

JUDGMENT

W.P. No. 652/2010 Date of hearing 11.05.2010

EJAZ AFZAL KHAN, C.J.- By this single order, we propose to dispose of writ petition Nos.69 & 652 of 2010, wherein petitioners, who are charged in a case registered against them and others under Section 365-A/368 PPC, vide FIR No.337, dated 20-5-2009 in Police Station East, District Peshawar, seek their release on bail mainly on the ground that no evidence whatsoever is available on the record to connect them with the crime attracting prohibitory clause.

2. As against that, the learned Additional Advocate General appearing on behalf of the State argues that the available material on record could not show any source much less reliable implicating the petitioner Muhammad Karim in the commission of crime. He, however, while opposing the grant of bail to Maqbali, adds that he is prime facie linked with the crime, firstly because the abductee after being recovered from his house, charged him and secondly because he was arrested on the spot.

3. We have gone through the record carefully and have also considered the submissions made by the learned counsel for the parties.

4. Though petitioner Muhammad Karim has been charged by the abductee on the strength of an information from reliable source but that source never came to light. His complicity in the crime thus calls for further enquiry. Petitioner Maqbali prima facie stands connected with the crime attracting prohibitory

clause, firstly because he is charged by the abductee, secondly because the abductee was recovered from his house, and thirdly because he was arrested from the spot. We thus allow W.P.No.69/2010 filed by Muhammad Karim and direct that he be released on bail if he furnishes bail bonds in the sum of Rs.Two lac, with two sureties, each in the like amount to the satisfaction of the Illaqa/ Judicial Magistrate while dismiss the writ petition filed by Maqbali, with the direction to the trial court to conclude his trial within a period of two months positively, failing which the petitioner may, if so advised, approach this court for bail.

CHIEF JUSTICE

Announced on
11th May,2010.

J U D G E

Peshawar High Court

Muhammad Umar --- Appellant/Petitioner (s)

Versus

The State --- Respondent (s)

JUDGMENT

W.P. No. 67/2010 Date of hearing 11.05.2010

EJAZ AFZAL KHAN, C.J.- By this single order, we propose to dispose of writ petition Nos.67, 712 & 713 of 2010, wherein petitioners who are charged in a case registered against them and others under Section 365-A PPC, vide FIR No.369, dated 14-7-2009 in Police Station Daudzai, District Peshawar, seek their release on bail mainly on the ground that the abductee after having satisfied himself about their innocence does not charge them in the case. The abductee present in the court affirms the above stated position.

2. As against that, the learned Additional Advocate General appearing on behalf of the State too does not seriously oppose the grant of bail when the abductee himself states in no uncertain terms that he has satisfied himself about the innocence of the petitioners.

3. In this view of the matter, we allow these petitions and direct that the petitioners be released on bail provided they furnish bail bonds in the sum of Rs.one lac each, with two sureties, each in the like amount to the satisfaction of the Illaqa/Judicial Magistrate.

CHIEF JUSTICE

Announced on
11th May,2010. J U D G E

Peshawar High Court

Said Akbar --- Appellant/Petitioner (s)

Versus

The State --- Respondent (s)

JUDGMENT

W.P. No. 13/2010 Date of hearing 11.05.2010

EJAZ AFZAL KHAN, C.J.- Through the instant petition, petitioners, who are charged in a case registered against them and others under Section 34 PPC/13 AO/6/7 ATA/5 of the Explosive Substances Act, vide FIR No.18, dated 9-1-2009 in Police Station Darosh, District Chitral, seek their release on bail mainly on the ground that they have no nexus whatsoever with the house wherefrom the incriminating material was recovered and that the circumstances of the case call for further enquiry.

3. As against that, the learned Additional Advocate General appearing on behalf of the State argues that the petitioners being prima facie linked with the commission of a crime attracting prohibitory clause do not deserve the concession of bail at least at this stage, that too when they could be forwarded to the court of competent jurisdiction for trial within a week or so.

4. We have gone through the record carefully and considered the submissions made by the learned counsel for the parties.

5. A perusal of the data available on the record shows that the petitioners are prima facie linked with a crime attracting prohibitory clause, therefore, we at this stage do not feel inclined to countenance their prayer for their release on bail. This petition is, thus, dismissed. However, the prosecution is directed to forward the case of the petitioners within a fortnight to the court of competent jurisdiction while the latter is directed to conclude this

case within a period of two months, failing which the petitioners may, if so advised, approach the court for their release on bail. The office is directed to send the record of the case immediately to quarter concerned.

CHIEF JUSTICE

Announced on
11th May,2010.

J U D G E

Peshawar High Court

Zabihullah --- Appellant/Petitioner (s)

Versus

Government --- Respondent (s)

JUDGMENT

W.P No. 1586/2010 Date of hearing 11.05.2010

EJAZ AFZAL KHAN, CJ.- Petitioner through the instant petition has asked for the issuance of an appropriate writ directing respondent No.4 to give him back benefits with effect from 01.08.2007 to 17.04.2009.

2. We have gone through the available record carefully and considered the submissions made by the learned counsel for the petitioner.

3. Since the questions urged before us being related to the terms and condition of service can well be urged before the departmental authority and then before the Service Tribunal, we, while hearing a petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, can't intervene. We, instead of dismissing the writ petition, treat it as a representation before the departmental authority by following the dictum rendered in the case of ***Muhammad Anis & others vs. Abdul Haseeb & others (PLD 1994 SC 539)*** and direct the office to send it thereto for decision in accordance with law. This writ petition, thus, stands disposed of.

Announced.
11. 05. 2010 CHIEF JUSTICE

J U D G E

Peshawar High Court

Mst. Farzana Shaheen --- Appellant/Petitioner (s)

Versus

E.D.O --- Respondent (s)

JUDGMENT

W.P No. 1621/2010 Date of hearing 13.05.2010

EJAZ AFZAL KHAN, CJ.-Petitioner through the instant petition has asked for the issuance of an appropriate writ declaring the transfer order dated 02.04.2010 of the respondents as being nullity on account of having been passed without jurisdiction and lawful authority.

2. We have gone through the available record carefully and considered the submissions made by the learned counsel for the petitioner.

3. Since in view of the judgments rendered in the cases of *Miss Rukhsana Ijaz vs. Secretary, Education, Punjab & others (1997 SCMR 167); Ayyaz Anjum vs. Government of Punjab, Housing and Physical Planning Department through Secretary and others (1997 SCMR 169); Rafique Ahmad Chaudhry vs. Ahmad Nawaz Malik & others (1997 SCMR 170); Secretary Education NWFP, Peshawar and 2 others vs. Mustamir Khan & another (2005 SCMR 17) and Peer Muhammad vs. Government of Baluchistan through Chief Secretary & others (2007 SCMR 54),* posting and transfer being related to the terms and condition of service can be urged before the departmental authority and then before the Service Tribunal, this Court, while exercising its jurisdiction under Article 199 of the Constitution of Islamic Republic of Pakistan, can't step-in, atleast, at this stage. Since the petitioner has already filed a representation before the departmental authority, we direct it to decide the same in

accordance with law within a fortnight. This writ petition is disposed of accordingly.

Announced. CHIEF JUSTICE
13. 05. 2010

JUDGE

Peshawar High Court

Laeeq Muhammad --- Appellant/Petitioner (s)

Versus

Government --- Respondent (s)

JUDGMENT

W.P No. 1654/2010 Date of hearing 13.05.2010

EJAZ AFZAL KHAN, CJ.-Petitioners through the instant petition have asked for the issuance of an appropriate writ declaring the orders dated 09.09.2009 of respondent No.3 as being nullity for having been passed without giving them an option of hearing.

2. We have gone through the available record carefully and considered the submissions made by the learned counsel for the petitioners.

3. Since the questions urged before us being related to the terms and condition of service can well be urged before the departmental authority and then before the Service Tribunal, we, while hearing a petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, can't intervene. Since the petitioners have already filed representations before the departmental authority, we direct it to decide the same in accordance with law within a month. This writ petition is disposed of accordingly.

Announced.
13. 05. 2010 CHIEF JUSTICE

J U D G E

Peshawar High Court

Saleem --- Appellant/Petitioner (s)

Versus

J.A.C --- Respondent (s)

JUDGMENT

W.P No. 2249/2009 Date of hearing 19.05.2010

EJAZ AFZAL KHAN, CJ.- Petitioner through the instant petition has asked for the issuance of an appropriate writ directing the respondents to admit him in the college of Dentistry by arguing that stammering by no stretch of imagination can hedge or impede his educational pursuit, that too, when his mental faculties and body reflexes evince the smartness and alacrity of a normal man.

2. As against that the learned counsel appearing on behalf of respondent No.1 contended that sometimes, petitioner is stammering so much that he can neither express his point of view nor the person sitting across him can understand what he wants to say.

3. We have gone through the record carefully and considered the submissions made by the learned counsel for the parties.

4. During the course of hearing, we posed certain questions to the petitioner to assess his ability to undertake the course he has opted for. Though, he stammered, all the same, he succeeded in expressing his point of view. Yes, this handicap may sometime create a problem while diagnosing a disease and voicing his point of view but it is not of a nature, which can't be overcome, as he can successfully convey his message by writing it on a piece of paper. Viva voce too can be managed along the same lines. This disability or deprivation can't be overblown in a society, which hasn't yet learnt to be generous towards such people. A boy, who performed well and brought himself to a point where he qualified

the entry test after competing with many other normal boys, can't be deprived to acquire knowledge in the field of his choice. It would be rather cruel and even tyrannical to barricade his way to such pursuits. A boy with such will and determination is required to be encouraged before he sinks into a state of depression and gets ostracized from the world around him. Admission in the college, thus, can't be declined on the ground of stammering.

5. For the reasons discussed above, we allow this petition and direct the respondents to admit the petitioner in college. In case, he can't be accommodated this year because of deficiency in attendance, he be accommodated in the next session.

Announced.
19. 05. 2010

CHIEF JUSTICE

J U D G E

Peshawar High Court

Muhammad Khalid --- Appellant/Petitioner (s)

Versus

The State --- Respondent (s)

JUDGMENT

W.P. No. 3312/2010 Date of hearing 19.05.2010

EJAZ AFZAL KHAN, CJ.- Petitioner who is charged in a case registered against him and many others under Sections 324, PPC / 3 / 4 of the Explosive Substances Act, 1908 read with Section 7 of the Anti-Terrorism Act, 1997, vide FIR No.1415 dated 14.11.2006 in Police Station Timergara, Dir Lower sought his release on bail on the ground that he wasn't charged in the FIR and that the charge against him emanating from the persons inimical to him, can't connect him with the crime, when no evidence whatever in its support has come forth.

2. The learned Additional Advocate General appearing on behalf of the State opposed the grant of bail by submitting that though the petitioner hasn't been charged in the FIR but the charge against him from the horses' mouth can't be doubted.

3. We have gone through the record carefully and considered the submissions made by the learned counsel for the parties.

4. When none from amongst the persons witnessing the crime has charged the petitioner nor the one charging can be said to have given the firsthand account of the occurrence, we are afraid, it can't be held that the petitioner reasonably stands connected with the crime he is charged with. We, thus, can't decline the concession of bail.

5. For the reasons discussed above, this petition is allowed and it is directed that the petitioner be released on bail on

furnishing bail bonds in the sum of Rs.3,00,000/- (Rupees three lac) with two sureties, each in the like amount to the satisfaction of the learned Trial Court, who is to ensure that the sureties are local, reliable and men of means.

Announced.
19. 05. 2010

CHIEF JUSTICE

J U D G E

Peshawar High Court

Habib Khan Afridi --- Appellant/Petitioner (s)

Versus

The State --- Respondent (s)

JUDGMENT

W.P. No. 797/2009 Date of hearing 26.05.2010

EJAZ AFZAL KHAN, C.J.- Petitioner through the instant petition has questioned the order dated 15-11-2008 of the FCR Tribunal whereby he allowed revision filed by the respondents and modified the judgment dated 27-2-2008 of the Commissioner FCR.

2. The learned counsel appearing on behalf of the petitioner contended that where Jirga handed down a finding in favour of the petitioner and did not approve of confiscation of the arms recovered from the petitioner and his companions, there was no occasion to order their confiscation and that the decision of the Commissioner FCR reversing the finding of the Political Agent being well reasoned and well founded could not be reversed by the Tribunal.

3. As against that the learned counsel appearing on behalf of the respondents contended that the petitioner can not approbate and reprobate by accepting a part of the finding and rejecting the other going to his disadvantage. The learned AAG too supports the contention of the learned counsel for the respondents.

4. We have gone through the record carefully and have also considered the submissions made by the learned counsel for the parties.

5. Whether carrying of arms without a license is an offence in the tribal area, if not, how could the proceeding be initiated against the petitioner culminating in the confiscation of the

arms so recovered. If it is not an offence as per finding of the council of elders, how could it be overlooked by the Political Agent? If the Commissioner functioning under the hierarchy of FCR treated the finding of the council of elders as correct and final, how could that be over turned by the FCR Tribunal. A perusal of the impugned order would reveal that none of these points has been dealt with in a judicial or even quasi judicial manner. When so, we would not like to uphold a telegraphic judgment of the Tribunal which has disposed of the matter in a cursory and casual manner. We thus allow this petition, set aside the impugned judgment and send the case back to the learned Tribunal FCR for decision afresh after attending to the points hinted to above.

CHIEF JUSTICE

Announced on
26th May, 2010.

J U D G E

Peshawar High Court

Siraj ud Din --- Appellant/Petitioner (s)

Versus

Government --- Respondent (s)

JUDGMENT

W.P No. 1774/2010 Date of hearing 26.05.2010

EJAZ AFZAL KHAN, CJ.- Petitioner through the instant petition has asked for the issuance of an appropriate writ declaring the transfer order dated 28.04.2010 of respondent No.3 as being nullity on account of having been passed without jurisdiction and lawful authority.

2. We have gone through the available record carefully and considered the submissions made by the learned counsel for the petitioner.

3. Since in view of the judgments rendered in the cases of ***Miss Rukhsana Ijaz vs. Secretary, Education, Punjab & others (1997 SCMR 167); Ayyaz Anjum vs. Government of Punjab, Housing and Physical Planning Department through Secretary and others (1997 SCMR 169); Rafique Ahmad Chaudhry vs. Ahmad Nawaz Malik & others (1997 SCMR 170); Secretary Education NWFP, Peshawar and 2 others vs. Mustamir Khan & another (2005 SCMR 17) and Peer Muhammad vs. Government of Baluchistan through Chief Secretary & others (2007 SCMR 54),*** posting and transfer being related to the terms and condition of service can well be urged before the departmental authority and then before the Service Tribunal, this Court, while exercising its jurisdiction under Article 199 of the Constitution of Islamic Republic of Pakistan, can't step-in. We, instead of dismissing the writ petition, treat it as a representation before the departmental authority by following the dictum rendered in the case of ***Muhammad Anis & others vs.***

Abdul Haseeb & others (PLD 1994 SC 539) and direct the office to send it thereto for decision in accordance with law with a month. This petition, thus, stands disposed of.

Announced.
26. 05. 2010

CHIEF JUSTICE

J U D G E

Peshawar High Court

Bahar Gul --- Appellant/Petitioner (s)

Versus

Principal Education Institute --- Respondent (s)

JUDGMENT

W.P No. 1820/2010 Date of hearing 26.05.2010

EJAZ AFZAL KHAN, CJ.- Petitioner through the instant petition has asked for issuance of an appropriate writ directing the respondents to transfer him from the place of his posting where he has been serving for last ten years.

2. We have gone through the available record carefully and considered the submissions made by the learned counsel for the petitioner.

3. Since in view of the judgments rendered in the cases of ***Miss Rukhsana Ijaz vs. Secretary, Education, Punjab & others (1997 SCMR 167); Ayyaz Anjum vs. Government of Punjab, Housing and Physical Planning Department through Secretary and others (1997 SCMR 169); Rafique Ahmad Chaudhry vs. Ahmad Nawaz Malik & others (1997 SCMR 170); Secretary Education NWFP, Peshawar and 2 others vs. Mustamir Khan & another (2005 SCMR 17) and Peer Muhammad vs. Government of Baluchistan through Chief Secretary & others (2007 SCMR 54),*** posting and transfer being related to the terms and condition of service can well be urged before the departmental authority and then before the Service Tribunal, this Court, while exercising its jurisdiction under Article 199 of the Constitution of Islamic Republic of Pakistan, can't step-in. Since the representation of the petitioner has borne no fruit, we, instead of dismissing the writ petition, treat it as an appeal before the Service Tribunal by following the dictum rendered in the case of ***Muhammad Anis & others vs. Abdul Haseeb & others (PLD***

1994 SC 539) and direct the office to send it thereto for decision in accordance with law. This petition, thus, stands disposed of.

Announced.
26. 05. 2010

CHIEF JUSTICE

J U D G E

Peshawar High Court

Prof: Salma Shaheen --- Appellant/Petitioner (s)

Versus

University of Peshawar --- Respondent (s)

JUDGMENT

W.P No. 2161/2009 Date of hearing 27.05.2010

EJAZ AFZAL KHAN, CJ.- Petitioner through the instant petition has questioned the notification dated 17.08.2009 of respondent No.2, whereby, he ordered merger of Pashto Academy and Pashto Department into "Centre of Pashto Language and Literature".

2. The learned counsel appearing on behalf of the petitioner contended that where the academy was established under the statute, it couldn't be undone, otherwise, than in due course of law and that the entire exercise being without jurisdiction and lawful authority can't be sustained. The learned counsel by referring to Section 24 of the University of Peshawar Act contended that where it is within the competence of Academic Council to propose to the Syndicate schemes for the constitution and organization of faculties, teaching departments and Boards of Studies, the Vice Chancellor couldn't have arrogated to himself such powers against the express provision of law, therefore, the academy is required to restored to its erstwhile position. The learned counsel next contended that though the Vice Chancellor can in emergency take such actions as he may consider necessary but where there was no such emergency, he couldn't have resorted to such powers in order to issue the impugned notification. The learned counsel by highlighting the meaning of emergency, placed reliance on the cases of **Irshad Ahmed vs. Sarkar (1973 PCrLJ 305); Faisal Shafique vs. Vice-Chancellor, AJ&K University & 5 others, (1999 MLD 175) & Maj. (Retd). Rafique Ahmed Durrani, Superintending Engineer AJ&K University,**

Muzaffarabad vs. Vice-Chancellor, AJ&K University, Muzaffarabad & others, 2003 PLC (C.S.) 748.

3. As against that the learned counsel appearing on behalf of the respondents by referring to the prayer in the writ petition contended that the grievance of the petitioner culminated from her removal from the post of Director and appointment of respondent No.3 as Chairman, Centre of Pashto Language and Literature but since it being related to the terms and conditions of service, can be urged before the Syndicate under Section 39 of the Act, this Court shall have no jurisdiction to grant the relief asked for, atleast, at this stage. The learned counsel to support his contention placed reliance on the case of **Dr. Syed Qaisar Shah vs. University of Peshawar through its Vice Chancellor & 3 others (Writ Petition No.965/2008 and decided on 15.04.2009)**. The learned counsel next contended that where the petitioner herself proposed the merger of Pashto Academy and Pashto Department, vide letter dated 01.07.2008, she can't turn round now to question it. The learned counsel by concluding his arguments submitted that though the power to propose to the Syndicate schemes for the constitution and organization of faculties, teaching departments and Boards of Studies lies within the competence of the Academic Counsel, nevertheless, the Vice Chancellor in case of an emergency can exercise such powers in view of the provision contained in Section 13(3) of the Act.

4. We have gone through the record carefully and considered the submissions made by the learned counsel for the parties.

5. A perusal of the record reveals that the controversy between the parties surfaced only when the petitioner was removed from the post of Director, Pashto Academy and respondent No.3 was appointed as Chairman, Centre of Pashto Language and Literature. This dispute, to our mind, being clearly related to the terms and conditions of service can be urged before the Syndicate under Section 39 of the Act. We, therefore, wouldn't like to intervene at this stage.

Peshawar High Court

6. Now the question crops up us whether the merger could be brought about by the order of the Vice Chancellor, notwithstanding, it fell within the powers and duties of the Academic Council. The answer to this question is a simple yes because the Vice Chancellor can exercise such powers under Section 13(3) of the Act. In case, he has exercised it without justification, it can be dealt with by the authority or other body which, in the ordinary course, would have dealt with the matter as is provided under Section 13(4) of the Act. The argument, that there was no such situation as could call for the exercise of emergent power could have been considered by us, had there been no inbuilt mechanism or machinery providing for reconsidering a decision taken on the basis of assumed or actual state of emergency. We, under no circumstances, would approve of bypassing a forum which has been provided by the statute in this behalf. Quite apart from this, when we questioned as to what locus standi the petitioner has to challenge the merger, the learned counsel couldn't give any satisfactory answer in this behalf. Having thus considered, we don't think a case for the issuance of the writ asked for is made out. The judgments rendered in the cases of **Irshad Ahmed vs. Sarkar; Faisal Shafique vs. Vice-Chancellor, AJ&K University & 5 others and Maj. (Retd). Rafique Ahmed Durrani, Superintending Engineer AJ&K University, Muzaffarabad vs. Vice-Chancellor, AJ&K University, Muzaffarabad & others (Supra)** cited by the learned counsel for the petitioner regarding the definition of the expression 'emergency', despite being relevant, can't be considered, atleast, at this stage, when the forum intervening in between the Vice Chancellor and this Court hasn't yet given any opinion on the matter. We, therefore, dismiss this petition. However, petitioner would be at liberty to have recourse to the remedy provided under Section 39 of the Act.

Announced.
27. 05. 2010

CHIEF JUSTICE

J U D G E

Peshawar High Court

Muhammad Afzal --- Appellant/Petitioner (s)

Versus

DG --- Respondent (s)

JUDGMENT

W.P. No. 1259/2010 Date of hearing 27.05.2010

EJAZ AFZAL KHAN, C.J.- Petitioner through the instant petition has questioned the order dated 4-3-2010 of the learned Judge Special Court (CNS), Peshawar, whereby his prayer to declare him juvenile was declined.

2. The record reveals that this plea was urged previously and declined by this court vide judgment dated 1-2-2010. When so it cannot be urged again. Therefore, this petition being misconceived is dismissed.

CHIEF JUSTICE

Announced on
27th May, 2010.

J U D G E

Naseer --- Appellant/Petitioner (s)

Versus

EDO --- Respondent (s)

JUDGMENT

W.P. No. 21/2006 Date of hearing 27.05.2010

EJAZ AFZAL KHAN, C.J.- Petitioner through the instant petition has asked for the issuance of an appropriate writ directing the respondents to regularize him according to the law prevailing at the time of his selection as he despite being selected was dropped on account of a certificate obtained outside the Province.

3. The learned AAG appearing on behalf of the respondents contended that since the petitioner has been regularized, this writ petition has become infructuous.

4. We have gone through the record carefully and have also considered the submissions made by the learned counsel for the parties.

5. The record reveals that the petitioner was appointed in 2004. Though he has been regularized from the date of his appointment but this is not in accordance with his wishes. He wants that since he was dropped without any justification in the year 1999, despite being selected, he be regularized under the law in force at that time. The argument of the learned counsel for the petitioner may not be without force but it being related to the terms and conditions of service, goes outside the domain of this court. Therefore, we cannot issue the writ asked for. However, we instead of dismissing this petition treat it as an appeal before the Service Tribunal and direct the office to send it thereto for decision in accordance with law.

CHIEF JUSTICE

Announced on
27th May, 2010. J U D G E

Peshawar High Court

Said Ali --- Appellant/Petitioner (s)

Versus

FATA --- Respondent (s)

JUDGMENT

W.P. No. 3453/2009 Date of hearing 27.05.2010

EJAZ AFZAL KHAN, C.J.- Petitioner through the instant petition has asked for the issuance of an appropriate writ directing the respondents to allow the petitioner to continue till completion of the Project in accordance with the terms of Office Order dated 19-7-2006.

2. The learned counsel appearing on behalf of the respondents contended that though the extension was granted to the petitioner till completion of the Project, but the remaining terms and conditions of service were left in tact and as such his services could be terminated on one month's notice.

3. We have gone through the record carefully and have also considered the submissions made by the learned counsel for the parties.

4. Though according to the terms and conditions of initial appointment order, the services of the petitioner can be terminated on one month notice but this extension order which is linked with the completion of the Project appears to have an over riding effect on all the previous orders that too when it is later in terms of time. When this being the case, we are afraid, the post held by the petitioner could not have been advertised till completion of the Project. This petition is thus allowed in terms of prayer.

CHIEF JUSTICE

Announced on
27th May, 2010. J U D G E

Peshawar High Court

Taj Ali --- Appellant/Petitioner (s)

Versus

NAB --- Respondent (s)

JUDGMENT

W.P. No. 757/2010 Date of hearing 27.05.2010

EJAZ AFZAL KHAN, C.J.- Petitioner who is hauled up in a case of NAB seeks his release on bail on the ground that another accused similarly placed has been granted bail by this Court and that the he cannot be treated differently that too when he has spent four months in the jail.

2. As against that, learned counsel appearing on behalf of the respondents contended that the trial of the petitioner is going to be concluded within a few months, therefore, release of the petitioner on bail would not be just and proper as he, besides being is charged in a crime against the society, also remained absconder.

3. Since another accused similarly placed has been granted bail vide order dated 27-3-2007 of this court, we would not like to treat him with a different yardstick that too when his case cannot be distinguished from the other on legal and factual plane. Yes, the petitioner remained absconder for a few years but when a case for bail is made out, abscondence cannot be taken to unworkable extreme. This petition is, thus, allowed and the petitioner is admitted to bail provided he furnishes bail bonds in the sum of Rs. Two Million with two sureties each in the like amount to the satisfaction of the Judge Accountability Court.

CHIEF JUSTICE

Announced on
27th May, 2010. J U D G E

Peshawar High Court

Gul Muhammad --- Appellant/Petitioner (s)

Versus

Government --- Respondent (s)

JUDGMENT

W.P. No. 2523/2009 Date of hearing 01.06.2010

EJAZ AFZAL KHAN, C.J.- By this single judgment, we propose to dispose of W.P. Nos. 2523, 2516, 1992 and 2871 of 2009 wherein the petitioners have asked for the issuance of an appropriate writ directing the respondents to register them as Internally Displaced Persons(IDPs).

2. The learned counsel for the petitioners contended that where the petitioners were IDPs in every sense of the words, they were required to be registered and that refusal of the respondents to do so would amount to refusing what they are required under the law to do.

3. The learned Deputy Advocate General appearing on behalf of the respondents contended that when the people did not get registered till the cut-off date, the matter was to be closed and that now they again turned around to ask for their registration. When confronted that even after the cut off date, many persons have been registered, the learned DAG could not give any satisfactory answer in this behalf.

4. We have gone through the record carefully and have also considered the submissions made by the learned counsel for the parties.

5. Whether the petitioners have asked for their registration on the basis of genuine ground or otherwise, is not for us to scrutinize. However, if they succeed in proving before the

competent authority that they are IDPs in the real sense of the words, they are required to be registered as such. We while disposing of these petitions, direct the concerned authorities to scan and scrutinize the cases of the petitioners and if their cases are found genuine, they be treated accordingly.

CHIEF JUSTICE

Announced on
1st June. 2010.

J U D G E

Peshawar High Court

Muhammad Naeem --- Appellant/Petitioner (s)

Versus

Government --- Respondent (s)

JUDGMENT

W.P. No. 1992/2009 Date of hearing 01.06.2010

EJAZ AFZAL KHAN, C.J.- By this single judgment, we propose to dispose of W.P. Nos. 1992, 2516, 2523 and 2871 of 2009 wherein the petitioners have asked for the issuance of an appropriate writ directing the respondents to register them as Internally Displaced Persons(IDPs).

2. The learned counsel for the petitioners contended that where the petitioners were IDPs in every sense of the word, they were required to be registered and that refusal of the respondents to do so would amount to refusing what they are required under the law to do.

3. The learned Deputy Advocate General appearing on behalf of the respondents contended that when the petitioners did not get themselves registered as I.D.Ps. till the cut-off date, the matter was to be closed and that they cannot turn round now to ask for their registration. When confronted as to how and why many, even after the cut off date, have been registered, the learned DAG could not give any satisfactory answer in this behalf.

4. We have gone through the record carefully and have also considered the submissions made by the learned counsel for the parties.

5. Whether the petitioners have asked for their registration as IDPs on the basis of genuine ground or otherwise, is not for us to scrutinize. It clearly and squarely lies within the

domain of the respondents. However, if the petitioners succeed in proving before the competent authority that they are IDPs in the real sense of the word, they are required to be registered as such. We while disposing of these petitions, direct the competent authority to scan and scrutinize the cases of the petitioners within a period of one month or so and if their cases are found genuine, they be treated accordingly.

CHIEF JUSTICE

Announced on
1st June. 2010.

J U D G E

Peshawar High Court

TUFAIL AHMED---Petitioner

Versus

GOVERNMENT OF NORTH-WEST FRONTIER PROVINCE through Secretary Ministry of Education, Peshawar and 6 others---Respondents

JUDGMENT

W.P No. 2366/2009 Decided on 1st June, 2010
(2010 Y L R 3286 Peshawar)

Constitution of Pakistan (1973)---

Ejaz Afzal Khan, C.J. and Sardar Shaukat Hayat, J ---- Arts. 25 & 199---Constitutional petition--- Educational institution---Equality before law---All the recognized educational institutions of the country and certificates and diplomas by them being at par with each other, no condition of refresher course could be imposed on any of them for making same equivalent with the other; and imposition of any such condition being violative of the constitutional provisions ensuring equality before law was to be struck down---Condition imposed in the present case vide letter, being violative of the declared law, had to be set at naught---Direction asked for by the petitioner was issued, in circumstances.

Baber Elahi and 9 others v. Direct of Education, Primary Schools, N.-W.F.P., Peshawar and 3 others 2000 YLR (Pesh.) 3056 and Director of Education and others v. Babar Elahi and other 2007 PLC (C.S.) 157 fol.

Sharin Munir v. Government of Punjab PLD 1990 SC 95 and Attiyya Bibi Khan v. Federation of Pakistan 2001 SCMR 1161; The Province of East Pakistan v. Dr. Azizul Islam PLD 1963' SC 296 and Ardeshir Cowasjee and 10 others v. Karachi Building

Control Authority (KMC) Karachi and 4 others 1999 SCMR 2883 ref.

Adnan Saboor for Petitioner.

Barrister Waqar Ali D.A.-G. for Respondent.

Date of hearing: 1st June, 2010.

JUDGMENT

EJAZ AFZAL KHAN, C.J.---By this single judgment, we propose to decide Writ Petition No.2366 of 2009 and Writ Petition No.1030 of 2010, wherein the petitioners have asked for the issuance of an appropriate writ directing the respondents to treat them in accordance with the dictum rendered by a Full Bench of this Court in the case of Baber Elahi and 9 others v. Director of Education, Primary Schools, N.-W.F.P., Peshawar and 3 others (2000 YLR (Peshawar) 3056, which was also upheld by the Supreme Court, vide judgment rendered in the case of Director of Education and others v. Babar Elahi and other (2007 PLC (C.S.) 157).

2. Learned counsel appearing on behalf of the petitioners contended that once it was held by a Full Bench of this Court in the case of Baber Elahi and 9 others v. Director of Education Primary Schools, N.-W.F.P. Peshawar and 3 others (Supra) that, all the recognized institutions and the Certificates and Diplomas issued by them are at par with each other, no condition of refresher course could be imposed on any of them for making it equivalent with the other and that imposition of any such condition being violative of

the Constitutional provision ensuring equality before law is to be struck down.

3. As against that, the learned D.A.-G appearing on behalf of the respondents in the first instance sought refuge in the judgment rendered in the case of Sarhad University v. Government through Chief Secretary in Writ Petition No.822 of 2008 decided on 17-9-7009 but when realized it is in conflict with a Full Bench judgment of this Court, he could not defend the condition imposed by the Government, vide letter No. SO (B/T) S & L/1-1/2007/ Sarhad University, dated 18-10-2008.

4. We have gone through the record carefully and considered the submissions of the learned counsel for the parties.

5. While facing a similar situation, this Court in the case of Baber Elahi and 9 others v. Director of Education Primary Schools, N.-W.F.P., Peshawar and 3 others (Supra) held as under:--

> "The learned counsel for the petitioners was of the view that the petitioners have qualified PTC from the recognized Institutions of the country and hence should not be treated with discrimination, being violative of the provisions of Article 25 of the Constitution. It is a matter of paramount importance that recognized Institutions in a country must be treated at par with each other failing which the importance of recognition lose the very significance. We believe that the discrimination involved in the instant case, indirectly affects the very incidence of recognition of certain Institutions which are otherwise recognized by the

> Government as well as by the University Grants Commission."

6. Another paragraph which is relevant for the purpose of this case also merits reproduction and thus runs as under:

> "Last but not the least, the University Grants Commission has categorically ruled through its Equivalence Committee that the degrees, certificates, diplomas issued by the Allama Iqbal Open University are equivalent to all above awarded by all the Universities of Pakistan. The learned A.A-G. has not either refuted or contested such certificate on record. No discrimination or policy ultimately leading to discrimination, can be adopted or resorted to and if so done, would clearly be in violation of Article 25 of the Constitution."

7. The Hon'ble Supreme Court while hearing an appeal in the case of Director of Education and others v. Babar Elahi and others (2007 PLC (C.S.) 157), against the Full Bench judgment of this Court held as under:

> "We have heard learned counsel for the petitioners as well as Sardar Shaukat Hayat, learned Additional Advocate General, N.-W.F.P. On perusal of the impugned judgment, dated 12-5-2000 rendered by Full Bench of the High Court, we are of the firm view that it does not suffer from any legal infirmity or misconstruction of material facts and the law. Indeed it lays down correct and harmonious interpre-tation of the provisions contained in Article 25 of the

Constitution, which guarantee equal treatment before law and equal protection of law to all citizens similarly placed. Since all the educational institutions situated within the country are duly recognized by the University Grants Commission and their certificates and diplomas are given equivalence by the said Commission, there is no warrant for discriminating the candidates qualifying from Institutions other than Elementary PTC, Colleges managed and controlled by the Government of N.-W.F.P. Reference may be made to Oliver Brown v. Board of Education of Topeka 347 U.S. 483,349 U 294, Sharin Munir v. Government of Punjab PLD 1990 SC 95 and Attiyya Bibi Khan v. Federation of Pakistan 2001 SCMR 1161. For these reasons, Appeal No.1903 of 2000 preferred by the Government of N.-W.F.P. stands dismissed."

8. Once a Full Bench of this Court upheld that all the Institutions of the country and the Certificates or Diplomas issued by them are at par with each other, we do not think, the Government could impose any condition of a refresher course on any one of them for making it equivalent with the other. The condition, thus, imposed vide letter mentioned above, being violative of the declared law of the land has to be set at naught. The judgment cited by the learned D.A.G. would be of no value, when it being in conflict with a Full Bench judgment of this Court and that of the apex Court has no force altogether. Even otherwise, when all the judgments given earlier are binding on all the subsequent Benches of equal number of Judges, none can afford to disagree with or dissent from the former without referring the matter to a larger Bench. This is what was held in the cases of The Province of East Pakistan v. Dr. Azizul Islam (PLD 1963 Supreme Court 296) and Ardeshir Cowsajee and 10 others v. Karachi Building Control Authority (KMC), Karachi and 4 others (1999 SCMR 2883) and this is what is reiterated by us today.

Peshawar High Court

9. Having thus considered in this backdrop, we cannot take a different view and thus issue the writ asked for. These writ petitions are thus disposed of.

H.B.T./281/P
Order accordingly.

Peshawar High Court

Farman Ali --- Appellant/Petitioner (s)

Versus

A.G. --- Respondent (s)

JUDGMENT

W.P (HCP) No. 265/2010 Date of hearing 02.06.2010

EJAZ AFZAL KHAN, CJ.- Petitioner through the instant petition has asked for the issuance of an appropriate writ directing the respondents to produce the detenue in the Court and to show under what law and authority, he has been hauled up.

2. The learned Deputy Attorney General states that as per para-wise comments, submitted on behalf of Secretary Defence, the detenue is not with any of the agencies nor he has ever been detained or arrested by any of them. When this being the state of things, we are afraid, we can't issue the writ asked for. This petition being without substance is, thus, dismissed. However, the petitioner may, if so advised, after getting some ink-link about the later fate of the detenue, file a fresh petition.

Announced.
02. 06. 2010 CHIEF JUSTICE

J U D G E

Peshawar High Court

Syeda Samia Bukhari --- Appellant/Petitioner (s)

Versus

Joint Admission Committee --- Respondent (s)

JUDGMENT

W.P.No. 435/2010 Date of hearing 03.06.2010

EJAZ AFZAL KHAN, C.J.- Petitioner through the instant petition has asked for the issuance of an appropriate writ directing the respondents to admit her against the seat reserved for Kala Dhaka on annulment of admission granted to respondent No.4.

2. The essence of the arguments addressed by the learned counsel for the petitioner was that when neither the respondent nor her father is domiciled of Kala Dhaka, the former is not entitled to get admission against the seat reserved therefor.

3. The learned counsel appearing on behalf of the respondents by referring to certain documents tried to canvass at the bar that respondent No.4 being a daughter of a person domicile of the area of Kala Dhaka was rightly given admission in the College.

4. We have gone through the record carefully and have also considered the submissions made by the learned counsel for the parties.

5. Main thrust of the argument of the learned counsel for the petitioner was against the genuineness of domicile certificate issued to the father of respondent No.4. He by referring to certain particulars mentioned therein tried to make it doubtful in order to make out a case for the cancellation of admission granted to his daughter. But all these questions being related to the factual controversy cannot be gone into by this court while hearing a petition under Article 199 of the Constitution of the Islamic

Republic of Pakistan,1973. We thus at this stage would not like to intervene. However, the petitioner would be at liberty to question the genuineness and validity of the certificate by filing a civil suit in the competent court.

CHIEF JUSTICE

Announced on
3rd June, 2010. J U D G E

Peshawar High Court

Jamil & Behram --- Appellant/Petitioner (s)

Versus

The State --- Respondent (s)

JUDGMENT

W.P. No. 3409/2009 Date of hearing 03.06.2010

EJAZ AFZAL KHAN, C.J.- Petitioners Jamil and Behram , who are charged in a case registered against them and others under Section 365-A PPC/7 ATA, vide FIR No.201, dated 24-11-2008 in Police Station Nasir Bagh, Peshawar, seek their release on bail mainly on the ground that their co-accused similarly placed has been granted bail, vide order dated 13-11-2009 of this court.

2. The learned AAG appearing on behalf of the respondents could not refer to anything as could draw a line of distinction between the case of the petitioners and that of their co-accused. When that being the case, we cannot decline the concession of bail. Needless to say, that alike are to be treated alike. We thus allow this petition and direct release of the petitioners on bail if they furnish bail bonds in the sum of Rs. Four lac each, with two sureties, each in the like amount to the satisfaction of the Illaqa/Judicial Magistrate.

CHIEF JUSTICE

Announced on
3rd June, 2010. J U D G E

Peshawar High Court

Muhammad Anwar Sohail --- Appellant/Petitioner (s)

Versus

DOR --- Respondent (s)

JUDGMENT

W.P. No. 1390/2009 Date of hearing 03.06.2010

EJAZ AFZAL KHAN, C.J.- Petitioner through the instant petition has asked for the issuance of an appropriate writ directing the respondents to implement the order of the superiors.

2. The learned counsel appearing on behalf of the petitioner contended that once the petitioner was granted leave on half pay, none could stop his salary and that the order, if any, passed in this behalf being without jurisdiction is liable to be struck down.

3. We have gone through the record carefully and have also considered the submissions made by the learned counsel for the parties.

4. Since the matter relaters to the terms and conditions of service, we would not like to intervene at this stage. However, we instead of dismissing this petition, treat it as representation before the Commissioner concerned and direct the office to send it thereto for decision in accordance with law. Since the issue of salary is involved, this matter be disposed of within a fortnight.

CHIEF JUSTICE

Announced on
3rd June, 2010. J U D G E

Peshawar High Court

Munir Khan --- Appellant/Petitioner (s)

Versus

The State --- Respondent (s)

JUDGMENT

W.P. No. 1545/2010 Date of hearing 03.06.2010

EJAZ AFZAL KHAN, C.J.- Petitioner Munir Khan, who is charged in a case registered against him under Sections 365-A/368 PPC/7 ATA, vide FIR No.250, dated 6-4-2009 in Police Station Paharipura, Peshawar, seeks his release on bail mainly on the ground that the abductee as well as the complainant do not charge him on being satisfied about his innocence. The abductee and the complainant present in the court affirm the above stated position.

2. As against that, the learned AAG opposes the grant of bail on the sole ground that the offence is not compoundable.

3. We have gone through the record carefully and have also considered the submissions made by the learned counsel for the parties.

4. Be all that as it may, once the complainant and the abductee so-called do not charge the petitioner, we do not think it would be proper and adequate to decline him bail. We thus allow this petition and direct release of the petitioner on bail if he furnishes bail bonds in the sum of Rs. Two lac, with two sureties, each in the like amount to the satisfaction of the Illaqa/Judicial Magistrate.

CHIEF JUSTICE

Announced on
3rd June, 2010.

J U D G E

Peshawar High Court

Said Ghaffar --- Appellant/Petitioner (s)

Versus

Dr. Sher Umar --- Respondent (s)

JUDGMENT

W.P. No. 3277/2009 Date of hearing 03.06.2010

EJAZ AFZAL KHAN, C.J.- Petitioner, Said Ghaffar, who is charged in a case registered against him under Sections 148/149 PPC/7 ATA/17(3) Haraba, vide FIR No.87, dated 16-7-2009 in Police Station Nawagai, District Buner, seeks his release on bail mainly on the ground that none charged him so far and that nothing incriminating was recovered either at his instance or from his possession during police custody and that he has been in Jail ever since October 2009 but his trial still awaits commencement, let alone its conclusion.

2. The learned AAG appearing on behalf of the State could not refer to any admissible or even inadmissible evidence as could connect him with the crime. When so we would not like to become privy to his confinement. We, thus, allow this petition and direct release of the petitioner on bail if he furnishes bail bonds in the sum of Rs. Four lac, with two sureties, each in the like amount to the satisfaction of the Illaqa/Judicial Magistrate.

CHIEF JUSTICE

Announced on
3rd June, 2010. J U D G E

Peshawar High Court

Said Ghaffar --- Appellant/Petitioner (s)

Versus

Dr. Sher Umar --- Respondent (s)

JUDGMENT

W.P. No. 3277/2009 Date of hearing 03.06.2010

EJAZ AFZAL KHAN, C.J.- Petitioner Said Ghaffar, who is charged in a case registered against him under Sections 148/149 PPC/7 ATA/17(3) Haraba, vide FIR No.86, dated 5-7-2009 in Police Station Nawagai, District Buner, seeks his release on bail mainly on the ground that none charged him so far and that nothing incriminating was recovered either at his instance or from his possession during police custody and that he has been in Jail ever since October 2009 but his trial still awaits commencement, let alone its conclusion.

2. The learned AAG appearing on behalf of the State could not refer to any admissible or even inadmissible evidence as could connect him with the crime. When so we would not like to become privy to his confinement. We, thus, allow this petition and direct release of the petitioner on bail if he furnishes bail bonds in the sum of Rs. Four lac, with two sureties, each in the like amount to the satisfaction of the Illaqa/Judicial Magistrate.

CHIEF JUSTICE

Announced on
3rd June, 2010. J U D G E

Peshawar High Court

Mst. Perveen Akhtar --- Appellant/Petitioner (s)

Versus

Government of KPK --- Respondent (s)

JUDGMENT

W.P No. 1955/ Date of hearing 03.06.2010

EJAZ AFZAL KHAN, CJ.- Petitioner through the instant petition has asked for the issuance of an appropriate writ declaring the transfer order dated 30.04.2010 of respondent No.2 as being nullity on account of having been passed without jurisdiction and lawful authority.

2. We have gone through the available record carefully and considered the submissions made by the learned counsel for the petitioner.

3. Since in view of the judgments rendered in the cases of ***Miss Rukhsana Ijaz vs. Secretary, Education, Punjab & others (1997 SCMR 167); Ayyaz Anjum vs. Government of Punjab, Housing and Physical Planning Department through Secretary and others (1997 SCMR 169); Rafique Ahmad Chaudhry vs. Ahmad Nawaz Malik & others (1997 SCMR 170); Secretary Education NWFP, Peshawar and 2 others vs. Mustamir Khan & another (2005 SCMR 17) and Peer Muhammad vs. Government of Baluchistan through Chief Secretary & others (2007 SCMR 54),*** posting and transfer being related to the terms and condition of service can well be urged before the departmental authority and then before the Service Tribunal, this Court, while exercising its jurisdiction under Article 199 of the Constitution of Islamic Republic of Pakistan, can't step-in. We, instead of dismissing the writ petition, treat it as a representation before the departmental authority by following the dictum rendered in the case of ***Muhammad Anis & others vs. Abdul Haseeb & others (PLD 1994 SC 539)*** and direct the office

to send it thereto for decision in accordance with law with a month. This petition, thus, stands disposed of.

Announced.
03. 06. 2010

CHIEF JUSTICE

J U D G E

Peshawar High Court

Mst. Mastoor Khan --- Appellant/Petitioner (s)

Versus

Government --- Respondent (s)

JUDGMENT

W.P No. 1924/2010 Date of hearing 09.06.2010

EJAZ AFZAL KHAN, CJ.-Petitioner through the instant petition has questioned the order dated 05.04.2010 of respondent No.2, whereby, she has been directed to perform her duties on the station, she was working before the issuance of the order dated 23.02.2010.

2. We have gone through the available record carefully and considered the submissions made by the learned counsel for the petitioner.

3. Since in view of the judgments rendered in the cases of ***Miss Rukhsana Ijaz vs. Secretary, Education, Punjab & others (1997 SCMR 167); Ayyaz Anjum vs. Government of Punjab, Housing and Physical Planning Department through Secretary and others (1997 SCMR 169); Rafique Ahmad Chaudhry vs. Ahmad Nawaz Malik & others (1997 SCMR 170); Secretary Education NWFP, Peshawar and 2 others vs. Mustamir Khan & another (2005 SCMR 17) and Peer Muhammad vs. Government of Baluchistan through Chief Secretary & others (2007 SCMR 54),*** posting and transfer being related to the terms and condition of service can be urged before the departmental authority and then before the Service Tribunal, this Court, while exercising its jurisdiction under Article 199 of the Constitution of Islamic Republic of Pakistan, can't step-in, atleast, at this stage. Since the petitioner has already filed a representation before the departmental authority, we direct it to decide the same

in accordance with law within a month. This writ petition is disposed of accordingly.

Announced.
09. 06. 2010

CHIEF JUSTICE

J U D G E

Peshawar High Court

Jehangir Khan --- Appellant/Petitioner (s)

Versus

PA --- Respondent (s)

JUDGMENT

W.P. No. 1771/2010 Date of hearing 10.06.2010

EJAZ AFZAL KHAN, C.J.- Petitioner through the instant petition has asked for the issuance of an appropriate writ directing the respondents to release him on bail when he is willing to furnish bond.

2. The learned AAG, assisted by Mr.Iqbal Ahmad Durrani, counsel for the political authorities, states that since the petitioner is hauled up in Sections 40/21 FCR, this court cannot straightaway intervene.

3. We have gone through the record carefully and have also considered the submissions made by the learned counsel for the parties.

4. The record reveals that the petitioner has already filed an application before the competent forum. When so, we would not like to intervene at this stage. This petition is thus dismissed. However, we would direct the respondents to dispose of the application of the petitioner within a fortnight.

CHIEF JUSTICE

Announced on
10th June, 2010. J U D G E

Peshawar High Court

Johar Mehmood --- Appellant/Petitioner (s)

Versus

Government --- Respondent (s)

JUDGMENT

W.P No. 1973/2010 Date of hearing 10.06.2010

EJAZ AFZAL KHAN, CJ.-Petitioners through the instant petition has asked for the issuance of an appropriate writ declaring the notifications dated 10.05.2006 and 25.08.2006 of respondent No.2 as being nullity on account of having been issued without jurisdiction and lawful authority.

2. We have gone through the available record carefully and considered the submissions made by the learned counsel for the petitioners.

3. Since the vires of the rules can also be challenged before the Service Tribunal in view of the judgment rendered in the case of ***I.A. Sharwani & others vs. Government of Pakistan through Secretary, Finance Division, Islamabad & others (1991 SCMR 1041),*** we, while exercising a petition under Article 199 of the Constitution of Islamic Republic of Pakistan, wouldn't like to step-in. We, however, instead of dismissing the writ petition, treat it as an appeal before the Service Tribunal by following the dictum rendered in the case of ***Muhammad Anis & others vs. Abdul Haseeb & others (PLD 1994 SC 539)*** and direct the office to send it thereto for decision in accordance with law. This writ petition, thus, stands disposed of.

Announced.
10. 06. 2010 CHIEF JUSTICE

J U D G E

Peshawar High Court

Amir Nawaz --- Appellant/Petitioner (s)

Versus

Government --- Respondent (s)

JUDGMENT

W.P No. 2218/2010 Date of hearing 15.06.2010

EJAZ AFZAL KHAN, CJ.-Petitioner through the instant petition has asked for the issuance of an appropriate writ declaring the order dated 20.05.2010 of respondent No.1 as being nullity on account of having been passed without jurisdiction and lawful authority.

2. We have gone through the available record carefully and considered the submissions made by the learned counsel for the petitioner.

3. Since the questions urged before us being related to the terms and condition of service can well be urged before the departmental authority and then before the Service Tribunal, we, while hearing a petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, wouldn't like to intervene. We, instead of dismissing the writ petition, treat it as a representation before the departmental authority by following the dictum rendered in the case of ***Muhammad Anis & others vs. Abdul Haseeb & others (PLD 1994 SC 539)*** and direct the office to send it to the Chief Secretary for decision in accordance with law within one month. This writ petition, thus, stands disposed of.

Announced.
15. 06. 2010 CHIEF JUSTICE

J U D G E

Peshawar High Court

Messrs BANK ALFALAH LIMITED, KARACHI---Petitioner

Versus

EXCISE AND TAXATION OFFICER-IV, PESHAWAR and 2 others---Respondents

JUDGMENT

W.P Nos. 1982/2006, 742, 1107/2007 and 950/2008 Decided on 17th June, 2010
(2010 P T D 1913 Peshawar High Court)

Banking Companies Ordinance (LVII of 1962)---

Ejaz Afzal Khan, C.J. and Mazhar Alam Khan, J---- S.5(c)---Cantonments Act (II of 1924), S.60---Constitution of Pakistan (1973), Arts 163, 199 & Fourth Sched. Part-1, Entry 48---Constitutional petition---Levy of professional tax by Provincial Government on Banking Company housed in Cantonment area---Plea of Bank that its Head Offices located in other Provinces had paid such tax according to their paid-up capital, thus, its Branch could not be subjected to such levy; that such levy was illegal as its Branch Office located in Cantonment area would not fall within domain of Provincial Government; and that such levy covered by Entry 48 of Fourth Sched. of the Constitution would not fall within competence of Provincial Government---Validity---Such tax could be levied on limited company, Mudariba, Mutual Fund and other corporate bodies having prescribed paid-up capital or reserves in preceding years---Payment of such tax in one Province could not diminish or dilute its liability once Bank decided to expand its activity by entering into another Province---Powers of Cantonment Board to impose tax within scope of S.60 of Cantonments Act, 1924 would not take any such business, trade, calling or employment carried in Cantonment area outside scope of Province or its Assembly-Such tax was not imposed on Cantonment, but on business carried

therein by petitioner---In absence of any provision whether express or implied in any law for the time being in force, powers of Provincial Government to levy such tax on business carried in Cantonment area could not be restricted---Petitioner being a limited company, could not escape liability of such levy irrespective of fact whether its Head Offices were within or outside Province---Bank/Banking Companies could not be termed as "corporation" used in Entry 48 of Fourth Sched. of the Constitution---Impugned levy was legal---High Court dismissed constitutional petition in circumstances.

Province of Punjab and others v. Sargodha Textile Mills Ltd. and others PLD 2005 SC 988 and Fist Leasing Corporation Ltd. v. Government of N.-W.F.P. and others rendered in Writ Petition No. 1965 of 1998, decided on 28-1-2009 rel.

Sharif Ahmad Butt for Petitioners.

Farman Ullah Khattak for Respondent Nos. 1 and 2.

Wazar Ali A.A.-G. for Respondent No.3.

JUDGMENT

EJAZ AFZAL KHAN, C.J.---By this single judgment, we propose to decide Writ Petitions Nos. 1982 of 2006, 742 and 1107 of 2007, 950 of 2008 and 188 of 2009, as the petitioners therein seek to question the imposition of professional tax.

2. The learned counsel appearing on behalf of the petitioners contended that where the petitioners being the companies with their Head Offices at Karachi, Islamabad and Lahore, have already paid professional tax according to their paid-up capital, their Branches cannot be subjected to such levy. The learned

counsel next contended that when the Branch Offices of the petitioners are housed in the Cantonment area, they go outside the domain of the Provincial Government, therefore, levy of professional tax being beyond its competence would be illegal and unlawful. The learned counsel appearing in Writ Petition No.950 of 2008 contended that since the Bank cannot be pushed within the definition .of profession, trade of calling, levy of professional tax thereon would be totally unwarranted. The levy of professional tax on the Banking Companies, the learned counsel added, is also unjustified, when they being covered by Entry No.48 of the Federal Legislative List, go outside the competence of the Provincial Assembly.

3. As against that, the learned counsel appearing on behalf of the respondents contended that Article 163 of the Constitution of Islamic Republic of Pakistan, 1973, enables the Provincial Assembly to levy professional tax on professions etc. provided it does not exceed the limits prescribed by the Act of the Parliament. The learned counsel next contended that since the levy is within the limits fixed by the Parliament, it cannot be questioned on any score. The learned counsel to support his contention placed reliance on the case of "Province of Punjab and others v; Sargodha Textile Mills Ltd. and others" (PLD 2005 SC 988). The learned counsel next contended that the mere fact that the companies are housed in the Cantonment area cannot limit the powers of the Provincial Assembly when such area despite being part and parcel of the cantonment lies within the province. The learned counsel by referring to section 60 of the Cantonments Act submitted that the Cantonment Board has, no doubt, powers to impose any tax in any cantonment with the previous sanction of the Federal Government which may be imposed in any Municipality in the province wherein such cantonment is situated but it nowhere restricts the powers of the Provincial Assembly to impose tax on a person, company, trade, employment or calling simply because its branch is housed in the Cantonment area. The learned counsel

to support his contention placed reliance on the case of "First Leasing Corporation Ltd v. Government of N.-W.F.P. and others' rendered in Writ Petition No.1965 of 1998 decided on 28-1-2009.

4. We have gone through the record carefully and have also considered the submissions made by the learned counsel for the parities.

5. How far the Provincial Assembly is competent to impose the provincial tax on a profession, trade, calling or employment, has been elaborately dealt with by the apex Court in the case of "Province of Punjab' and others v. Sargodha Textile Mills Ltd. and others" (PLD 2005 Supreme Court 988), in the words which are reproduced as under;-

> "We have heard the learned Advocate-General, Punjab, the learned Deputy Attorney-General for Pakistan, the learned counsel for the Cantonment Board as well as the learned counsel for the companies. The subject-matter of professional tax has a chequered legislative history. The Government of India Act, 1935, by section 111, as also the Government of India Act, 1935, by Item No.46, List II (Provincial Legislative List) of the Seventh Schedule, empowered the Provincial Legislatures of India to levy the Professional Taxes. Certain provinces imposed the professional taxes on the basis of income which were considered to be quite unjust and inequitable as if they were in the nature of income tax in disguise. The Calcutta Municipal Corporation and other bodies in the State of West Bengal imposed the annual professional tax at a flat rate ranging from Rs.3

> to Rs.50 for individuals and from Rs.20 to Rs.200 from companies calculated on the basis of their paid-up capital. The Government of United Provinces by taking advantage of the unlimited power imposed the employment tax on all salaried persons who were entitled to draw monthly emoluments of Rs.250 or above. The Governor-General of India took up the matter with the Secretary of State for India for the removal of anomalies with regard to the unfettered powers of the Provincial Governments to impose the professional tax. Therefore, the British Parliament enacted the India and Burma (Miscellaneous Amendments) Act, 1940. Item No.46 List II (Provincial Legislative List) in the Seventh Schedule of Act of 1935 was amended. The professional tax was made subject to newly-inserted section 142-A which clearly laid down, inter alia, that a provincial law relating to professional taxes for the benefit of a Province or a municipality, district or local board or other local authority would not be invalid on the ground that it was with respect to a tax on income provided that the professional tax would not exceed Rs. 50 per annum. The Constitution of India, by Article 276 had originally fixed a maximum limit of Rs.250 of the professional tax which was raised to Rs.2,500 by the Indian Constitution (Sixtieth Amendment) Act, 1988.

Another relevant paragraph also deserves verbatim reproduction which runs a under:---

> "Both in Pakistan and India the companies were made liable to pay the professional tax, by the provincial law, in the past as well. Even by the West Pakistan Finance Act, 1964, the companies were made liable to pay the

professional tax. Generally speaking, a company is considered to be a body of persons associated for the purpose of business. It is a juristic and artificial person created under the provisions is of the Companies Ordinance, 1984, possessed with certain legal rights and charged with certain legal duties. The word "person" has been defined in Article 260 of the 1973 Constitution so as "to include any body politic or corporate". The same is the definition of "person" is found in section 3(47) of West Pakistan General Clauses Act, 1956. Therefore, the companies cannot be considered as falling outside the purview of provincial law in the matter of imposition of professional taxes. Article 163 of the Constitution clearly postulates that the professional taxes shall not be considered as a tax on income. It was with a view to remove the doubt that all the Constitutional dispensations had made it clear that a provincial law imposing professional taxes would not be regarded as imposing a tax on income."

6. Now the question crops up whether a company with its Head Office outside the province having paid the professional tax according to its paid up-capital, is liable still to pay professional tax simply because one of its Branches is functioning in the province? Our answer to the question would be a simple "yes" because what is required for the levy of such tax is that it must be a limited company, Mudariba, mutual fund and other body corporate with paid-up capital or reserves in the preceding years. If the petitioners come within the pale of any these, as they do, they cannot escape the liability of such levy, irrespective of the fact whether their Head Offices are within or outside the province. Even otherwise, a company which enters a Province other than the one where its Head Office is established with all its paraphernalia for any business activity shall invariably be exposed to such levy. Payment of professional tax in one province cannot diminish or dilute its

liability once it decides to expand its activity by entering into another province.

7. Next comes the question of Cantonment. It is true that Cantonment being a body at par with a Municipality can levy taxes the way and to the extent the latter does within the scope of section 60 of the Cantonments Act, but this under no canons of interpretation takes any such business, trade, calling or employment carried in the Cantonment area outside the scope of the Province or its Assembly. What is provided by section 60 of the Act is that each has domain of its own. Neither one nor the other can meddle in each other's domain. In the absence of any provision whether express or implied in any law for the time being in force, the powers of the Provincial Government to levy the professional tax on the business carried in the Cantonment area, cannot be restricted. If the argument of this nature is allowed to prevail then the professionals whose offices are housed in the Cantonment area would go outside the province and therefore cannot be subjected to this levy. On this analogy even vehicles owned by the residents of Cantonment area cannot be made liable to any provincial tax. The argument of this nature and character being pedantic, if not preposterous, cannot be given much weight. It may not, however, be forgotten that tax is not imposed on Cantonment but on the business carried therein.

8. The argument that the levy of professional tax on Banks is all the more unjustified when the Banks being covered by Entry No.48 of the Federal Legislative List, go outside the competence of the Provincial Assembly, has not impressed us as the Banks or Banking Companies cannot be termed as corporation in any sense of the word. They being limited companies cannot be pushed into the above mentioned entry

with all the noise and chaos of semantics heard and witnessed during the course of arguments.

9. When considered in this background, we do not think the levy of professional tax on any of the petitioners can be held as illegal or ultra vires.

10. For the reasons discussed above, 'we finding no substance in these writ petitions dismiss them, with no order as to costs.

S.A.K./231/P

Petitions dismissed.

Peshawar High Court

First National Equities --- Appellant/Petitioner (s)

Versus

Excise & Taxation Officer --- Respondent (s)

JUDGMENT

W.P. No. 1982/2006 Date of hearing 17.06.2010
(2010 CLD Peshawar 975)

EJAZ AFZAL KHAN, C.J.- By this single judgment, we propose to decide W.P. Nos. 1982/2006, 742 & 1107 of 2007, 950/2008 and 188/2009, as the petitioners therein seek to question the imposition of professional tax.

2. The learned counsel appearing on behalf of the petitioners contended that where the petitioners being the companies with their Head Offices at Karachi, Islamabad and Lahore, have already paid professional tax according to their paid up capital, their Branches cannot be subjected to such levy. The learned counsel next contended that when the Branch Offices of the petitioners are housed in the Cantonment area, they go outside the domain of the provincial Government, therefore, levy of professional tax being beyond its competence would be illegal and unlawful. The learned counsel appearing in W.P.No.950/2008 contended that since the Bank cannot be pushed within the definition of profession, trade or calling, levy of professional tax thereon would be totally unwarranted. The levy of professional tax on the Banking Companies, the learned counsel added, is also unjustified, when they being covered by Entry No.48 of the Federal Legislative List, go outside the competence of the Provincial Assembly.

3. As against that, the learned counsel appearing on behalf of the respondents contended that Article 163 of the Constitution of Islamic Republic of Pakistan, 1973, enables the Provincial Assembly to levy professional tax on professions etc. provided it does not exceed the limits prescribed by the Act of the

Parliament. The learned counsel next contended that since the levy is within the limits fixed by the Parliament, it cannot be questioned on any score. The learned counsel to support his contention placed reliance on the case of **"Province of Punjab and others Vs. Sargodha Textile Mills Ltd. and others" (P L D 2005 Supreme Court 988).** The learned counsel next contended that the mere fact that the companies are housed in the cantonment area cannot limit the powers of the Provincial Assembly when such area despite being part and parcel of the cantonment lies within the province. The learned counsel by referring to Section 60 of the Cantonment Act submitted that the Cantonment Board has, no doubt, powers to impose any tax in any cantonment with the previous sanction of the Federal Government which may be imposed in any Municipality in the province wherein such cantonment is situated but it nowhere restricts the powers of the Provincial Assembly to impose tax on a person, company, trade, employment or calling, simply because its branch is housed in the cantonment area. The learned counsel to support his contention placed reliance on the case of **"Fist Leasing Corporation Ltd Vs. Government of NWFP and others" rendered in W.P.No.1965/98 decided on 28-1-2009**.

4. We have gone through the record carefully and have also considered the submissions made by the learned counsel for the parties.

5. How far the Provincial Assembly is competent to impose the provincial tax on a profession, trade, calling or employment, has been elaborately dealt with by the apex Court in the case of **"Province of Punjab and others Vs. Sargodha Textile Mills Ltd. and others" (P L D 2005 Supreme Court 988) , in the words which are reproduced as under:-**

> **"We have heard the learned Advocate General, Punjab, the learned Deputy Attorney General for Pakistan, the learned counsel for the Cantonment Board as well as the learned counsel for the companies. The subject matter of professional tax has a chequered legislative history. The Government of India Act, 1935,**

by section 111, as also the Government of India Act, 1935, by Item No.46, List II (Provincial Legislative List) of the Seventh Schedule, empowered the Provincial Legislatures of India to levy the Professional Taxes. Certain provinces imposed the professional taxes on the basis of income which were considered to be quite unjust and inequitable as if they were in the nature of income tax in disguise. The Calcutta Municipal Corporation and other bodies in the State of West Bengal imposed the annual professional tax at a flat rate ranging from Rs.3 to Rs.50 for individuals and from Rs.20 to Rs.200 from companies calculated on the basis of their paid-up capital. The Government of United Provinces by taking advantage of the unlimited power imposed the employment tax on all salaried persons who were entitled to draw monthly emoluments of Rs.250 or above. The Governor General of India took up the matter with the Secretary of State for India for the removal of anomalies with regard to the unfettered powers of the Provincial Governments to impose the professional tax. Therefore, the British Parliament enacted the India and Burma (Miscellaneous Amendments) Act, 1940. Item No.46 list II (Provincial Legislative List) in the Seventh Schedule of Act of 1935 was amended. The professional tax was made subject to newly-inserted section 142-A which clearly laid down, inter alia, that a provincial law relating to professional taxes for the benefit of a Province or a municipality, district or local board or other local authority would not be invalid on the ground that it was with respect to a tax on income provided that the professional tax would not exceed Rs.50 per annum. The Constitution of India, by Article 276 had originally fixed a maximum limit of Rs.250 of the professional tax which was raised to Rs.2,500 by the Indian Constitution (Sixtieth Amendment) Act, 1988.

Another relevant paragraph also deserves verbatim reproduction which runs as under:-

> **"Both in Pakistan and India the companies were made liable to pay the professional tax, by the provincial law, in the past as well. Even by the West Pakistan Finance Act, 1964, the companies were made liable to pay the professional tax. Generally speaking, a company is considered to be a body of persons associated for the purpose of business. It is a juristic and artificial person created under the provision is of the Companies Ordinance, 1984, possessed with certain legal rights and charged with certain legal duties. The word "person" has been defined in Article 260 of the 1973 Constitution so as "to include any body politic or corporate". The same is the definition of "person" is found in Section 3(47) of West Pakistan General Clauses Act, 1956. Therefore, the companies cannot be considered as falling outside the purview of the provincial law in the matter of imposition of professional taxes. Article 163 of the Constitution clearly postulates that the professional taxes shall not be considered as a tax on income. It was with a view to remove the doubt that all the Constitutional dispensations had made it clear that a provincial law imposing professional taxes would not be regarded as imposing a tax on income."**

6. Now the question crops up whether a company with its Head Office outside the province having paid the professional tax according to its paid up capital, is liable still to pay professional tax simply because one of its Branches is functioning in the province? Our answer to the question would be a simple **"yes"** because what is required for the levy of such tax is that it must be a limited company, Mudariba, mutual fund and other body corporate with paid up capital or reserves in the preceding years. If the petitioners come within the pale of any these, as they do, they cannot escape the liability of such levy, irrespective of the fact whether their Head Offices are within or outside the province. Even

otherwise, a company which enters a Province other than the one where its Head Office is established with all its paraphernalia for any business activity shall invariably be exposed to such levy. Payment of professional tax in one province cannot diminish or dilute its liability once it decides to expand its activity by entering into another province.

7. Next comes the question of Cantonment. It is true that Cantonment being a body at par with a Municipality can levy taxes the way and to the extent the latter does within the scope of Section 60 of the Cantonment Act, but this under no canons of interpretation takes any such business, trade, calling or employment carried in the Cantonment area outside the scope of the Province or its Assembly. What is provided by Section 60 of the Act is that each has domain of its own. Neither one nor the other can meddle in each other's domain. In the absence of any provision whether express or implied in any law for the time being in force, the powers of the provincial Government to levy the professional tax on the business carried in the cantonment area, cannot be restricted. If the argument of this nature is allowed to prevail then the professionals whose offices are housed in the Cantonment area would go outside the province and therefore cannot be subjected to this levy. On this analogy even vehicles owned by the residents of Cantonment area can not be made liable to any provincial tax. The argument of this nature and character being pedantic, if not preposterous, cannot be given much weight. It may not, however, be forgotten that tax is not imposed on Cantonment but on the business carried therein.

8. The argument that the levy of professional tax on Banks is all the more unjustified when the Banks being covered by Entry No.48 of the Federal Legislative List, go outside the competence of the Provincial Assembly, has not impressed us as the Banks or Banking Companies cannot be termed as corporation in any sense of the word. They being limited companies cannot be pushed into the above mentioned entry with all the noise and chaos of semantics heard and witnessed during the course of arguments.

Peshawar High Court

9. When considered in this background, we do not think the levy of professional tax on any of the petitioners can be held as illegal or ultra vires.

10. For the reasons discussed above, we finding no substance in these writ petitions dismiss them, with no order as to costs.

CHIEF JUSTICE

Announced on
17.06.2010

J U D G E

Peshawar High Court

Wajid ul Haq --- Appellant/Petitioner (s)

Versus

Deputy Administrator Afghan Refugees --- Respondent (s)

JUDGMENT

W.P No. 2118/2010 Date of hearing 22.06.2010

EJAZ AFZAL KHAN, CJ.-Petitioner through the instant petition has asked for the issuance of an appropriate writ directing the respondents to grant him two advance increments on decision of his case.

2. We have gone through the available record carefully and considered the submissions made by the learned counsel for the petitioner.

3. The record reveals that the petitioner has already approached the departmental authority with similar request but no decision has so far been made. Since the question urged before us being related to the terms and condition of service can well be urged before the Service Tribunal, we, while hearing a petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, can't issue the writ asked for. We, instead of dismissing the writ petition, treat it as an appeal before the Federal Service Tribunal by following the dictum rendered in the case of ***Muhammad Anis & others vs. Abdul Haseeb & others (PLD 1994 SC 539)*** and direct the office to send it thereto for decision in accordance with law. This writ petition, thus, stands disposed of.

Announced.
22. 06. 2010 CHIEF JUSTICE

J U D G E

Peshawar High Court

Muhammad Azeem --- Appellant/Petitioner (s)

Versus

Chief Engineer --- Respondent (s)

JUDGMENT

W.P No. 1683/2010 Date of hearing 23.06.2010

EJAZ AFZAL KHAN, CJ.-Petitioner through the instant petition has asked for the issuance of an appropriate writ declaring the orders dated 31.03.2010 and 09.04.2010 of respondents No.1 & 2 as being nullity on account of having been passed without jurisdiction and lawful authority.

2. We have gone through the available record carefully and considered the submissions made by the learned counsel for the petitioner.

3. Since the questions urged before us being related to the terms and condition of service can well be urged before the departmental authority and then before the Service Tribunal, we, while hearing a petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, wouldn't like to intervene. We, instead of dismissing the writ petition, treat it as a representation before the departmental authority by following the dictum rendered in the case of ***Muhammad Anis & others vs. Abdul Haseeb & others (PLD 1994 SC 539)*** and direct the office to send it to the Chief Secretary for decision in accordance with law within a fortnight. This writ petition, thus, stands disposed of.

Announced.
23. 06. 2010 CHIEF JUSTICE

J U D G E

Peshawar High Court

Mst. Farida Rehman --- Appellant/Petitioner (s)

Versus

EDO --- Respondent (s)

JUDGMENT

W.P No. 1691/2010 Date of hearing 23.06.2010

EJAZ AFZAL KHAN, CJ.-Petitioners through the instant petition have asked for the issuance of an appropriate writ directing the respondents to dispose of their applications in accordance with the posting and transfer policy, formulated by the Provincial Government and the judgment of this Court rendered in Writ Petition No.1865/2007 on 24.10.2008.

2. We have gone through the available record carefully and considered the submissions made by the learned counsel for the petitioners.

3. A perusal of the record would reveal that the petitioners have already filed applications before the departmental authority, vis-à-vis, their posting and transfer in accordance with the policy but they haven't been decided so far despite the lapse of sufficient time. Since, many other petitions have been disposed of by issuing alike directions, we, also direct the respondents in this case to dispose of the applications of the petitioners in accordance with the policy and judgment of this Court within a fortnight. This writ petition is disposed of accordingly.

Announced.
23. 06. 2010 CHIEF JUSTICE

J U D G E

Peshawar High Court

Mst. Baseen Akhtar --- Appellant/Petitioner (s)

Versus

EDO --- Respondent (s)

JUDGMENT

W.P No. 1692/2010 Date of hearing 23.06.2010

EJAZ AFZAL KHAN, CJ.-Petitioners through the instant petition have asked for the issuance of an appropriate writ directing the respondents to dispose of their applications in accordance with the posting and transfer policy, formulated by the Provincial Government and the judgment of this Court rendered in Writ Petition No.1865/2007 on 24.10.2008.

2. We have gone through the available record carefully and considered the submissions made by the learned counsel for the petitioners.

3. A perusal of the record would reveal that the petitioners have already filed applications before the departmental authority, vis-à-vis, their posting and transfer in accordance with the policy but they haven't been decided so far despite the lapse of sufficient time. Since, many other petitions have been disposed of by issuing alike directions, we, also direct the respondents in this case to dispose of the applications of the petitioners in accordance with the policy and judgment of this Court within a fortnight. This writ petition is disposed of accordingly.

Announced.
23. 06. 2010 CHIEF JUSTICE

J U D G E

Peshawar High Court

Aminul Haq --- Appellant/Petitioner (s)

Versus

Government of KPK --- Respondent (s)

JUDGMENT

W.P. No. 1848/2010 Date of hearing 29.06.2010

EJAZ AFZAL KHAN, C.J.- Petitioner through the instant petition has sought annulment of order dated 10-5-2010 of the Secretary Local Government whereby he has been transferred from the post of TMO, TMA, Takht Bai to that of Secretary, Zilla Council, Nowshera.

2. Learned counsel appearing on behalf of the petitioner contended that where the impugned order is against the notified policy of the Government and is based on malafide, it has to be struck down. The learned counsel next contended that an order of this nature cannot remain in the field when it seems to have been passed on the basis of extraneous considerations including the political influence as is inferable from the dispatch of a copy of the order to the P.S. to the Senior Minister, Local Government. The learned counsel by concluding his arguments submitted that where the impugned order does not show anywhere that it has been passed in the public interest or on the basis of exigencies of service, it is a nullity in the eye of law and has to be declared as such.

3. The learned counsel appearing on behalf of the respondents contended that order of the same nature was passed in favour of the petitioner somewhere back in December, 2008 on the same considerations. Though, the learned counsel added, copies of the such order were also despatched to the concerned Minister, but this would not in any way show that such order was passed at the instance of the Minister.

4. We have gone through the record carefully and have also considered the submissions made by the learned counsel for the parties.

5. Whether the order was passed on account of malafides or at the instance of a Minister would be essentially a question of fact. Whether the order was passed in the public interest and could be said to have been based on the exigencies of service would again be a question of fact which cannot be enquired into by this court while exercising the Constitutional jurisdiction of this Court under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973. Whether the order conforms to the declared policy of the Provincial Government and the Rules framed in this behalf is also a question which can well be attended to by the Chief Secretary of the Province who is to ensure that everything under his hierarchy is done according to law, relevant rules and the declared policy. We at this stage would not comment on any of these questions when they being inextricably linked with the question of facts go outside the domain of this court. We thus do not feel inclined to issue the writ asked for. However, in the circumstances of the case, we treat this petition as an appeal before the Chief Secretary of the Province and direct the office to send it thereto for decision in accordance with law, within a period of one month by attending to all the aspects highlighted above.

CHIEF JUSTICE

Announced on
29th June, 2010.

J U D G E

Peshawar High Court

Sarfaraz --- Appellant/Petitioner (s)

Versus

Collector Custom --- Respondent (s)

JUDGMENT

W.P. No. 2125/2006 Date of hearing 29.06.2010

EJAZ AFZAL KHAN, C.J.- Petitioner through the instant petition has questioned the provisional assessment order dated 17-11-2006 of import value of the timber, whereby he has been directed to deposit Rs.200/- per CFT in cash and to furnish call deposit for the remaining.

2. Hardly, the learned counsel for the petitioner could canvass the facts of his case at the bar, that the learned counsel for the respondents brought to the notice of the court the final assessment order dated 9-3-2007 determining the value of the timber so imported. The learned counsel for the respondents then added that when the final assessment order is appealable, an appeal and not the writ would be a proper remedy in the circumstances of the case.

3. We have gone through the record carefully and considered the submissions made by the learned counsel for the parties.

4. When final assessment order has been passed which, under the Customs Act, is appealable, we would not like to meddle in the matter at least at this stage. We instead would treat this petition as an appeal before the Collector Appeal by following the dictum laid down in the case of **Muhammad Anis and others Vs. Abdul Haseeb and others (PLD 1994 Supreme Couort - 539)** and direct the office to send it thereto for decision in accordance with law after hearing the petitioner. The petitioner would be at

liberty to amend the petition so as to bring it in conformity with the format of appeal.

CHIEF JUSTICE

Announced on
29th June, 2010.

J U D G E

Peshawar High Court

Dr. Farhad Khan --- Appellant/Petitioner (s)

Versus

DCO --- Respondent (s)

JUDGMENT

W.P. no. 2143/2010 Date of hearing 29.06.2010

EJAZ AFZAL KHAN, C.J.- The learned counsel appearing on behalf of the petitioners submitted at the bar that he would not press this petition if the respondents are directed to consider the petitioners for appointment against the posts advertised afresh. The learned Additional Advocate General appearing on behalf of the respondents alongwith Fahimullah SO (Litigation) Health stated at the bar that the petitioners shall be considered for appointment against the posts thus advertised and appointed if found eligible. In this view of the matter, this petition is disposed of in the terms mentioned above.

CHIEF JUSTICE

Announced on
29th June, 2010. J U D G E

Peshawar High Court

Dr. Shahzad Ali --- Appellant/Petitioner (s)

Versus

Government of N-W.F.P --- Respondent (s)

JUDGMENT

W.P. No. 1009/2010 Date of hearing 29.06.2010

EJAZ AFZAL KHAN, C.J.- Petitioner through the instant petition has questioned the order dated 6-3-2010 whereby his appointment order dated 22-2-2010 was cancelled.

2. The learned counsel appearing on behalf of the petitioner though canvassed many things at the bar but the main thrust of his arguments was that once he was appointed after due process, the order appointing him could not be cancelled without giving him an opportunity of hearing. The learned Additional Advocate General appearing on behalf of the respondents could not advance any convincing reason to come out of this situation. When so, we set aside the impugned, send the case back to the concerned authority for decision afresh in accordance with law, after hearing the petitioner. The writ petition is thus disposed of.

CHIEF JUSTICE

Announced on
29th June, , 2010.

J U D G E

Peshawar High Court

Mir Sarwar --- Appellant/Petitioner (s)

Versus

Chief Election Commission --- Respondent (s)

JUDGMENT

W.P No. 2226/2010 Date of hearing 29.06.2010

EJAZ AFZAL KHAN, CJ.-Petitioner through the instant petition has asked for the issuance of an appropriate writ declaring the order dated 10.04.2008 of respondent No.2, removing him from service, as being nullity on account of having been passed without jurisdiction and lawful authority.

2. We have gone through the available record carefully and considered the submissions made by the learned counsel for the petitioner.

3. The record reveals that the impugned action was taken against the petitioner under the Removal of Service (Special Power Ordinance), 2000. When so, the petitioner can file a representation before the departmental authority and then before the Federal Service Tribunal under Section 10 of the said Ordinance. We, therefore, while exercising powers under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, can't issue the writ asked for. Since the petitioner has already filed a representation before the departmental authority, we direct it to decide the same in accordance with law before 10.07.2010. This petition is disposed of accordingly.

Announced.
29. 06. 2010

CHIEF JUSTICE

J U D G E

Peshawar High Court