LAHORE HIGH COURT

BULLETIN

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FORTNIGHTLY CASE LAW BULLETIN

(01-01-2021 to 15-01-2021)

A Summary of Latest Decisions by the superior Courts of Local and Foreign Jurisdictions on crucial Legal, Constitutional and Human Right Issues prepared by Research Centre Lahore High Court

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1. **Supreme Court of Pakistan**
National Bank of Pakistan v. Zahoor Ahmed Mengal
Against the judgment dated 30.12.2019, passed by the High Court of Balochistan, Quetta in C.P.No.869 of 2016
https://www.supremecourt.gov.pk/downloads_judgements/c.a._681_2020.pdf

Facts: Respondent, a civil servant remained absent from duty hence; his service was terminated without conducting regular inquiry while treating period of absence as Extra Ordinary Leave without pay.

Issue: (i). Whether regular inquiry ought to have been conducted for absence from duty?
(ii).Whether treatment of absence period as Extra Ordinary Leave was a punishment and justified?

Analysis: In the face of such absence from duty of the respondent, which being admitted, there was no need to hold a regular enquiry because in the case of Federation of Pakistan through Secretary, Ministry of Law and Justice Division, Islamabad vs. Mamoon Ahmed Malik (2020 SCMR 1154), it has already been held that where the fact of absence from duty being admitted on the record, there was no need for holding of a regular enquiry for that there was no disputed fact involved to be enquired into.
The treatment of absence period as EOL without pay has already been dealt with in the case of NAB through its Chairman vs. Muhammad Shafique (2020 SCMR 425) and Kafyat Ullah Khan vs. Inspector General of Police, Islamabad and another (Civil Appeal No.1661 of 2019), where it was held that while imposing penalty on the employee in the case of unauthorized absence, the absence period treated as an EOL is not a punishment, rather is a treatment given to the absence period, which employer is entitled to do.

Conclusion: (i). In case of an admitted absence from duty, there is no need to hold a regular enquiry.
(ii). The absence period treated as an EOL is not a punishment, rather is a treatment given to the absence period, which employer is entitled to do.

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2. **Supreme Court of Pakistan**
Divisional Superintendent, Postal Services v. Muhammad Zafarullah
Civil Appeal No. 420 of 2020
https://www.supremecourt.gov.pk/downloads_judgements/c.a._420_2020.pdf

Facts: Respondent was dismissed from service but the Federal Service Tribunal converted penalty of dismissal into compulsory retirement without recording any reasons.

Issue: (i) Whether the Tribunal can convert the penalty without recording the reasons?
(ii) What are the parameters for exercise of jurisdiction/power by courts/tribunals?

Analysis: The Tribunal could not convert the penalty without recording cogent reasons…There is no cavil to the proposition that a Court/Tribunal may exercise a power conferred upon it by law but such power is required to be exercised carefully, judiciously and after recording cogent reasons keeping in view the specific facts and circumstances of each case. All Courts/Tribunals seized of the matter before them are required to pass order strictly in accordance with the parameters of the Constitution, the law and the rules and the regulations framed under the law. No court has jurisdiction to grant arbitrary relief without the support of any power granted by the Constitution or the law.

Conclusion: (i) The tribunal can't convert the penalty without recording cogent reasons.
(ii) Court/Tribunal may exercise a power carefully, judiciously and after recording cogent reasons keeping in view the specific facts and circumstances of each case. All Courts/Tribunals seized of the matter before them are required to pass order strictly in accordance with the parameters of the Constitution, the law and the rules and the regulations framed under the law. No court has jurisdiction to grant arbitrary relief without the support of any power granted by the Constitution or the law.

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3. **Supreme Court of Pakistan**
Province of Punjab through Secretary Excise & Taxation Department v. Murree Brewery Company Ltd
Civil Petitions No.1369-L & 1370-L of 2019
https://www.supremecourt.gov.pk/downloads_judgements/c.p._1369_l_2019.pdf

Facts: Chief Secretary, Government of Punjab through Secretary, Excise and Taxation Department, Government of Punjab filed intra court appeal which was dismissed being non-compliant with Article 174 of the Constitution, read with S.79 of the Code of Civil Procedure, 1908 (CPC), whereby it is stated that the case has to be filed in the name of the Federal or Provincial Government, as the case may be, and not through any of its functionaries.

Issue: (i).Whether S.79 of the CPC amounts to a mandatory or directory provision?
(ii). How it is to be determined that a provision is directory or mandatory?
(iii). Is there any exception, if the provision is found mandatory?

Analysis: The test to determine whether a provision is directory or mandatory is by ascertaining the legislative intent behind the same. The general rule expounded by this Court is that the usage of the word 'shall' generally carries the connotation that a provision is mandatory in nature. However, other factors such as the object and purpose of the statute and inclusion of penal consequences in cases of noncompliance also serve as an instructive guide in deducing the nature of the provision.

Following are some major principles:-

a) “While determining whether a provision is mandatory or directory, somewhat on similar lines as afore noticed, the Court has to examine the context in which the provision is used and the purpose it seeks to achieve;
b) To find out the intent of the legislature, it may also be necessary to examine serious general inconveniences or injustices which may be caused to persons affected by the application of such provision;
c) Whether the provisions are enabling the State to do some things and/or whether they prescribe the methodology or formalities for doing certain things;
d) As a factor to determine legislative intent, the court may also consider, inter alia, the nature and design of the statute and the consequences which would flow from construing it, one way or the other;
e) It is also permissible to examine the impact of other provisions in the same statute and the consequences of non-compliance of such provisions;
f) Physiology of the provisions is not by itself a determinative factor. The use of the words 'shall' or 'may', respectively would ordinarily indicate imperative or directory character, but not always.
g) The test to be applied is whether non-compliance with the provision would render the entire proceedings as invalid or not.
h) The Court has to give due weightage to whether the interpretation intended to be given by the Court would further the purpose of law or if this purpose could be defeated by terming it mandatory or otherwise.
However, where the Government itself files the appeal, albeit with the wrong description, the provisions of S.79 of the CPC amount to mere nomenclature, which, if not followed, do not render the suit unmaintainable. The rationale being that, the object and purpose of S.79 of the CPC is for the Government to be properly represented and defended. The same purpose is still achieved where the Government themselves file an appeal, as in this case. While such mis-description is a contravention of S.79 of the CPC, it is not fatal to the case when it is indeed the Government filing the appeal themselves. where there is a matter of mis-description of parties, the Court may, either on its own accord, exercising suo-moto powers, or after an application being submitted to it, order that the name of any party improperly joined be struck out and the appropriate party whose presence is necessary to do complete justice be added to the suit under the powers conferred on it by S.153 and Order 1, Rule 10(2) of the CPC.

Conclusion: (i). S.79 of CPC is a mandatory provision.
(ii). See principles in analysis above.
(iii). Yes, a mis-description of parties only amounts to a mere technicality that cannot be allowed to stand in the way of justice, which should be corrected by the Courts.

4. **Lahore High Court**
Bismillah Agro, etc. v. Soneri Bank Ltd
2020 LHC 3327
FAO No.35 of 2019
https://sys.lhc.gov.pk/appjudgments/2020LHC3327.pdf

Facts: The respondent filed suit under section 9 of the Financial Institutions (Recovery of Finances) Ordinance, 2001. The appellants were served through publication in the newspapers who filed leave to defend in the office of High Court on the very next working day when court resumed to regular work after summer vacations. However the leave to defend was not placed before the court and suit was exparte decreed by the single judge holding that despite effective service the appellants had failed to submit application for leave to defend. Appellants then filed application for setting-aside of ex-parte decree, which was dismissed on two grounds firstly**,** that service was validly affected upon the appellants but no application for leave to defend was filed within stipulated time. And secondly, that the application for leave to defend, even in terms of notices/publication issued was beyond 30 days prescribed period of limitation.

Issue: Whether the application for leave to defend was to be treated within limitation when the same was filed on the second day after summer vacations of High Court and was beyond prescribed period of 30 days?

Analysis: Per Section 10(2) of the Ordinance, application for leave to defend is required to be filed within 30 days of the date of first service by any of the modes laid down in sub-section (5) of section 9 of the Ordinance. However, according to the proviso attached to section 10(2), where service has been validly affected only through publication, the court may extend the time for filing an application for leave to defend. In this case, as apparent from the record, valid and effective service was only affected through the publication – effective service through other modes remained obscured and unsubstantiated. Hence proviso to sub-section (2) of section 10 of the Ordinance is attracted. As regards the claim that court erroneously, overlooking the fact that service had already been effected on the appellants, passed the order on 24.05.2018 for repeating service of summons on the defendants, the court observed that financial institution has not objected to the order of fresh service, instead same was acted upon in letter and spirit and observation of erroneousness of order of 24.05.2018 is inappropriate and unwarranted. In the wake of the order, a right has been accrued to the appellants, which right cannot be denied by attributing error on the part of the court, and even if it was termed as 'inadvertent error' it should not prejudice the appellants being act of the court.

Conclusion: View of learned Single Judge in Chambers that 'summer vacations continued from 02.07.2018 to 01.09.2018 and leave application filed on 03.09.2018 was otherwise beyond limitation', was erroneous as on 02.09.2018 it was Sunday, hence, application filed on 03.09.2018 was in accordance with the mandate of

Section 4 of the Limitation Act, 1908. Application for leave to defend should be treated as validly filed and same be adjudicated upon on its own merits.

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5. **Lahore High Court**
Jabran Mustafa v. Judge Family Court etc.
2021 LHC 1
WP No. 69574 of 2020
https://sys.lhc.gov.pk/appjudgments/2021LHC1.pdf

Facts The Court while executing a family decree, due to non-service of warrants upon the judgment debtor, issued warrant of arrest for the petitioner (brother and attorney of judgment debtor). Application of the petitioner for cancellation of his warrants was also dismissed by the executing Family Court and the petitioner assailed the same in writ jurisdiction of the High Court.

Issue: Whether writ is maintainable against an order of dismissal of application for cancellation of warrants of arrest passed by family court in execution proceedings?

Analysis: It is not a case wherein warrants of arrest have been simplicitor issued against the petitioner to be treated as an interlocutory order. Rather the executing court, by placing reliance on a judgment of the Supreme Court and application of its mind to the facts of the matter, has dismissed the petitioner's application for cancellation of his warrant of arrest and has refused to recall its earlier order. Said order is a "decision given" on the application/objection petition of the petitioner against execution of decree, hence, same amounts to a final decision; therefore said order is appealable before the appellate court in terms of Section 14 of the Family Courts Act, 1964.

Conclusion: Order of dismissal of petitioner's application for cancellation of his arrest warrants by the executing family court amounted to final decision; therefore it could not be challenged in writ jurisdiction of High Court since right of appeal was available under the relevant law.

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6. **Lahore High Court**
Mst. Shahnaz Begum v. Additional District Judge etc.
2020 LHC 3399
Writ Petition No. 16208 of 2019
https://sys.lhc.gov.pk/appjudgments/2020LHC3399.pdf

Facts: Wife and children (petitioners) of a martyred police official applied for grant of succession certificate to collect his service benefits. Alleged second wife and son of the deceased (respondent No.4 & 5) filed a separate application for succession certificate for their shares. The court consolidated both the applications and issued succession certificate in accordance with the request of the respondent No.4 & 5.

Appeal by the petitioners against the order was dismissed. Said order was challenged in constitutional jurisdiction of the High Court.

Issue: Whether under Succession Act, the court can decide intricate question of declaring someone as a legal heir of a person?

Analysis: The court held that since the petitioners had contested the claim of respondents No. 4 & 5 that they were widow and son of the deceased, therefore in view of the law, the controversy between the parties could only be decided by the civil court in a regular suit and not in summary proceedings under the Succession Act. The courts exceeded their jurisdiction in the matter. However the Hon'ble court disposed of the petition with following directions:

i) Succession certificate shall be issued to respondents No. 4 & 5 subject to their furnishing a bond with two sureties for a sum equal to the amount of the share to which they may be entitled to receive from the service benefits of the deceased;
ii) The finding of the learned courts that respondent No. 4 & 5 were the second widow and son respectively of the deceased are set aside. They shall immediately file a civil suit to establish their status as such.
iii) If respondents No. 4 & 5 succeed in getting a decree, they would be entitled to retain the money received by them under the Succession Certificate.
iv) If respondents No. 4 & 5 do not file a civil suit as aforesaid or if it is instituted but decided against them the petitioner may apply for revocation of Succession Certificate under clause (e) of section 383 of the Act.

Conclusion: Under the Succession Act, the court cannot decide intricate questions like declaring someone as a legal heir of a person.

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7. **Lahore High Court, Lahore**
Muhammad Saif Ullah v. Lahore Development Authorities & others
Review Application No.2005 of 2019
https://sys.lhc.gov.pk/appjudgments/2020LHC3437.pdf

Facts: Petitioner was aggrieved of an order passed by executing court. His appeal u/s 104 C.P.C against said order was dismissed by the lower appellate court. He preferred a revision petition in High Court but till that time an amendment in section 115 of the C.P.C (insertion of new sub-section 5) had already been effected by virtue of which revision was barred against an order passed by the District Court under Section 104 CPC. Hence, his revision was found to be not maintainable owing to said amendment. However, subsequently in another case of similar nature, High Court took a contrary view. Hence petitioner filed this review petition in view of divergence of opinions of High Court.

Issue: **(i)** Whether the newly added sub-section (5) in Section 115 CPC by the Code of Civil Procedure (Punjab Amendment) Act 2018 affected the pending cases/revisions or it will has retrospective effect?

Analysis: Revision is one of the remedies provided under the C.P.C. The Superior Courts have different views on the nature of this remedy. Some say it is the right of a litigant and other say it is his privilege. Keeping in view the prevailing view enunciated through Karamat Hussain's case (PLD 1987 SC 139) and the other cases cited as 1992 SCMR 2334 and PLD 2015 SC 137 revision is a vested right of an aggrieved person/litigant.

Under the Amendment Act, 2018 the second proviso of sub-section (1) of Section 115 CPC has been changed and at the same time sub-section (5) has been added within it. It is now well settled that where a section of a statute is amended, the original ceases to exist and the new section supersedes it and becomes a part of the law just as if the amendment had always been there. The general rule as to the effect of repeal of a statute follows the legal maxim "*nova constitution fututris forman imponere debet non prateritis*" i.e. a new law ought to regulate what is to follow, not the past. This maxim was statutorily recognized in Section 38 (2) of the Interpretation Act, 1889, which is on the same lines as Section 4 of the Punjab General Clauses Act, 1956 and it provides for the effect of repeal. In fact, when a lis commences, all rights and obligations of the parties get crystalized on that date. The mandate of Section 4 of the General Clauses Act is simply to leave the pending proceedings unaffected which commences under the un-repealed provisions unless the contrary intention is expressed. The principle enshrined under sec.4 was followed in the Colonial Sugar Refining Company Limited's case (1905 AC 369). Whenever the superior Courts of Pakistan or India have faced such a question like the one under discussion, they have invariably placed reliance on the principle settled in the case of Colonial Sugar Refining Company. Principles that emerge from the reading of judgments cited as PLD 1956 S.C.256, PLD 1957 SC (Ind.) 448, PLD 1965 SC 681, PLD 1967 SC 259, PLD 1969 SC 187, PLD 1969 SC 599, PLD 1981 SC 553, PLD 1985 SC 376, 1988 SCMR 526 are that:

(i) the legal pursuit of a remedy, appeal or second appeal or revision are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding,
(ii) the right of appeal or revision or second appeal is not a mere matter of procedure but is a substantive right,
(iii) the institution of the suit carries with it the implication that all rights of appeal or revision or second appeal then in force are preserved to the parties thereto till the rest of the career of the suit,
(iv) the right of appeal or revision or second appeal is a vested right and such a right to enter the superior Court accrues to the litigant and exists as on and from the date of the lis commences and although it may be actually exercised when the

adverse judgment is pronounced such right is to be governed by the law prevailing as the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal, and

(v) this vested right of appeal or revision or second appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise.

Whereas the Amendment Act, 2018 does not indicate that it is to have retrospective operation, it cannot be so construed as to have the effect of altering the law applicable to a claim in litigation at the time when it was passed.

Conclusion: Addition of sub-section (5) in Section 115 CPC by the Code of Civil Procedure (Punjab Amendment) Act 2018 has no effect on the cases which had already commenced in the original Court before its enactment. As the proceedings in present case were instituted in suit much prior to amendment, hence the right of revision had vested in the parties thereto at that date.

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8. **Lahore High Court**

Syed Iftikhar Hussain Shah v. Muhammad Sharif

R.S.A.No.98 of 2011

https://sys.lhc.gov.pk/appjudgments/2020LHC3358.pdf

Facts: The appellant filed a suit for cancellation of mutations sanctioned in favour of respondent regarding his property on the basis of misrepresentation and fraud. The suit was decreed by learned trial court but the learned lower appellate court reversed the decision while setting aside the decree. Through this regular second appeal, the appellant has challenged the decision of learned lower appellate court.

Issues: How a mutation is to be proved as per law?

Analysis: The mutation proceedings are initiated primarily for fiscal purposes to collect the land revenue and are only meant for maintaining the record which by no stretch of imagination can be considered a judicial proceeding wherein right/title qua immoveable property is determined. Although these proceedings made u/s 42 of the Land Revenue Act, 1967 are admissible under Article 49 of the Qanun-e-Shahadat Order, 1984 and some presumption is also attached thereto, but it is always rebuttable. It is also well established by now that mutation per se is not deed of title and the party relying upon its entries is always bound to prove the transaction reflected therein.

As a matter of law, subject mutations containing sale transactions were documents pertaining to financial liability, thus required to be proved as per yardstick laid down in Article 79 of the Qanun-e-Shahadat Order, 1984. The examination of only one marginal witness, by the beneficiary was not enough to meet with the legal requirement. No doubt Rapats Roznamcha Waqiati were brought on record, but through the statement of counsel, the contents whereof were neither proved by

summoning its maker nor custodian of the record. Moreover, these entries were also not confronted to the plaintiff/alleged vendor, when he appeared in the witness box. There is no hesitation to hold that Rapat Roznamcha Waqiati is not per se admissible, whereas exhibition of document as well as proof of contents are two different aspects and the latter is more relevant and important, which was lacking here.

Conclusion: Mutation containing sale transaction is a document pertaining to financial liability, thus requires to be proved as per yardstick laid down in Article 79 of the Qanun-e-Shahadat Order, 1984.

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9. **Lahore High Court**
Ch. Muhammad Anwar v. Judge Accountability Court & others
W. P. No. 246/2021
https://sys.lhc.gov.pk/appjudgments/2021LHC5.pdf

Fact: Petitioner has challenged the orders of trial and appellate court wherein the application under section 540 Cr.P.C filed by prosecution, for re-summoning of witnesses already recorded, was accepted for the purpose of exhibiting the documents which were part of record but could not be exhibited earlier inadvertently.

Issue. Whether the witnesses can be re-summoned if once examined for the purpose of exhibiting documents already available on record?

Analysis It is well settled principle of law that criminal justice system is not adversarial rather inquisitorial and Court has to reach at just decision of the case. Any piece of evidence which is essential for just decision of the case, has to be brought on record irrespective of the fact that either it favours one party or goes against other Any delay for filing any application for calling/recalling of witnesses or bringing any piece of evidence on record, is immaterial; similarly, filling lacuna in the case is also immaterial if said piece of evidence is otherwise necessary for securing ends of justice.
Rule 2, Chapter.1-E of the Volume III of Lahore High Court Rules deals with duty of Court to elucidate facts. Similarly Article 161 of the Qanun-e-Shahadat, 1984] should be judiciously utilized for this purpose when necessary.

Conclusion. When the "evidence" is not newly created rather already available and is otherwise relevant and necessary for just decision of the case then the witnesses may be re-summoned and documents can be exhibited. No prejudice will be caused to accused person particularly when accused party has been allowed to cross-examine the witness.

10. **Lahore High Court**
Nestle Pakistan Ltd & another v. Federation of Pakistan
2020 LHC 3369
W.P No. 4361 of 2017
https://sys.lhc.gov.pk/appjudgments/2020LHC3369.pdf

Facts: Petitioners challenged S.R.O. No. 115(I)/2015 dated 09.02.2015 issued by the Federal Board of Revenue whereby certain powers and functions were conferred on the officers of Directorate General of Intelligence and Investigation. Petitioners avowed inter alia, the impugned S.R.O. conferred powers on the said officers beyond remit of authority of such officers under the law. FBR by virtue of impugned S.R.O. had conferred on the designated officers of DG (I&I), jurisdiction to exercise powers and functions of Chief Commissioner (Inland Revenue) and also Commissioner (Inland Revenue) which was against mandate of S. 30(3) of the Sales Tax Act, 1990 and tantamount to setting up a parallel hierarchy of officers without laying out a statutory regime for exercise of such powers.

Issue: Whether a parallel hierarchy of officers could function in absence of any clearly defined statutory regime underpinning the array of powers and whether there can be conferment of powers without specifying functions and jurisdiction of the officers in terms of section 230 of the Income Tax Ordinance 2001?

Analysis: The court by applying the ratio of the case titled 2017 PTD 1875 where the Hon'ble Court observed that it was against the mandate of S. 30(3) of the Sales Tax Act, 1990 whereby FBR by virtue of impugned S.R.O. had conferred on the designated officers of DG (I&I), jurisdiction to exercise powers and functions of Chief Commissioner (Inland Revenue) and also of Commissioner (Inland Revenue). The court went a step ahead and opined inter alia that SRO 115 has been found deficient on a number of interwoven principles ranging from constitutional (due powers of law) to rule of law sources. The court observed that essence of the matter is that the periphery of powers of D.G (I&I) has not been defined in either the law itself or in any statutory rules framed under the Ordinance, 2001. Hence a genuine, concern is that no rules have been enacted to regulate and structure the powers of officers of D.G (I&I) to distinguish them from the other officers of Inland Revenue. This makes their powers unregulated and is a reasonable ground for holding that any powers exercised by the officers of D.G (I&I) are based on whims and unstructured discretion which cannot be countenanced and is an affront to the rule of law……

Conclusion: A proper construction of section 230 sub-section (2) ineluctably leads to the conclusion that there cannot be a conferment of powers without specifying functions and jurisdiction of the officers….notification regarding the functions and jurisdiction has to precede the notification conferring powers, and not the other wary round. SRO 115 and the impugned notices were set aside being without lawful authority and of no legal effect. FBR was directed to initiate the

process of specifying the functions and jurisdiction of the Officers of D.G (I&I) and to complete it within two months. Thereafter FBR may confer powers on officers of D.G (I&I) compatibly with their functions.

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11. **Lahore High Court Lahore**
Muhammad Asif v. Amjad Ali, etc.
Criminal Revision No.57092 of 2020
https://sys.lhc.gov.pk/appjudgments/2020LHC3347.pdf

Facts: The complainant was examined on 10.12.2018, however, on 07.03.2020, during the cross-examination, he had not supported the prosecution story, thus, on the same day, the application was filed by the petitioner, not a party to these proceedings, forwarded by the learned Deputy District Public Prosecutor seeking permission to declare the witness i.e. complainant as hostile so that he could be cross-examined by the petitioner. The petitioner assailed the said order whereby the application filed by the petitioner seeking permission to cross examine complainant as witness during trial of case, was dismissed.

Issue: (i). Whether the petitioner being real nephew of the deceased was within his rights to move the application for declaring a witness as 'Hostile'?
(ii). Whether the prosecution is allowed to cross examine the witness after cross-examination by defence?

Analysis: The application was not filed at an appropriate stage and no request was made by the complainant or any legal heir of the deceased. The petitioner in this case is only a witness. He is not amongst the legal heirs and thus had no locus standi to file application for such declaration.
The Court may permit re-examination of a witness if considered proper and necessary on a material question which has been omitted by the prosecution to bring on record in his examination-in-chief but the prosecution is not allowed to cross examine the witness after cross-examination of defence in respect of the facts narrated by him either in his examination-in-chief or cross examination. If a witness is allowed to be cross-examined by the prosecution after the cross-examination by the defence, the purpose of right of cross-examination would be defeated and provision of Article 133 and 151 of Qanun-e-Shahadat, 1984 relating to the examination and cross-examination of a witness would be negated. The credibility of a statement of witness may be permitted to be impeached by the prosecution of its own witness, if, his statement in examination-in-chief is in deviation to his previous statement or the statements is adverse to the interest of prosecution but no such permission can be granted to the prosecution on the basis of averment of the statement of witness in cross examination by defence.

Conclusion: (i). Petitioner is not amongst the legal heirs and only a witness and thus had no locus standi to file application for such declaration.

(ii). The prosecution is not allowed to cross examine the witness after cross-examination by the defence side in respect of the facts narrated by him either in his examination-in-chief or cross examination.

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12. **Lahore High Court**
Sadaf Aziz etc v. Federation of Pakistan etc.
W. P. No. 13537/2020
https://sys.lhc.gov.pk/appjudgments/2020LHC3407.pdf

Fact: That the Surgeon Medico Legal Punjab issued the 2015 General Instructions for conducting the medico-legal examination of victims of rape or sexual abuse. The SOPs have been replaced by the 2020 Guidelines. The 2015 Guidelines refer to digital examination while 2020 Guidelines require bimanual traction. The two finger test is part of the digital examination and bilateral digital traction is done to determine the status of the hymen. Therefore, as per the admitted position, digital examination and bilateral digital traction are terms used for virginity testing. Petitioners have challenged the use and conduct of virginity tests specifically being the two finger test and hymen examination in cases of rape or sexual abuse and seek permanent restraint against the use, conduct or facilitation of virginity tests.

Issue. Whether the two finger test and the hymen test (virginity test) carried out for the purposes of ascertaining the virginity of a female victim of rape or sexual abuse has any relevance for establishing the offence of rape or sexual abuse?

Analysis The inspection of the hymen cannot give conclusive evidence of vaginal penetration or any other sexual history. While examination of the hymen may, in very limited contexts, be useful in the diagnosis of sexual assault in prepubescent females, it is not an indicator of sexual intercourse or habituation. The belief that absence of the hymen confirms that there has been penetration of the vagina is incorrect; equally false is the notion that the presence of a 'normal' or 'intact' hymen means that penetration has not occurred.

Further, it is demeaning to the status of a woman to be forced by orders of Court to carry out test of virginity of woman and must be taken as a grave threat to privacy, a cherished fundamental right. It also violates the right of rape survivors to privacy, physical and mental integrity and dignity. Thus, this test, even if the report is affirmative, cannot ipso facto, be given rise to presumption of consent. No presumption of consent could be drawn ipso facto on the strength of an affirmative report based on the unwarranted two fingers test. Even if it is admitted that she was a girl of an easy virtue, no blanket authority can be given to rape her by anyone who wishes to do so. Consequently, carrying out virginity testing not only for being discriminatory but also for having harmful consequences

Conclusion. That two finger test and the hymen test (virginity test) carried out for the purposes of ascertaining the virginity of a female victim of rape or sexual abuse is

unscientific having no medical basis, illegal and against the Constitution. Federation and Provincial Government should take necessary steps to ensure that virginity tests are not carried out in medico legal examination of the victims of rape and sexual abuse.

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13. **Sindh High Court**
Salman Bariv.Mst. Samia Khan & Another
Constitutional Petition No. S–02 of 2021
2021 SHC 6
https://eastlaw.pk/cases/Salman-BariVSMst. Samia.Mzk3Mjcw

Facts: Learned Family Judge issued non-bailable warrants (NBWs) against the petitioner to enforce its decision in execution petition of judgment and decree passed in a Family suit. According to the petitioner the learned trial Court erroneously issued his warrants of arrest under Section 51, C.P.C i.e. to effect this appearance in court, as he had already paid partial maintenance allowance.

Issue: What are pre-requisites for issuance of non-bailable warrants in an execution petition of Judgment and decree passed in a Family Suit?

Analysis: Pre-conditions for issuance of NBWs as enunciated under Section 51 of C.P.C are that the judgment-debtor should be proved to have attempted to leave the limits of the Court, to obstruct the decree or execution thereof or dishonestly transferred the property after the institution of the suit to avoid the decree or that he has means to pay the decree but neglected to do the same. Without the satisfaction of these pre-conditions, no mechanical order for detention in prison can be passed. It is only after the conclusion of the inquiry the Court can order for detention of judgment-debtor in prison. In the present case, the petitioner had already paid a partial payment to the respondent and undertook to pay the remaining amount within a reasonable time as per his financial position; hence the operation of NBWs issued against him by the learned trial Court was converted into BWs, enabling him to furnish security / appropriate bond equivalent to the remaining amount before the learned trial Court.

Conclusion: Before issuing non-bailable warrants Court must ensure that the Judgment debtor attempted to leave the limits of the Court in order to obstruct the decree or execution thereof or dishonestly transferred the property after the institution of the suit to avoid the decree; or that he has means to pay the decree but neglected to do the same.

14. **Sindh High Court**
Sami Pharmaceuticals (Pvt) Ltd v. Province of Sindh &Ors
C. P. No. D-5220 / 2017, C. P. No.D-5222 /5222 of 2017 C. P. No.D-5273 / 2017 etc.
2021 SHC 2
https://eastlaw.pk/cases/Sami-Pharmaceuticals-Pvt-VSProvince-Of-Sindh.Mzk3MjYz

Facts: Petitioners are engaged in the business to provide services of supply of labour, manpower and to acquire services from various service providers by out sourcing different jobs including the job of cleaning, maintenance and other requirements as defined under Section 2(55A) of the Sindh Sales Tax on Services Act, 2011. Being aggrieved by a notification issued by Sindh Revenue Board **(SRB)** pursuant to which, proviso to Rule 42(E) of the Sindh Sales Tax Rules, 2011 **(2011 Rules)** was deleted/omitted, and as a consequence thereof, petitioners were asked to pay Sales Tax on such services on the gross amount of receipts, including the amounts which were reimbursed to the service providers in lieu of salaries and wages etc. According to the petitioners act of SRB is in violation of Article 18, 77, 127, 129 and 130 of the Constitution and beyond the mandate of the legislature as through special procedure or rules, no tax can be imposed; so deletion of proviso is otherwise discriminatory.

Issue: Whether the provincial Government is empowered to charge sales tax on the entire gross amount of service invoiced or billed to the service recipient?

Analysis: After 18th amendment federal government has exclusive power to make laws with respect to any matter in the federal legislative list and the matters not mentioned in the federal legislative list are within the legislative powers of the Provinces. Whereas the levy of sales tax on services and the enactment of any Act is concerned, the power to do so is derived from addition of the exception to entry 49 of federal legislative list, whereby it has been categorically provided that in any circumstances the federation will not have any authority to make laws for levy and collection of any sales tax on services. Insofar as the authority to levy tax on service is concerned, though the same now rests with the Province pursuant to the exception to entry 49 (ibid); but it needs to be appreciated that such authority to impose tax is only on *services* and not on goods or otherwise. It is only the quantum of service rendered or supplied which can be taxed by Province. By no stretch of imagination either by rules or otherwise, it can be extended to any other goods or amount which is not falling within services. It is settled law that by a rule making power no tax could be imposed or levied as it is only the charging provision of the Act which can do so. If any service provider who issues an invoice which includes both the amounts; that of his services and any other reimbursement or charges paid by or on behalf of the service recipient, would not ipso facto render the entire invoice amount to be taxed. If that be so, then it would go beyond the mandate of the Province to levy tax only on *service* and would

transgress into the domain of the federation. Merely for the reason that the service recipient is engaging service providers and is also paying for the salaries of employees engaged by the service provider, would that render such payments liable to sales tax. The answer is a big no. Findings of Indian Supreme Court reported as (AIR 2018 SC 3754) squarely apply to the present case.

Conclusion: Provincial Government is not empowered to charge sales tax on the entire gross amount of service invoiced or billed to the service recipient. Impugned action and interpretation arrived at by SRB is contrary to the Act itself. It is only the quantum and value of service which is taxable and not the amount being reimbursed by the service recipient.

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15. **Supreme Court of India**
Civil Appeal No.7469 of 2008
M/s. Padia Timber Company (P) Ltd. v. The Board of Trustees of Visakhapatnam Port Trust Through its Secretary
https://main.sci.gov.in/supremecourt/2007/5298/5298_2007_35_1501_25342_Judgement_05-Jan-2021.pdf

Facts:

- Respondent-Port Trust floated a tender for supply of Wooden Sleepers with the condition that the purchaser will not pay separately for transit insurance and the supplier will be responsible till the entire stores contracted for arrive in good condition at destination. Appellant submitted its offer with a specific condition that inspection of the Sleepers would have to be conducted only at the depot of the Appellant. In accordance with the terms and conditions of the tender, the Appellant deposited Rs.75,000/- towards earnest deposit, along with its quotation.
- By a letter dated 11.10.1990, the Appellant agreed to supply wooden sleepers with the condition that Respondent could inspect the goods to be supplied, at the factory site of the Appellant, otherwise the Appellant would charge 25% above the rate quoted.
- By a letter dated 29.10.1990, the Respondent-Port Trust accepted the offer of the Appellant to inspect the Wooden Sleepers at the site of the Appellant but that the final inspection would be made at the General Stores of the Respondent-Port Trust and also requested to extend the delivery period of the sleepers until 15.11.1990.
- By a letter dated 30.10.1990 appellant did not accept the terms and conditions stipulated in the letter dated 29.10.1990 and also declined to extend the validity of its offer and requested to return the earnest money.
- It appears that on the same day, i.e.t 30.10.1990, the Controller of Stores of the Respondent-Port Trust put up an Office Note, seeking sanction of the Chairman to place orders on the Appellant for supply of requisite Sleepers for which a Letter of intent cum purchase order dated 29.10.1990

had been issued by the Respondent-Port Trust. A purchase order No. G 101126 90-91 dated 31.10.1990 was issued to the Appellant.

- The Letter of intent and the purchase order were followed by a letter dated 12.11.1990, written in response to the letter dated 30.10.1990 of the Appellant to request the Appellant to supply the materials ordered as per the purchase order, inter alia, contending that the purchase order had duly been placed on the Appellant within the period of validity of the price quoted by the Appellant, after issuing a letter of intent to the Appellant, accepting its offer with a warning that if supply was not made as per the purchase order, risk purchase would be made at the cost of the Appellant and the Earnest Deposit of Rs.75,000 would be forfeited.
- By another letter dated 19.11.1990, the Respondent-Port Trust requested the Appellant to commence supply of materials. In response to the said letter, the Appellant wrote a letter dated 27.11.1990 to the Respondent-Port Trust, contending that that there was no concluded contract between the parties and once again requested to refund the earnest money.
- On or about 03.9.1991, that is, after ten months, the Respondent-Port Trust placed an order on M/s. Chhawohharia Machine Tools Corporation, for supply of wooden sleepers at a much higher rate.
- On or about 10.4.1992, the Respondent-Port Trust filed the suit, seeking damages for breach of contract and on or about June, 1994, the Appellant filed the suit claiming refund of earnest money deposited along with interest @ 24% per annum from 24.4.1991 to 23.4.1993, costs and other consequential reliefs.
- Suit of Respondent-Company was decreed while suit of Appellant was dismissed and same was the fate of Appeals of the Appellant in the High Court.

Issue: Whether the acceptance of a conditional offer with a further condition results in a concluded contract, irrespective of whether the offerer accepts the further condition proposed by the acceptor?

Analysis: Supreme Court held that:

- It is a cardinal principle of the law of contract that the offer and acceptance of an offer must be absolute. It can give no room for doubt. The offer and acceptance must be based or founded on three components, that is, certainty, commitment and communication.
- However, when the acceptor puts in a new condition while accepting the contract already signed by the proposer, the contract is not complete until the proposer accepts that condition. An acceptance with a variation is no acceptance. It is, in effect and substance, simply a counter proposal which must be accepted fully by the original proposer, before a contract is made.

- Acceptance of an offer may be either absolute or conditional. If the acceptance is conditional, offer can be withdrawn at any moment until absolute acceptance has taken place.
- Section 7 of the Contract Act acceptance of the offer must be absolute and unqualified and it cannot be conditional. However, in the facts and circumstances of that case, on a reading of the letter of acceptance as a whole, the Appellant's argument that the letter was intended to make a substantial variation in the contract, by making the deposit of security a condition precedent instead of a condition subsequent, was not accepted.
- In the response to the tender floated by the Respondent-Port Trust, the Appellant had submitted its offer conditionally subject to inspection being held at the Depot of the Appellant. This condition was not accepted by the Respondent-Port Trust unconditionally.

Conclusion: Supreme Court, in view of above discussion, held that it could not, therefore, be said that there was a concluded contract. There being no concluded contract, there could be no question of any breach on the part of the Appellant or of damages or any risk purchase at the cost of the Appellant. The earnest deposit of the Appellant is liable to be refunded within four weeks with interest @ 6% per annum from the date of institution of suit No.450 of 1994 till the date of refund thereof.

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16. **Supreme Court of the United States**
Seila Law LLC v. Consumer Financial Protection Bureau, 591 U.S__ (2020)
https://scholar.google.com.pk/scholar_case?case=14557349188638541514&q=seila+law+llc+v.+consumer+financial+protection+bureau&hl=en&as_sdt=2006&as_vis=1;https://ballotpedia.org/Seila_Law_v._Consumer_Financial_Protection_Bureau

Facts: It is a case that examined the extent of the U.S President's appointment and removal powers. The Consumer Financial Protection Bureau (CFPB) issued a civil investigative demand to the California-based firm, Seila Law. Seila Law refused to comply, so the agency petitioned the U.S. District Court for the Central District of California, asking the court to enforce the demand. Seila Law responded by arguing that the CFPB violated the U.S. Constitution's separation of powers doctrine. The district court rejected Seila Law's argument and ordered the law firm to comply. Seila Law appealed to the 9th Circuit, which affirmed the district court's order.

Issue: Whether the vesting of substantial executive authority in the Consumer Financial Protection Bureau, an independent agency led by a single director, violates the separation of powers. If the Consumer Financial Protection Bureau is found unconstitutional on the basis of the separation of powers, can 12 U.S.C. §5491(c)(3) be severed from the Dodd-Frank Act?

Analysis: In a 5-4 decision, the court ruled that the structure of the Consumer Financial Protection Bureau, an independent agency that exercised executive powers and had a director protected from at-will termination by the president, was unconstitutional. The majority held that restrictions on the president's ability to remove such agency leaders violated separation of powers principles by limiting presidential control of executive power. The decision only affected part of the agency's structure without eliminating the agency altogether by striking down the Dodd-Frank Act, the 2010 law that created the agency. Chief Justice John Roberts delivered the majority opinion by opining inter alia,*"while we have previously upheld limits on the President's removal authority in certain contexts, we decline to do so when it comes to principal officers who, acting alone, wield significant executive power."*

Conclusion: The court nullified the judgment of the 9th Circuit and sent the case back for further proceedings to see whether Seila Law will have to obey a CFPB document request.

LIST OF ARTICLES

1. **HARVARD LAW REVIEW**
   https://harvardlawreview.org/2021/01/tribal-power-worker-power-organizing-unions-in-the-context-of-native-sovereignty/
   Tribal Power, Worker Power: Organizing Unions in the Context of Native Sovereignty 134rv. L. Rev. 1162

2. **YALE LAW REVIEW**
   https://www.yalelawjournal.org/article/retroactive-adjudication
   Retroactive Adjudication by Samuel Beswick

3. **COURTING THE LAW**
   https://courtingthelaw.com/2020/12/29/commentary/continuing-mandamus-productive-or-deleterious-overreach/
   Continuing Mandamus: Productive or Deleterious Overreach? By Talha