LAHORE HIGH COURT, LAHORE

CITATOR OF CIVIL LAWS

FOREWORD

It is said that *'All laws must be on the sleeve of a judge'*. Law is not only confined to what is written in a statute book but also includes the interpretations made by the Courts. The legal *Precedent* carries great significance for understanding the true meaning and spirit of law. It enunciates principles, which explain, extend and limit the scope and applicability of laws. A judge can perform the onerous task of dispensing justice if he is not only well acquainted with laws but is also well conversant about the latest interpretation of such laws by the Superior Courts. District Judiciary is the first door for an aggrieved person to be knocked for justice. Being head of the institution, this was the purpose in my mind when I instructed Research Center of this Court to prepare this Book, *'Citator of Civil Law'* as a brief ready-reference for the Judges of District Judiciary. It will not only augment their skills and abilities to comprehend the given propositions in a better way but also enhance the quality of their work. The *Citator of Civil Law* is not however a substitute for recourse to the primary sources of law, the readers are actively encouraged to research the law with numerous citations of relevant statutory provisions and cases.

This book offers a comprehensive overview of different propositions of law, which the Judges of District Judiciary encounter on daily basis and it provides an enlightened insight into admirably clear, concise and powerful understanding of the given topics along with updated interpretation by the Superior Courts. It is my hope that judges of the District Judiciary will use this Citator in their day to day duties in court and find it useful. I look forward to judges providing their feedback for the production of future editions in due course as this publication is a process as opposed to a blueprint. I acknowledge the hard work of Lahore High Court Research Center in transforming my vision into reality in a manner of my complete satisfaction.

I appreciate the efforts of Muhammad Sher Abbas, Senior Research Officer, Shafqat Abbas, Muhammad Rizwan, Muhammad Kashif Iftikhar, Ahmad Zia Ch., Sher Hassan Pervez, Muhammad Kashif Pasha, Hamid-ul-RahmanNasir, Uzma Zahoor and Sumaira Jabbar (Research Officers) on completing this task in the shortest possible time. I am also thankful to Mian Ghulam Hussain, D&SJ (Retd.) who reviewed the book and made useful suggestions. I have a message of learning for my District Judiciary and I will urge them to have strong bond with knowledge and books. The Book in hand will surely be a step to materialize this aim.

Muhammad Qasim Khan
Chief Justice
Lahore High Court, Lahore

COMPILED BY

- Mr. Muhammad Sher Abbas, *(Senior Research Officer)*
- Mr. Shafqat Abbas Mighiana, (Research Officers)
- Mr. Muhammad Rizwan, (Research Officers)
- Mr. Muhammad Kashif Iftikhar, (Research Officers)
- Mr. Ahmad Zia Ch., (Research Officers)
- Mr. Sher Hassan Pervez, (Research Officers)
- Mr. Muhammad Kashif Pasha, (Research Officers)
- Mr. Hamid-ul-Rahman Nasir, (Research Officers)
- Ms. Uzma Zahoor, (Research Officers)
- Ms. Sumaira Jabbar, (Research Officers)

TABLE OF CONTENTS

PART-A

PART-B

ARBITRATION ACT 1940

GUARDIANS AND WARDS ACT, 1890

LIMITATION ACT, 1908

PUNJAB PARTITION ACT, 2012

PUNJAB PRE-EMPTION ACT, 1991

PUNJAB RENTED PREMISES ACT, 2009

PUNJAB TENANCY ACT 1887

QANOON-E-SHAHADAT ORDER, 1984

SPECIFIC RELIEF ACT, 1877

TRANSFER OF PROPERTY ACT, 1882

1. ACQUISENCE

1.1. Meaning

Cause to be initiated within reasonable time and unreasonable delay will, amount to acquiescence. (**2008 MLD 993)**

1.2. Instances

- Plaintiff claimed inheritance from great grandfather. Grandfather and father of the plaintiff having not asserted any right in the estate in their life span, their silence/inaction operated as relinquishment of their right. **(2005 YLR 2170, 2002 SCMR 1330, 2004 CLC 515)**
- Institution of suit/Constitutional Petition after more than 7 years of accruing of cause of action. Such conduct would amount to acquiescence. (**1998 MLD 1818)**

1.3. Exception

- Acquiescence, as legally understood, do not take place when its root and basis are ignorance or unawareness of ones own rights and entitlement. **(1993 SCMR 893)**

2. ACT OF THE COURT

2.1. Principle

- A party cannot be made to suffer on account of acts of the Court. **(PLD 1989 SC 146, 1998 CLC 1453)** Maxim "an act of Court shall prejudice, no man" comes into play, with a view to obviate hardships which may otherwise be the result of the errors of the Court itself. Where non-compliance with the mandatory provisions of law occurs by complying with the direction of the Court, which is not in conformity with the law, the party complying therewith is not to be penalized. **(2001 SCMR 100)**
- Exercise of jurisdiction in violation of law, for extraneous consideration, can make liable the concerned Judicial Officer for action under the relevant provision governing and controlling his conduct as well affairs of his service. It is also well settled by law that a party should not suffer on account of wrongs committed by the judicial functionaries. **(PLJ 2001 SC 402)**

3. ADJOURNMENTS

3.1. Relevant Provision

Order XVII CPC

3.2. General Rule

Adjournment cannot be claimed as of right and the Trial Court has the discretion to grant or refuse it. (**2008 SCMR 322, 2010 CLC 77)**

3.3. Discretion of Court

Rule 3 of Order XVII CPC was not mandatory rather matter had been left to the discretion of the Court. (**2018 MLD 1658)** Order IX, R.8, C.P.C. was mandatory in its nature, while O.XVII, R.2, C.P.C., gave discretion to the Court to take any action under O.IX, C.P.C. or otherwise to make any order, the Court thinks fit in exercise of its discretion. (**2015 GBLR 24 Supreme-Appellate-Court)**

3.4. Parameters to grant or refuse adjournment

- Warning to close right to produce evidence. Court must enforce its order unfailingly and unscrupulously without exception. Trend of *akhri moqa, qati akhari moqa* etc is mockery of law. That practice must be discontinued forthwith. (**2020 SCMR 300).** Provisions of O.XVII, R. 3, C.P.C. are penal in nature and should be strictly construed and applied (**2014 SCMR 637**)
- Where case was not adjourned on previous date at request of such party, then his right to lead evidence could not be closed. (**2012 SCMR 361**)
- It was not an extraneous consideration for Court to note conduct of a party or their counsel when granting or refusing adjournment. (**1986 SCMR 1688)**
- Provision of O.XVII, R.3, C.P.C. was not the only provision for proceeding with the suit forthwith but sub-rule (3) of R.1 of O.XVII, C.P.C. was also available for the Trial Court to proceed with the suit forthwith. (**2016 CLCN 65)**

- When Trial Court itself fixed case for hearing then it could have taken action under O.XVII, R.3, C.P.C. and should not have dismissed suit under O. IX, R. 8, C.P.C. Dismissal of suit for non-appearance was wholly not warranted as entire labour and expense could not be allowed to waste. (**PLD 2019 Quetta 106)**
- No condition that request for adjournment must be made on the part of defaulting party for attracting the provisions of O.XVII, R.3, C.P.C. was found mentioned in said provision. Court should proceed with the suit forthwith where sufficient cause was not shown for grant of adjournment. (**PLD 2014 Lahore 158)** Trial Court after refusal of adjournment under O.XVII, R. 3, C.P.C., was required to decide the case forthwith, while under O.XVII, R.1(3), C.P.C. it had to proceed with the suit. (**1995 CLC 483)**

3.5. Sufficient cause

Expression "sufficient cause" means a cause and reason beyond the control of the party ruling out the element of culpable slackness and negligence. (**PLD 2014 Lahore 158).** Failure of a party to show sufficient cause for grant of adjournment. Court would not be obliged to grant further adjournment but could proceed with case forthwith. (**PLD 2013 Lahore 313)**

3.6. When suits should not be dismissed

- On the date when suit was dismissed, plaintiff himself was in attendance and recourse to O.XVII, R.2 C.P.C. could have been made. Trial Court despite non-production of witnesses by plaintiff, instead of dismissing the suit forthwith, should have asked the plaintiff to come in witness box. (**2008 SCMR 942)**
- Plaintiff's right to produce evidence could not be closed on date due to his failure to produce evidence because on immediately preceding date, case was adjourned due to non-availability of Presiding Officer. Where a case was

adjourned due to the absence of Presiding Officer, such adjournment could not be attributed to any party. (**PLD 1987 Lahore 157)**

- It was sufficient if case was dismissed for non-prosecution, however, order with regard to dismissal of suit for failure to produce evidence was superfluous and in fact not required, as such, would have completely defeated the ends of justice---Impugned order appeared to be too harsh, as, only three opportunities were afforded to the plaintiff to produce evidence. (**2011 YLR 1234)**

3.7. When suit should be dismissed

- Case fixed for evidence but in spite of adjournments granted, petitioner failing to produce evidence. Order dismissing suit of petitioner, held, suffering from no infirmity in circumstances. (**1986 SCMR 1349)**
- Defendant by his words and conduct had made impossible for trial Court to proceed with trial of suit. Provisions of O. XVII, R. 1(3), CPC fully attracted to the present case. (**2014 YLR 1797)**
- Presence of defendant's counsel was marked in previous order when trial Court could not record evidence due to strike of lawyers. Non-production of evidence by defendant, on relevant date, was willful and contumacious, thus, trial Court had no option except to refuse further adjournment and close his evidence. (**PLD 2013 Lahore 313)**
- Dismissal of suit for non-production of evidence by plaintiff. Affidavit of plaintiff alleging taking up of case by Court on a date earlier than adjourned date. Presumption of regularity/correctness attached to judicial proceedings could not be adjudged on mere affidavits. (**2007 MLD 1072)**
- Court in such case could dismiss suit either under O.IX, C.P.C. for non-prosecution or under O.XVII, R.3, C.P.C. for non-compliance of its order, but could not exercise both such powers simultaneously. Provision of O.XVII,

R.3, C.P.C. would not apply where neither plaintiff was present nor was any evidence available on record. (**2012 YLR 2658)**

- Where the act/conduct of the party appeared to be contumacious/negligent one and it failed to produce its evidence inspite of grant of time, Court was empowered to decide the suit forthwith. (**2018 MLD 1658)**
- Matter was pending for *Kacha Peshi* since three years, messages were repeatedly sent to counsel to come and argue. There was no justification for Court to adjourn case on ground of engagement of new counsel when the original counsel was also present in court. Petition dismissed. **(PLJ 1998 Karachi 517)**

3.8. Meaning of "proceed to decide the suit forthwith"

Words "proceed to decide the suit forthwith" do not mean "to decide the suit forthwith" or "dismiss the suit forthwith". Court may proceed with the suit notwithstanding either party failed to produce evidence, meaning thereby that in case of default to do a specific act by any party to the suit, next step required to be taken in the suit should be taken. Word "forthwith" means without any further adjournment yet it cannot be equated with the words "at once pronounce the judgment". (**2008 SCMR 942)**

3.9. Parties to be vigilant

Parties were under obligation to attend the Court on next opening day in order to know the next date of hearing. Presumption of law was that the parties had knowledge of next date of hearing fixed by the Court. Court was not bound to inform the parties about next date of hearing in presence of O.XVII, R.4, C.P.C. and it was the duty of parties to have inquired about the next date of hearing. (**2005 SCMR 609)**

3.10. Adjournment when Presiding Officer on leave

- The Reader of the Court before the amendment in the Civil Procedure Code, referred to above, was not authorized to fix a date for proceeding with the

suit in the absence of the Presiding Officer of the Court but could fix a date for purposes of enabling the Court to fix another date for the future conduct of the proceedings. It was only as a result of the new rule 5 inserted in Order XVII, that this has become possible. (**1983 SCMR 1092)**

- Presiding Officer of Court being on leave, it was mandatory for Reader of Court while adjourning case to have handed over slip of paper to parties, specifying next date of hearing. (**1985 CLC 2984)**, (**PLD 1990 SC 713).** The same date given by the Reader might have become the date fixed for proceeding with the suit or proceedings. (**2001 MLD 890).** Appearance of parties on the day when Presiding Officer was absent. Non-issuance of slips of paper by the ministerial officer. Legal prejudice will be caused to the parties. Where the parties or any one of them had chosen to remain absent, then no such prejudice would be caused if the matter was fixed to an adjourned date for the purpose specified in the order of adjournment. (**1999 CLC 1070)**
- Non-production of evidence by plaintiff on adjourned date and closing of his right of defence. Such order which was composed by Reader of Court and not by the Duty Judge himself, being a routine order, could not entail penal provisions of O.XVII, R.3, C.P.C. (**2007 SCMR 1269)**
- Word "adjourned" as used in O.XVII, R.2, C.P.C., would mean "adjourned" by Court. Reader had adjourned case in absence of Presiding Officer of Court, without handing over to plaintiff such signed slip in terms of O.XVII, R.5, C.P.C. Such adjourned date was not a date of hearing. Order of dismissal of suit is such eventuality was a nullity and Art. 181 of Limitation Act, 1908 would apply thereto. (**2011 YLR 1738)**

3.11. Adjournment for moving transfer application

Adjournment obtained for making transfer application to High Court. No orders received from High Court by adjourned date. Magistrate relying on para II, Chap

26(A), Vol. III, High Court Rules and Orders (1958 Ed) proceeding further with case and discharging accused. Magistrate not guilty of contempt of High Court. **(PLD 1965 (W.P) Lahore 382)**

4. ADMINISTRATION OF JUSTICE

4.1. Principles

- It is cardinal principle of administration of justice that Courts neither enter into exercise in futility nor in an exercise which is purely academic in nature. **(PLJ 193 SC (AJK) 11, 1993 PSC 187)**
- All rules of procedure are intended to aid and assist the cause of justice. **(1992 CLC 196)**
- Courts of law were not supposed to perpetuate what was unjust and unfair by exploring an explanation there for. Courts should rather explore ways and means for undoing what was unjust and unfair. **(2014 SCMR 914)**

4.2. Preservation of valuable rights

All the Rules of procedure were meant for dispensation of justice and to preserve the valuable rights of the parties to a suit. Courts were duty bound to apply them for the same purpose, otherwise the litigants had to suffer a lot and very purpose of law would also be frustrated. Courts had also inherent jurisdiction to convert one kind of proceedings into another; and a party alleged to have obtained the decree or judgment from the Court, playing fraud and deception, should not be allowed to reap the fruits of its fraud, because fraud would vitiate the most solemn proceedings. **(2009 CLC 763)**

4.3. Role of Judiciary

The role assigned to the judiciary in a tripartite allocation of power is to assure that the Courts will not intrude into an area committed to the other branches of government. **(2018 PLR 412)**

4.4. Administrative authorities

Administrative Authorities were under no less obligation to do likewise, rigour of such requirement in their case, however, was not an intense, as, in case of judicial or quasi judicial bodies. **(1996 CLC 293)**

4.5. Impact of earlier decision

Judge is not disqualified to hear a case simply because he had expressed his opinion on similar questions of fact and law while deciding a similar case earlier. **(PLD 2009 Kar.176, PLJ 2009 Karachi 183)**

4.6. Technicalities to be within four corners of law

"....the proper place of procedure in any system of administration of justice is to help and not to thwart the grant to the people of their rights. All technicalities have to be avoided unless it be essential to comply with them on grounds of public policy.....Any system which by giving effect to the form and not the substance defeats substantive rights (and) is defective to that extent." ***(PLD 1963 S.C.382)***

All the Rules of procedure were meant for dispensation of justice and to preserve the valuable rights of the parties to a suit. Courts were duty bound to apply them for the same purpose, otherwise the litigants had to suffer a lot and very purpose of law would also be frustrated. Courts had also inherent jurisdiction to convert one kind of proceedings into another; and a party alleged to have obtained the decree or judgment from the Court, playing fraud and deception, should not be allowed to reap the fruits of its fraud, because fraud would vitiate the most solemn proceedings. (**2009 CLC 763**).

"Procedural law had immense significance and the true purpose and object of such law, was not merely a technical aspect of the law which should be reckoned as a mere formality, rather procedural law was meant to cause uniformity, discipline, parity and systemization in conducting the trial of the case, in the absence whereof, it shall not be possible for the courts of law to adjudicate the matter in accordance with law and to do justice according to law....Following the procedure prescribed by law in letter and spirit was bounden duty of the courts and also the litigants, as failure to do the same shall result in indiscipline and disarray in proceedings of the trial of a case." ***(PLD 2014 SC 89)***

No doubt technicalities were to be avoided and justice was to be done but that was to be accomplished within the four corners of law and not otherwise. **(2004 MLD 1346)**

4.7. Obstinate frivolous litigation

There is a growing tendency that even after final adjudication of the matter, parties indulge in abuse of process of law by way of frivolous, repetitive and fraudulent litigation. Therefore, an onerous duty is caste on those charged with difficult task of administration of justice to take effective measures against the obstinate litigations and their lawyers. **(2010 AC 622)**

4.8. Party not to suffer on account of act of Court

Exercise of jurisdiction in violation of law for extraneous consideration can make liable the concerned judicial officer for action under the relevant provision governing and controlling his conduct as well affairs of his service. It is also well settled by law that a party should not suffer on account of wrongs committed by the judicial functionaries. **(PLJ 2001 SC 402)**

4.9. Statement of law officer

Law Officer must not make any statement conceding an issue or a case in Court unless he has been duly instructed in writing by the competent Authority and an officer not below Grade 17 is present in Court to verify and reiterate such instructions. In all such cases the presence of the officer must be recorded in the order of the Court and the written instruments made part of the record of the Court. **(2004 SCMR 1247)**

5. ADMISSION

5.1. Relevant Provision

Order XII of CPC

5.2. Scope

In order to invoke the provisions of O. XII, R. 6, C.P.C. it was absolutely necessary that the admission relied upon be clear, unambiguous, unqualified and unequivocal and further that the purported admission had to be read as a whole; one could not be allowed to rely on a part (of the admission) ignoring the rest. (**2020 SCMR 171, 2019 CLC 1475)**

5.3. Judgment on the basis of admission

- Court was empowered under O.XII , R.6, C.P.C. to pass a judgment on the basis of admissions of facts made by the parties to their pleadings, at any stage of proceedings. (**2007 SCMR 433)**
- Provision of O.XII , R. 6, C.P.C. provide summary and speedy remedy in cases where admission was made by defendant in pleadings or outside the same. (**1996 SCMR 696)**
- Pleadings though do not themselves have evidentiary value, unless the Plaintiff and or Defendant, as the case may be, enter the witness box and lead the evidence in support or defence of their pleadings; but, an exception to such rule is, that pleadings or a Written Statement can be considered when there is an admission on the part of Defendant; because, depending upon the facts of each case, even on the basis of Written Statement a Judgment as envisaged under R. 6 of O. XII of C.P.C., can be pronounced. (**2019 YLR 2609 Karachi)**

5.4. Facts neither specifically pleaded nor denied

Fact neither specifically pleaded in plaint nor denied by defendant in written statement. Such non-denial could not be legally construed to be an admission. (**PLD 2012 SC 211)**

5.5. Decree on conceding written statement in case of minor defendant

Suit filed against minor was decreed in favour of plaintiff', on the basis of conceding statement made by his maternal uncle who was appointed guardian ad litem. Minor assailed the decree in a suit alleging fraud. Trial Court decreed suit in favour of minor while appellate Court dismissed the suit. Decision of appellate Court was upheld by High Court and Supreme Court on the ground that suit against minor was not decreed on the basis of any compromise but in view of conceding written statement filed by guardian ad litem under O.XII , R.6, C.P.C... Interest of minor being involved, it was all the more necessary for the Court to have been cautious to grant decree on conceding written statement filed by his guardian ad litem, who was none else than his real maternal uncle---Lower Appellate Court had taken note of the situation very carefully **(2007 SCMR 1684)**

5.6. Court can require any admitted fact to be proved otherwise than admission

Proviso to Order VIII rule 5 C.P.C. confers upon the Court discretion to require any fact admitted in the written statement to be proved otherwise than by such admissions (**1988 SCMR 322)**.

6. ADVOCATE

6.1. Responsibility of Advocate

Members of the Bar are equally responsible to protect process of the Court. It is their duty to exercise utmost care as their competence and professionalism is pivotal for creating public trust and confidence in the Courts. **(2015 CLR 171)**

6.2. Negligence of counsel

Negligence of counsel is not sufficient ground for restoration of appeal or for condonation of delay. **(1999 CLC 45)**

6.3. Continuation of appointment of counsel

Appointment of counsel would remain in force until determined with leave of Court or until party appointing him or counsel died or until all proceedings in regard to his client ended. **(1998 CLC 179)**

6.4. Judge as counsel at later stage

There is no rule preventing a counsel from appearing on behalf of other party in a case in which he had some earlier stage passed an order as Judge. **(2014 PSC (Crl) 420)**

6.5. Compromise on behalf of Advocate

Advocate's power to compromise or abandon claim on behalf of his client—Advocate in his discretion could do so in interest of his client, unless his *vakalatnama* restricted such authority. **(PLD 2010 SC 657, PLJ 2011 SC 37)**

6.6. Advocate's Clerk

The Clerk of the counsel is neither authorized nor entitled to appear in judicial proceedings. He could not be marked present in place of his counsel in the judicial proceedings. **(2008 Law Notes 816, PLD 2014 Lahore 22)**

7. AFFIDAVIT

7.1. Relevant Provision

High Court (Lahore) Rules and Orders, Volume IV Part B Chapter 12-B, Rules, 8,9,14 and 15 as well as section 139 CPC.

7.2. Basic requirements

The main requirements of affidavit as per High Court (Lahore) Rules and Orders, Volume IV Part B Chapter 12-B, Rules, 8,9,14 and 15 are:-

i. name of the Court and title of the proceedings;

ii. subject of the suit or proceedings;

iii. name of the deponent, the date and place;

iv. the affidavit is to be divided into paragraphs which shall be numbered consecutively and shall be confined to distinct portion of the subject;

v. the deponent, other than the party to the suit, shall be described in such a manner as would serve to identify him clearly i.e. full name, father's name, profession or trade and place of his residence;

vi. the declarant in affidavit will referring the facts within his knowledge must do so directly and positively using the words 'I affirm' or 'I make oath and say';

vii. when making reference as to the information obtained from others, the declarant must use the expression "I am informed", and should add 'and verily believe it to be true', or he may state the sour e from which he received such information. Every affidavit shall be signed or thumb marked; and

viii. it shall be verified in accordance with the verification in the forms given in Rule 16 of the High Court (Lahore) Rules and Orders. The verification shall be signed and thumb marked by the declarant. The affidavit shall be attested by the Oath Commissioner.

The affidavit which lacks any of these parts is not an affidavit in the eye of law. **(PLD 1995 Lahore 98)**

7.3. Certificate of Oath Commissioner

Affidavit did not bear requisite certificate of Oath Commissioner certifying that contents of the document were stated on oath or solemn affirmation before him by deponent and that the deponent was either personally known to him or was identified before him by a person known to him (Oath Commissioner)....Without such certificate, and without appearance of the deponent before Court, the affidavit could not be deemed as an affidavit in the eye of law and had no legal value in circumstances. **(2003 CLC 44)**

7.4. Affidavit not in prescribed form

Even if an affidavit is not in the prescribed form and the deponent enters in witness box on Oath and presents himself for cross examination, then the affidavit is taken as a written examination in chief of the deponent. **(2016 CLR 1475)**

7.5. Purpose of attestation and affirmation of oath

A person cannot administer oath to himself. The object of an oath is that there will be a super human retaliation in case of falsehood and the purpose of giving oath is to confront a party to the Almighty Allah. Therefore, somebody has to attest or affirm that the oath was made by the maker thereof. Section 139 of the Code of Civil Procedure refers to an affidavit but the heading of the section is "Oath on affidavit by whom to be administered", it is not an affidavit of a person which is required to be attested by person mentioned in section 139 of the Code of Civil Procedure. It is, in fact, attestation of the oath on the affidavit. **(2004 CLC 914)**

7.6. Difference between section 139 CPC & Order VI Rule 15(1)

Section 139 CPC deals with the affidavits and not with the verification of pleading and documents, while Rule 15(1) of Order VI, C.P.C. deal with the verification of pleading and it is not required to be attested by the Oath Commissioner. The rationale in enacting this provision seemed to be that the pleading and documents

appended therewith should be prima facie made authentic because these anything being false in the election petition or any document being forged or fabricated the party at fault could be punished by the Tribunal or concerned Court itself. (**1999 MLD 1533)**

7.7. Verification is not proof of pleading

Section 139, C.P.C. is to be read along with Order XIX, C.P.C. pertaining to the powers of the Court to order proof of facts by an affidavit. The verification is neither evidence nor proof and simply because a pleading is verified does not convert it into proof. **(2005 MLD 1577)** Section 139 (b) of the C.P.C. provides for an Oath Commissioner having to administer oath to a deponent. Not only that none of the so-called affidavits appears to have been sworn before any Oath Commissioner but also there is no certificate to such an effect appended on either of them... **(1987 MLD 1372)**

7.8. Statement in affidavit is not substantive evidence

It is settled law that the statement in affidavit cannot be treated as substantive evidence or acted upon unless the other party has had an opportunity to cross examine the deponent except its interlocutory proceedings and as such the trial Court was plainly wrong in taking such statements into consideration. **(1997 MLD 2835 Karachi)**

7.9. Effect of not compiling provisions of oath

- Oath has not been administered to appellant by a person authorized to do so, as per requirements of Order VI Rule 15 read with section 139, CPC. Thus, the pleadings shall be deemed not duly verified on "oath. **(PLD 2007 SC 362)**
- Section 139, CPC provides that any affidavit under the Code has to be sworn on oath which is to be administered by persons mentioned therein and that Rules 2 and 6 Chapter 1-E, High Court Rules and Orders Vol. V lays down that an application for admission of an appeal which is *prima facie* barred by

time has to be accompanied by an affidavit, oath of which had to be administered by a person appointed as provided under section 139, C. P. C..... affidavit accompanying this application having been just attested by a Commissioner of Rath, Kent, U. K. and the same having not been authenticated by an Officer of the Embassy of Pakistan there, wherein an Officer is appointed to administer oath has no value and there was thus no properly constituted application filed with the appeal seeking condonation of delay.....application under section 5 of the Limitation Act being not maintainable, in view of the provisions of section 139 of the Code of Civil Procedure read with High Court Rules and Orders mentioned above also has force. (**1979 CLC 725 Lahore)**

7.10. Whether statement of a person who filed affidavit but does not face cross examination can be referred in judgment?

If a person filed his affidavit but did not face the rigors of cross-examination, he cannot be termed as witness and his statement cannot be referred in judgment as statement of PW. (**2018 YLR 1262)**

8. ALTERNATE DISPUTE RESOLUTION

8.1. Relevant provisions

- At first Section 89 of Code of Civil Procedure was repealed by Arbitration Act, 1940. Now Section 89-A of CPC which provides for Alternate Dispute Resolution by Civil Courts is repealed by Alternate Dispute Resolution Act, 2019
- TORs of Mediation Centers of District Judiciary Punjab, issued by honorable Lahore High Court, Lahore.
- Arbitration Act 1940
- The Family Courts Act, 1964: Under Section 10, pre-trial reconciliation, under section 11, post reconciliation Proceedings.
- The Muslim Family Laws Ordinance, 1961: Section 6, 7, 9 pertaining to arbitration at stages of Talaq, permission for second marriage, maintenance of wife & children.
- The Local Government Ordinance 2001: Sections 102 to 106 provide for Musalihat Anjuman offices
- The Customs Act 1969: Section 195-C provide for alternate dispute resolution,
- Income Tax Ordinance 2001: Section 134-A of Income Tax Ordinance 2001 also enunciates Alternate Dispute Resolution
- Federal Excise Act, 2005: Section 38, any aggrieved may apply to the Board for the appointment of a committee for the resolution of any hardship or dispute…. Sales Tax Act, 1990: Section 47-A

8.2. Concept of alternate dispute resolution

- The recent trend throughout the world is to minimize the interference by the Courts, when the parties have voluntarily chosen a forum of their own choice.

The Courts can interfere to the extent as provided in the Act. (**2015 MLD 746)**

- It is emphasized that expeditious and inexpensive Dispute Resolution is the life blood for a vibrant economy and inevitable for economic growth and progress. The Courts have a crucial role to play in ensuring that the commitments made between the parties are honoured and implemented. It is the duty of the Courts to promote certainty by enforcing the binding commitments made by the parties. **(2015 MLD 746)**
- The Court to bring an end to the controversy and for expeditious disposal of case by consent of the parties may adopt any alternate method of dispute resolution including mediation, conciliation or any other means, which invariably includes arbitration. (**2011 CLC 758)**
- Since settlement of disputes through compromise and amicable means is one of the recognized modes, there is no factual or legal impediment in disposing of the matter in such a way. **(PLD 2005 Lahore 742)**

8.3. Object

- Dispute resolution in such a way not only relieves the parties of expensive and lengthy agonizing litigation it also saves the valuable time of the Court. (**PLD 2005 Lahore 742)**
- It is now a universally accepted method being followed as a less expensive, less time consuming, less cumbersome and ultimately a fruitful and beneficial mode, commonly known as ADR (Alternative Dispute Resolution). **(PLD 2007 Lahore 581)**

8.4. No bar to ADR proceedings after dismissal of application u/s 34 of Arbitration Act

- Even after dismissal of the application under section 34 of the Arbitration Act, law does not prohibit to resort to any method of alternate dispute

resolution including and not limited to mediation or to arbitration at any stage of the proceedings. **(2011 CLC 758)**

- Needless to say that even at one point of time the party had not agreed to arbitration will not be a bar in perpetuity to subsequently resort to such arrangement. Even under section 21 of the Arbitration Act, parties to the suit may any time before the judgment is announced apply in writing to the Court for an order of reference to arbitration. (**2011 CLC 758)**

8.5. Dismissal of the original suit in default while matter pending before mediation centre

While matter remains pending before the mediation center for further proceedings in terms of order itself, suit cannot be dismissed for non-prosecution as it is not fixed for hearing before the Court and therefore, such an order of the Court, dismissing the case for non-prosecution, is altogether without jurisdiction and void ab initio. **(2016 SCMR 2023)**

9. AMENDMENT OF JUDGMENTS, DECREES OR ORDERS

9.1. Relevant provisions

Section 152 and 153 of Civil Procedure Code, 1908

9.2. General Rule

Section 152 enables a Court to correct the mistake, omission or error in the judgment decree or order which has crept into it inadvertently and unintentionally. (**PLD 1992 SC 472)**

9.3. Nature of Power

Power is discretionary. (**PLD 1982 SC 220)**

9.4. Amendment - Suo moto power

Trial Court, Appellate Court and Revisional Court could suo moto direct amendment of plaint, without any application by plaintiff, and the Courts have powers to allow such amendment even when legal right had accrued in favour of other party. (**2015 YLR 1997)**

9.5. Amendment on contentious points

Correction under s. 152 on a contentious point not allowed. (**2003 SCMR 1401)**

9.6. Instances of mistakes which can be amended

- Mistake in the decree sheet regarding Khasra numbers of land was declared as a bona fide mistake, and trial Court was directed to make necessary corrections and amendments in the decree sheet. (**2012 YLR 875)**
- Clerical mistake neither going to merits of the case nor substantially affecting rights of parties can be corrected. (**1989 SCMR 189)**
- Incorrect specification or incorrect description of particular property can be resolved by reference to the deed so incorporated and not beyond. (**1991 SCMR 2451 and PLD 1990 SC 972)**

- Rectification of clerical error and amendment/correction in plaint after pronouncement of judgment-Dispute regarding name of village. (**2000 SCMR 1035)**

9.7. Executing Court - rectification of mistake

"It is well settled by now that "when decree passed attained finality it had got to be executed even if it was erroneously passed. Executing Court cannot rectify any mistake in decree which would tantamount to going behind decree. (**2007 CLD 473** while relying on **2002 SCMR 122)**

9.8. Amendment in plaint at the stage of announcement of judgment

When amendment is sought to be made, at the fag end of the trial particularly after making final arguments and at the stage of announcement of judgment, same cannot be allowed to be made as it would totally change the character of the plaint and basis of claim qua suit land, though not character of the suit, and such amendment would certainly prejudice the defendant in his defence which he had already filed in pursuance of the case set up by the plaintiffs in their plaint. **(2019 CLC 280)**

10. APPEAL

10.1. Relevant provisions

Secs: 96 to 112, Order XLI to XLV of CPC

10.2. Definition

To seek review (from a lower Court's decision) by a higher Court[1]. Appeal is a complaint to a superior body of any injustice done or error committed by an inferior one with a view to its reversion or correction etc. **(PLJ 1981 SC 790)**

10.2.1. Remedy of appeal - Object

Courts of law including Special Tribunals are not infallible. All of them may commit errors and that is why in most civilized system of administration of justice there is a provision for at least one appeal to a superior Court **(PLD 1977 SC 273).**

10.2.2. Scope and powers of appellate Court

An Appellate Court may either confirm, vary or reverse the decree or order or remand the case, it can also pass a decree **(2004 MLD 555) Appeals from original decrees (Secs: 96 to 99, Order XLI of CPC)**

10.2.3. Right of appeal, not an inherent one

It may be added that the right of appeal is not a natural or an inherent right of litigants but is a statutory right granted by different laws under different enactments and such a right had to be considered and examined in the light of the conditions prescribed by the law granting the said right (**2006 SCMR 590**).

10.2.4. Appeal only competent when so provided by the statute

We are of the opinion that appeal is a statutory right that can only be exercised if the Statute has provided so (**2014 SCMR 45**)

10.2.5. Appeal lies against decree

An appeal lies against the decree and it is the decree which is executed **(PLD 2016 SC 409).**

---

[1] Black's Law Dictionary, 11th edition, P 122

10.2.6. Additional evidence at appellate stage

No doubt as a general rule parties to a lis are not entitled to produce additional evidence but if the Appellate Court requires any document to be produced or any witness to be examined to pronounce judgment or for any other substantial cause, it can always do so after recording reasons **(PLD 2002 SC 615)**

10.2.7. First appeal on questions of law and fact

First appeal is a valuable right in which both the questions of law and facts are to be considered **(2019 CLC 71)**

10.2.8. Scope of adjudication on merits by appellate court when suit is not pending therein

Adjudication upon merits of the suit is out of scope of the appellate Court when the suit is not pending before the Court and determination of it on merits is not permissible while dealing with the decision of the trial Court pertaining to application for grant or refusal of temporary injunction. (**2020 CLC 315)**

10.2.9. Limitation for filing appeal before district Court

According to Article 152 of the first schedule of the Limitation Act, appeal can be preferred within thirty days from the date of decree or order before District Court **(2012 M L D 1121 Lhr).**

10.2.10. Limitation for appeal in High Court

Admittedly under Article 156 of the 1st Schedule of the Limitation Act, 90 days time has been prescribed for filing of appeal under the Code of Civil Procedure before the High Court except in the cases covered by Articles 151/153 and the time of 90 days shall run from the date of order appealed from (**PLD 2004 SC 894)**

10.2.11. Appeal by person not party to proceedings

A person who is not a party to a suit or a proceeding may prefer an appeal if he is affected by the judgment, decree or order of the trial Court provided he obtains leave from the Court of appeal (**PLD 1969 SC 65**).

10.3. Appeal from appellate decree (Sections 100 to 103, Order XLII of CPC)

10.3.1. Second appeal, scope

- By virtue of section 101, C.P.C. no second appeal lies except on the grounds enumerated in section 100, C.P.C. **(2001 SCMR 1641)**
- There is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however, gross or inexcusable the error may be **(PLD 1974 SC 22)**

10.3.2. Second appeal before High Court

In this behalf it is to be noted that according to the mandate of section 100, appeal before the High Court is competent against every decree passed in appeal (**PLD 2004 SC 894).**

10.3.3. Limitation for second appeal

Admittedly under Article 156 of the 1st Schedule of the Limitation Act, 90 days time has been prescribed for filing of appeal under the Code of Civil Procedure before the High Court except in the cases covered by Articles 151/153 and the time of 90 days shall run from the date of order appealed from (**PLD 2004 SC 894)**

10.4. Appeal from orders (Secs: 104 to 106, Order XLIII of CPC)

10.4.1. Relevant provisions regarding appealable orders

Appeal also lies against an order if so provided for by section 104 or Order XLIII, C.P.C. (**2014 SCMR 45)**

10.4.2. Second appeal against orders

However, where an adjudication is an `order' as defined in section 2(14), C.P.C., no appeal lies there from unless it is one of the 'appealable orders' specified in section 104 and Order XLII, Rule 1 of the Code, and no second appeal lies in any such case (**1991 SCMR 2457)**

10.5. Duty of Appellate Court while dealing with Family Appeal

(2020 MLD 277)

1. It is obligatory to appellate court to discuss each issue separately so far as necessary and give its finding on all points raised before it.
2. The appellate court has got ample power to thrash out entire evidence and scrutinize available documents in the light of arguments advanced by the respective parties.
3. It is obligatory to appellate court to thrash out available record and evidence independently and the appellate court should not depend on the decision of trial Court.
4. The appellate Court can take a second look at all legal and factual aspects of the case.
5. Appellate Court is required to reappraise the evidence and reach thereby to its own conclusion, which might be different from one arrived at by trial Court.
6. The first appellate Court is duty bound to deal with all issues as the first appeal is a valuable right in which both questions of law and fact are to be considered.
7. It is essential that the Judge should accord fair and proper hearing to a person sought to be affected by his order and give sufficient, clear and explicit reasons in support of order made by him.
8. In Family Appeals the District Court under the Family Court Act, 1964 being only Court of appeal is required under the law to dispose of the appeal after taking into consideration the entire material on the record.
9. It is equally well settled that if the appellate Ccourt proceeds to reverse the decree of trial court, it is incumbent upon it to not only take into consideration entire evidence but also to take notice of the reason which had prevailed with the lower Court for taking a contrary view.

10. Appeal under section 14 of the Family Courts Act, 1964 is a substantive right and is continuation of proceedings which comes entirely upon the first appellate court caring with the right of rehearing law and facts as well as reviewing pleadings and evidence afresh.

10.6. General provisions relating to Appeal (Sec 107/108 CPC)

10.6.1. Powers/Duties of Appellate Court

Seemingly, to fill in the gap in the procedure, section 107(2) was enacted under which the Appellate Court has the same powers and is burdened with the same duties, as conferred and imposed on the trial Court (**PLD 1993 SC 418**)

10.6.2. Appeal is continuation of the suit

An appeal is not merely a matter of procedure but a substantive right. It is the continuation of a suit **(PLD 2016 SC 712).**

10.6.3. Decree remains operable unless its operation is suspended

Operation of a decree, passed by a Court of first instance is not automatically suspended, on the mere filing of an appeal there from **(PLD 1966 SC 983).**

10.6.4. Consent decree is not appealable

The status of said impugned order and decree is that of consent decree, which is not appealable **(2020 CLC Note 10 Lhr)**

10.6.5. Entertaining applications touching questions involved in appeal

Court under obligation to entertain all or an applications/matters filed before it. Court could not altogether ignore any application filed before it touching the questions involved in appeal and proceed to decide the same without so much as even taking note of such application. Court was also fixed with a further duty to take up and dispose of a matter brought before it in accordance with law viz. either to accept or reject the same but in accordance with law. **(PLD 1973 SC 49, 2010 YLR 1498)**

11. APPEARANCE OF PARTIES AND CONSEQUENCES OF NON-APPEARANCE AND SETTING ASIDE OF EX-PARTE

11.1. Relevant Provision

Order IX Code of Civil Procedure, 1908

11.2. Basic rule

Law did favour disposal of cases on merits but it would help the vigilant and not the indolent. (**2020 CLC 384)**

11.3. Dismissal of suit in case of nemo appearance

Suit might be dismissed if neither party had appeared on the date of hearing which would be defined as date on which court would examine record of pleadings to understand contentions of pleadings or date on which issues were formulated. Date fixed for filing written statement was not to be termed as date of hearing (**2015 YLR 1768).**

11.4. One or more plaintiffs, not present

Order IX rule 10 would apply when some of the plaintiffs are absent. This rule gives the Court discretion to ignore the absence of any particular plaintiff subject to presence of some of the plaintiffs before Court (**2007 CLC 553).**

11.5. Order of Court to appear in person

When a party ordered to appear in person does not do so, the Court can invoke the provisions of order IX (**1984 CLC 2903).** An opportunity should be given to explain the cause for non-appearance. (**2005 MLD 986).**

11.6. Dismissal of suit under O XVII R 3 instead of non prosecution

Neither the petitioner nor his witnesses or his counsel was present even on the last date of hearing, which was a sufficient cause to close his evidence. Trial Court, in circumstances, while exercising jurisdiction under O.XVII, R.3, C.P.C. had not committed any illegality. (**PLD 2003 SC 180).**

11.7. When case fixed on miscellaneous application

Perusal of order of Trial Court revealed that on said date case was fixed for arguments on miscellaneous application and not the main suit. If plaintiff was not present on said date, Trial Court could dismiss miscellaneous application for non-prosecution and not the main suit. (**2013 YLR 785 Lahore).**

11.8. When case fixed for final arguments

Case was fixed for final arguments, entire evidence of parties was recorded and case was ripe for judgment. Dismissal of suit for non-appearance at such stage was wholly not warranted and entire labour and expense could not be allowed to go waste. (**PLD 2019 Balochistan 106)**

11.9. Dismissal of suit where summons not served in consequence of plaintiff's failure to pay cost

The provision of Order IX rule 2 attracted only where the court fee or the postal charges for summons have not been paid by the plaintiff (**2016 CLC 1111).** Where after due service of defendant the case is adjourned, the suit cannot be dismissed under rule 2 of Order IX on account of plaintiff's failure to deposit process fee for defendant's service for adjourned date of hearing. (**2003 CLD 531)**

11.10. Dismissal of suit after closing of evidence

Where after the close of their evidence, parties did not appear to assist the Court by highlighting the salient features of their respective cases, the only course available to the Court was to examine the record, evaluate the evidence and record the verdict on merits rather than to dismiss the suit for non-prosecution (**2008 SCMR 174).**

11.11. Revision against order

Order passed by Trial Court on an application under O. IX, Rr. 2, 3 & 4, C.P.C. is not appealable but revisable as these are orders not decrees. (**2012 MLD 39 Karachi)**

11.12. Fresh Suit

When suit is dismissed under rule 2 and 3 of Order IX, a fresh suit on the same cause of action is maintainable (**PLD 1991 SC 540, 2019 CLC 1992, 2019 YLR 209).**

11.13. Setting aside dismissal order under rule 2 & 3 of Order IX

When the suit is dismissed under rule 2 and 3 of Order IX, a fresh suit can be filed or an application be made for setting aside dismissal (**PLD 1991 SC 443)**. The dismissal can be set aside only by the Court which ordered the dismissal. (**1993 CLC 378).**

11.14. Application for issuance of fresh summons

Rule 5 of order IX lays down the time limit of three months for the plaintiff to file an application to issue fresh summons for the service of the defendant where the first summons are returned unserved, failing which the suit be dismissed. (**AIR 1954 Cal 369).**

11.15. Evidence in case of ex-parte proceedings

The Court is empowered/authorized to proceed ex-parte. Even then Court should require the plaintiff to adduce evidence to prove his case and dispose of the matter upon consideration of the relevant matters (**2017 SCMR 1849, PLD 2005 SC 337)**

11.16. Remedies against ex parte order:

A person aggrieved of an ex-parte decree can either apply under rule 13 of Order IX to have the decree set aside or can appeal against it **(1973 SCMR 589).** A review application under section 114 of CPC may be filed against an ex-parte order **(1993 MLD 796)** A revision may also lie **(1995 CLC 516)**. Where proceedings have been taken ex-parte, the defendant may join the proceedings at any stage **(1992 SCMR 1009)**. If the defendant has shown good cause for non-appearance to the satisfaction of the Court, ex-parte proceedings may be set aside and the defendant placed in the position as on the date when failed to appear **(1994 MLD 1947)**.

11.17. Grounds to set aside ex-parte decree

Two grounds on the basis of which an ex-parte decree can be set aside are that the summons are not duly served or that the defendant was prevented by sufficient cause from appearing before Court at the date of hearing (**PLD 19679 SC 18**).

11.18. Who can file application to set aside ex-pate decree

An application under rule 13 of Order IX can be filed by any of the defendant against whom the decree was passed ex-parte **(PLD 1955 Lahore 34).** The legal representative of a deceased defendant can also apply under this rule. **(1989 CLC 1434).**

11.19. Setting aside the decree without notice to opposite parte

An ex-pate decree cannot be set aside without notice to the opposite parties and opposite parties include all such parties interested in opposing said application **(PLD 1991 SC 65)**.

12. APPOINTMENT OF RECEIVER

12.1. Relevant Provision

Order XL

12.2. Object and purpose

- Object, scope and effect of appointment of receiver and his status stated. (**PLD 2007 Karachi 527)**
- Legal object and purpose of appointment of receiver was either to safeguard the interest of all parties or safeguard subject-matter pending final determination of rights, liabilities and claims of parties in respect of subject-matter. (**2016 YLR 1506 Karachi; 2015 YLR 550 Karachi; 2015 CLC 1695 Karachi)**
- Object behind appointment of receiver is to preserve status quo during pendency of litigation. Appointment of receiver is harshest remedy provided by Civil Procedure Code, 1908. Upon appointment of receiver, property comes into custodia legis for the benefit of all owners of property. Possession of receiver is deemed to be possession of Court. (**2014 CLC 945 Karachi)**
- The appointment of Receiver has been recognized as one of the harshest remedy allowable under the Civil Procedure Code and it is allowed only in a very exceptional case. The main object is to safeguard the interest of all parties and property under litigation. The party interested and desirous in the appointment of Receiver has to make out a prima facie case. (**PLD 2014 Peshawar 1)**

12.3. Discretion of Court to be exercised judicially

- Appointment of receiver is an act of Court and made in the interest of justice. Words "just and convenient" do not mean that Court is to appoint receiver simply because Court thinks it convenient. It does not mean arbitrary whim or pleasure of the Court. Such order is discretionary and

discretion must be exercised in accordance with principles on which judicial discretion is exercised. (**2015 YLR 550 Karachi)** Remedy provided in terms of O.XL, R.1, and C.P.C. by its very nature is the harshest one---Powers under O.XL, R.1. C.P.C. are to be exercised sparingly and with utmost caution---Conditions for appointment of receiver enumerated. (**2007 MLD 1121 Lahore)**

- Court may appoint receiver not as a matter of course but as a matter of procedure having regard to justice of situation. Receiver cannot be appointed unless there is some substantial background for such interference that property in suit will be dissipated or other irreparable mischief may be done, unless Court appoints a receiver. Main purpose for appointment of receiver over disputed property is to protect and preserve the same pending judicial determination. (**2015 YLR 550 Karachi, 2015 CLC 1695 Karachi)**
- In the matter of appointment of Receiver, a heavy responsibility thereof is cast upon the Court, not to treat such matter in a cursory and simple manner, but to apply its responsible judicial mind to the facts and circumstances of the case, as any irresponsible or slight omission in this regard would cause a great irreparable loss to a party before him in hope of justice. (**PLD 2014 Peshawar 1)**

12.4. Conditions for appointment of Receiver

- The bona fide possession over the property of a party to the lis would not be disturbed, unless there are allegations of wastage or dissipation of property or apprehension of irreparable loss or injury either to a party or the property in question. (**PLD 2014 Peshawar 1)**
- This power to be exercised only when a person would establish a special equity in his favour and made a case of exceptional circumstances. **(2011 PLD 112 Karachi)**

- Party had to prove at such interlocutory stage of suit by means of cogent evidence that property involved was at great risk and danger of getting destroyed at the hands of other party. (**2009 MLD 1082 Karachi)**
- Title to the properties was disputed and, therefore, until the dispute was decided he could not ask for a receiver to be appointed (**1974 SCMR 54**)
- Other related conditions as laid down in (**2016 YLR 1980 Lahore)**
    - Party to make out a prima facie case and establish his prima facie title to the suit property.
    - Such party had also to show that suit property would be wasted, misappropriated and destroyed

12.5. Apprehension not sufficient for appointment of Receiver

Apprehension of mismanagement or misappropriation alone would not be sufficient to call for appointment of receiver (**2016 YLR 1980, PLD 2012 Karachi 449**)

12.6. Effect of appointment of Receiver

Appointment of receiver would tantamount to dispossessing a person who was already in possession of the property. (**2016 YLR 1980)**

12.7. Appointment of Receiver in respect of business matters

- Court usually do not appoint receiver in respect of businesses which are making profits but at same time, if substantial issues are raised and there is a likelihood that property is in danger or partnership business, if continued in same manner, may deprive excluded partner from his legitimate share, a receiver can be appointed. **(PLD 2019 Karachi 564)**
- Receiver may be appointed for immovable property being in danger of alienation, damaged or wastage, but in matter of a company, appointment of an Inspector is requirement of law under the provisions of the Companies Ordinance, 1984, in case of gross allegation of mismanagement, fraud, wastage or loss to the company's property. (**PLD 2014 Peshawar 1)**

12.8. Injunction and appointment of Receiver

- When plaintiff moved an application under O. XL, R. 1, C.P.C. (for appointment of receiver), his application for seeking interim injunctive order would come to an end. (**2016 CLC N 129 Karachi)**

12.8.1. Distinction between temporary injunction and appointment of Receiver

Distinction between a case in which temporary injunction may be granted and a case in which receiver may be appointed is that while in either case it must be shown that property should be preserved from waste and alienation---In the former case it is sufficient that if it be shown that plaintiff in the suit has a fair question to raise as to existence of right alleged while in the latter case a good prima facie title to property over which receiver is sought to be appointed has to be made out. (**2015 YLR 550)** O. XL, R. I & O. XXXIX, Rr. 1, 2---"appointment of receiver " and "granting of temporary injunction" in a case---Distinction stated. (**PLD 2013 Karachi 555)**

13. ARGUMENTS

13.1. Principle

- All that law requires is that if the parties or their counsel want to address argument, the Court has to give them an opportunity to do so but hearing of arguments is not essential before disposing of the case. **(PLD 1991 SC 601)**
- Case was listed for arguments, however, none of Advocates was present. Order was passed. Court cannot force the party to address the arguments. Where a date was given for hearing of the arguments but none of the parties appeared to address the arguments which showed that in fact they were not interested in addressing the arguments and indeed, did not wish to address the arguments, Court were right in considering that purpose of Order XVIII, Rule 6 of CPC, the hearing would be deemed to have concluded with conclusion of the evidence of the parties in the case. Court cannot force the party to address the arguments. If the party did not avail of that opportunity it could decided the mater on the basis of material available before the Court. **(PLJ 2011 SC 82)**
- There is no specific provision in the CPC which confers the right upon the parties to make oral arguments before the trial Court but per convention, the oral submissions of the parties are also heard, which exercise, however, must be concluded within 30 days time from the conclusion of the trial as prescribed by law. If the parties, despite the opportunity granted by the Court to make oral submissions, do not avail the same, the Court is not bund to wait indefinitely for them and keep on adjourning the matter. This is highly deprecated and should be discouraged, rather the Court should pronounce the judgment without their arguments and this (such judgment) shall not be in violation of the rule of hearing. **(2015 SCMR 1550)**

- In case where the entire evidence has been recorded and the case is posted only for hearing of arguments, the case should not be dismissed but adjourned or decided on merits. **(1998 CLC 1383)**

14. ARREST AND DETENTION

14.1. Relevant provisions

- Sections 55 to 59 and Order XXI Rules 37 to 40 of Code of Civil Procedure, 1908 deals with arrest and detention of judgment debtor
- Chapter 12 Part-F and Rule XXXVI-A of Chapter 22, Volume 1, High Court (Rules and Orders).

14.2. Principles

(PLD 2000 Lahore 290)

- **Execution of decree for payment of money:** Order XXI, Rule 37 of C.P.C. contemplates that the Court shall, instead of issuing a warrant for arrest, issue a notice calling upon the judgment debtors to appear in Court and to show cause, why he should not be detained in prison.
- **Notice dispensing with** only if the Court is satisfied by affidavit or otherwise that the judgment debtor was likely to abscond or leave the local limits of jurisdiction of the Court.
- **Non-appearance in obedience of notice:** Sub-rule (2) of Rule 37 of C.P.C. provides that if appearance is not made in obedience of the notice, the Court shall, if the decree holder so requires, issue a warrant for the arrest of the judgment debtor.
- **When judgment debtor appears:** Under Rule 40 or 41 of Order 21, CPC when, the judgment-debtor appears before the Court in obedience to the notice or is brought before the Court, after being arrested in execution of decree, the Court is required to proceed for hearing of decree holder and to take such evidence as may be produced by it in support of the application for execution, where after the judgment debtor has to be given an opportunity of showing cause why he should not be detained in prison.

- **Discretionary powers of Court:** Pending inquiry, the Court has the discretion to order that the judgment debtor be detained in custody of an officer of the Court or be released on furnishing of security to the satisfaction of the Court, for appearance when required.
- **Detention of judgment debtor:** It is only after the conclusion of inquiry that the Court can order for detention of judgment debtor in prison, which order will be subject to the satisfaction of pre-conditions of section 51 of C.P.C.
- **Preconditions to detain judgment debtor:** Section 51 of CPC requires existence of certain preconditions to detain the judgment debtor in prison. Without satisfaction of these preconditions, no mechanical order for detention in prison can be passed. Preconditions are:
    - To give the judgment debtor an opportunity of showing cause why he should not be committed to prison, the Court
    - The judgment debtor, with the object of obstructing or delaying execution of decree:
        - is likely to abscond or leave the local limits of jurisdiction of the Court; or
        - has, after the institution of the suit, in which decree was passed, dishonestly transferred, concealed or removed any part of his property; or
        - committed any other act of bad faith in relation to his property or the judgment debtor has or has had since the date of decree the means to pay the amounts of decree or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same; or
        - the decree is for a sum for which the judgment debtor was bound in a fiduciary capacity to account.

- **Security for payment:** During these proceedings the judgment debtor can be asked to furnish security for appearance, which does not mean security for the payment of decretal amount. **(2018 CLD 830 (DB)**
- **Show cause notice:** The language of Order XXI, Rule 37, C.P.C. is very clear that prior to issuing warrant of arrest show cause notice is mandatory.
- **Previously issued show cause notice:** The previously issued show cause notices cannot be relied upon on the fresh proceedings as the circumstance may vary with the passage of time.
- **Opportunity to pay decretal amount:** Chance must be given to the judgment-debtor to pay the decretal amount.
- **Preconditions, not exhaustive:** Pre-conditions (mentioned in 14.2) are not exhaustive. There may be other conditions and circumstances of exceptional cases, which could satisfy the judicial conscience of the Court to adopt such course of arrest and detention of the judgment-debtor in a given case.
- **Written application for issuance of warrants of arrest:** Decree holder has to submit written application for issuance of warrants of arrest against the judgment debtor as per requirements of the Order XXI, Rule 37, C.P.C.

15. ATTACHMENT BEFORE JUDGMENT

15.1. Relevant Provision

Order XXXVIII CPC

15.2. Object

- Object of attachment before judgment was to prevent an attempt on part of defendant of defeating realization of decree which was to be ultimately passed against him---Such was a preventive and not a punitive action---Attachment could be ordered, if court was satisfied that defendant was about to dispose of whole or any part of his property with intent to obstruct or delay execution of decree, with or without application as court had to consider/see substance of case to meet the ends of justice- (**PLD 2018 Sindh 339)**
- Intention of the Legislature was very clear with regard to the attachment before judgment that to preserve and protect the property, which was in dispute and for the satisfaction of the decree, then interim order was to be passed; that the basic criteria given for passing restraining order of the property in dispute was for the satisfaction of the decree if considered necessary- (**PLD 2017 Lahore 689)**

15.3. Conditions

- Application under O. XXXVIII, R. 5, C.P.C. was an extraordinary relief where if Court was satisfied that other party was likely to defeat decree in future then under such special circumstances, Court may pass order with regard to attachment before Judgment. (**2020 CLD 238)**
- Such power is not to guarantee the plaintiff availability of an asset to satisfy decree which ultimately may be passed; it is to ensure non-abusing of process of court by defendant. (**2019 YLR 345)**
- Banking Court had rightly dismissed application on the ground that there was neither prima facie case made out nor any apprehension or probability expressed in application for alienation of the property or that defendants

would remove themselves from the jurisdiction of the Court. Application for attachment of property before judgment dismissed. (**2018 CLD 1086)**

- Provisions of O.XXXVIII, R.8, C.P.C. to be invoked where a party was likely to frustrate the order/decree of the Court either by absconding away or removing his property from the ambit of power of Court---Such provision was meant to protect future interest in the property---No such claim or allegation on behalf of plaintiffs was on record, in the present case---Claim of a party should be based on such facts and circumstances which could convince the Court to believe that there was real danger with regard to removal of property from the ambit of Court---Application for arrest and attachment of property before judgment could succeed only when there was an apprehension of irreparable loss and injury to the interest of party who was likely to acquire the property at the end of the day through judgment/decree of the court. (**2015 CLC 1695)**
- Before exercising power conferred by O.XXXVIII, C.P.C. a Court should be satisfied on two points---First that plaintiff's cause of action is prima facie an unimpeachable on subject to his/her proving allegations/claims made in plaint; second being that Court should have reason to believe on the basis of material that unless jurisdiction is exercised there is a real danger that defendant may remove himself from the ambit of powers of Court. (**PLD 2015 Sindh 134)**

15.4. Onus to prove

Onus of proof is on plaintiff's shoulders to establish that defendant is going to dispose of his property with an 'intent' to 'obstruct' or 'delay' execution of any decree that may be passed against him. (**2016 CLD 1202)** Attachment of property before judgment was an exceptional remedy under exceptional circumstances which should be established through some cogent evidence. Only apprehension of the plaintiff, in the present case, was that he would not be able to get execution of

decree which apparently would be in terms of money. Mere establishing prima facie good case was no ground for invoking the provisions of O. XXXVIII, R.5, C.P.C. without first complying with sub-Rule 1 of R.5 of the said provision (**2015 YLR 2674)**

16. BAR OF SUIT

16.1. Principle

- Law does not permit a second suit if a right to the plaintiff is available at the time of filing of the suit. A second suit is barred. **(2012 PSC 1446)**
- Plaintiff having filed a suit for permanent injunction against defendant with regard to same property wherein no relief either for declaration or for specific performance of agreement to sell was claimed, his present suit for declaration relating to the same property was barred by provisions of O.II R.2 CPC: **(1990 CLC 1532)**
- Fresh suit already instituted and pending at the time of withdrawal of earlier suit, not barred. **(PLD 1983 SC 344; 1990 Law Notes (Lahore) 199; AIR 1930 Lahore 599)**

17. BONA FIDE PURCHASER

17.1. Relevant Provision

O. XXI, R. 101, CPC

17.2. Conditions to prove claim of bona fide purchaser

Where the subsequent purchaser asserts that he/she is the bona fide purchaser, he/she has to establish on record first that disputed transaction is legal and is against legitimate consideration with legitimate object, It is not meant to cause loss to other person or persons, the claimant has to establish that defect was not in his/her knowledge nor he/she was aware about the interest of any other person or person in the suit property. If these facts are proved the onus of purchase stand discharged. (**2016 CLC 160)**

17.3. Bona fide auction purchaser

Distinction has to be drawn between decree-holder who comes to purchase under his own decree and bona fide purchaser who comes and gets sale in execution of decree to which he was not party. Where third party is bona fide auction purchaser, his interest in sale of auction has to be protected. (**PLD 2009 SC 207)**

17.4. Bona fide purchaser as objector in execution proceedings

- Objection petition was filed on the ground of bona fide purchaser of the property mortgaged with financial institution. Executing Court, without framing of issues, just on the basis of verification from the Development Authority, allowed the objection petition. Hon'ble High Court held that all questions as to the title, right and interest etc. in immovable property between decree holder and opposite party, should be adjudged and determined by Executing Court under O.XXI, R.103, C.P.C. and fresh suit in that behalf was barred. If there was any question of fact, which was involved in the matter, the same should have been resolved, by Executing Court in the manner as was the subject-matter of the suit. The matter was remanded to

Executing Court for decision afresh after framing of issues and recording of evidence. (**2005 CLD 1508 [Lahore])**

- Objector had purchased the property without obtaining the original title documents from the owner thus he failed to prove that the property was purchased in good faith and without making reasonable inquiries in order to get valid title qua the property in question. (**2005 CLD 165 [Lahore])**
- Factum of possession of party in suit and puts the subsequent vendee a sufficient notice to have inquired about the factum of possession to have established a bona fide purchaser. **(2011 PSC 217)**
- Before equitable defence of bona fide purchaser under the law, it must be established that such purchaser has exercised due care and diligence in ascertaining the clean visible title of his transfer. It is equally settled law that search and reliance solely of the Revenue Record is not sufficient to attract said provision. **(KLR 2009 Revenue Cases 32)**

18. BURDEN OF PROOF

18.1. Principle

- Initially burden of proof of fact is on the party who had alleged the same. When such party had led evidence in support of relevant issue resulting in preponderance of probability in favour of such party, then onus to rebut probability would shift to opposite party. **(1998 CLC 401)**
- Party to litigation through modes provided under law, can prove a fact and once initial onus has been discharged by a party, same shifts to the other party for its rebuttal or for proof otherwise. **(PLD 2018 Lahore 132)**
- The onus to prove voluntarily execution of the deed of gift lay upon the defendant who was its beneficiary. **(1994 MLD 1955)**
- Onus to proof execution and registration of document is always on the person who has asserted execution and registration by a particular person in his favour. No presumption was attached to a registered document regarding its execution where such document was challenged as forged one. **(1992 CLC 807)**
- Onus to prove voluntarily execution of gift is upon beneficiary of gift as well as to establish that the transaction was the result of conscious application of mind by donor and not under influence or fraud played with him. **(2011 PSC 276)**
- Onus in the case of Parda Nasheen/illiterate ladies. To discharge the burden of proof, beneficiary had to satisfy the Court that the entire transaction was completed in a transparent manner and all the required precautions were faithfully and honestly observed before the attestation of mutation, dispelling every suspicion that it was tainted with fraud and misrepresentation. **(2016 SCMR 862)**

- **2016 SCMR 1225**

In case of a (property) transaction with an old, illiterate/rustic village 'Pardanasheen' lady the following mandatory conditions should be complied with and fulfilled in a transparent manner and through evidence of a high degree so as prove the transaction as legitimate and dispel all suspicions and doubts surrounding it:

1. that the lady was fully cognizant and was aware of the nature of the transaction and its probable consequences;
2. that she had independent advice from a reliable source/person of trust to fully understand the nature of the transaction;
3. that witnesses to the transaction were such, who were close relatives or fully acquainted with the lady and had no conflict of interest with her;
4. that the sale consideration was duly paid and received by the lady in the same manner; and
5. that the very nature of transaction was explained to her in the language she understood fully and she was apprised of the contents of the deed/receipt, as the case may be.

19.COMMISSION

19.1. Relevant Provision

Section 75 CPC & Order XXVI, C.P.C.

19.2. Object

Power to issue a commission to examine any person; to make local investigation; to examine or adjust accounts or to make a partition, stemmed from S.75, C.P.C. was subject to conditions and limitations as might be prescribed by O.XXVI, C.P.C. (**2019 MLD 84 Karachi).** List shown in O.XXVI, R.1, C.P.C. was not exhaustive or limited, rather Court had jurisdiction to decide whether any miscarriage would be done by not issuing such Commission under particular facts and circumstances of case. (**2012 CLC 1902 Karachi)**

19.3. Discretionary powers of Court

No hard and fast rule could be laid down for grant or refusal of an application under O. XXVI, R. 4. Court has discretion in this regard which is to be exercised in a judicious manner taking into consideration all relevant circumstances of each case. (**1984 CLC 1549 Karachi)**

19.4. Consent of parties not necessary

Order for recording of evidence by Local Commission can be passed through consent of parties but there is no bar on the Court passing the order without consent. Even in cases where parties give consent, the Court is not bound to act accordingly. (**2008 PLD 239 Karachi, PLD 2011 Lahore 207)**

19.5. Issuance of Commission on motion of Court

Order XXVI, R.2, C.P.C. expressly empowered the Court to issue a commission for examination of a witness on its own motion. When the Court exercised power under O.XXVI, R.2, C.P.C. to issue a commission to examine witnesses on its own motion, such was largely a matter of discretion of the Court not circumscribed by the conditions set out in O.XXVI, Rr.1 & 4, C.P.C. (MLD**2019 Karachi 84)**

19.6. Grounds for appointment of commission to examine witness

Appointment of local commission was to be allowed when witness was suffering from sickness or infirmity, unable to attend the Court---If a witness is resident of foreign country, or even a distant place in Pakistan, the normal mode of examination would be by commission, unless the Court came to conclusion that the objects of justice could not be satisfied by examination on commission. (**2018 YLR 363 Islamabad)**

19.7. Examination of pardahnashin lady as a party or witness

While determining entitlement of a woman to such exemption, criterion would be current custom/ and manner and not which prevailed years ago and not of whole country, but of particular community/class/section to which she belonged---Woman once having claimed to be pardahnashin and declined to attend Court, then no evidence would be required for satisfaction of Court in support of her plea, though denied by other side. Pardahnashin lady could not be compelled to attend Court either as party or witness. (**2013 CLC 1813 Peshawar)**

19.8. Functions and powers of local commission

Local commission does not perform judicial function nor does a Court delegate its power to decide to the Commissioner, who only performs ministerial function the extent and scope of which is limited, narrow and clearly defined. Evidence recorded by commissioner is placed before Court and it is the Court alone which is empowered to record its findings on the basis of evidence before it. To determine questions regarding believing or disbelieving evidence, which continues to remain in the sole and exclusive domain and jurisdiction of the Court. (PLD **2011 Lahore 207, PLD 2008 Karachi 239)**

19.9. Local investigation, not substantive evidence

- Appointment of Local Commissioner was the prerogative of the Court and local investigation through Local Commissioner could not be a substitute of legal evidence. (**2007 CLC 894 Peshawar)**

- Mere opinion of Local Commission being not binding on Court, would not bestow any right upon party. (**PLD 2017 Peshawar 14)**
- Report prepared by the local commission was a piece of evidence but which was not admissible unless tendered in the proceedings. (**2019 CLC 596 Lahore)**

19.10. Commission" and "Commissioner"-Meaning and scope "Expenses of the commission"

The word "commission" is of a wider import than "commissioner", the latter meaning a person who is commissioned by the Court to carry out some specified work, whereas, the former connotes the entrustment or the authority created for the execution of that work. (**PLD 1961 Peshawar 36)**

19.11. Expense of commission

- The expenses of the commission refer not only to the fee of the commissioner, but to the entire expense including all the ancillary expenses that may be incurred in the discharge of the entrustment or in the execution of the authority for doing a particular work. For example, if the execution of the commission entails some technical advice the expenses of a technical advisor may be allowed by the Court.
- But the term "expenses of the commission" cannot be extended to include the expenses of the counsel for the opposite party for any extra engagement which may be necessitated for him by the setting up of the commission at the instance of the other party. However, if the Court considers that the examination of a witness on commission at the instance of one party puts the other party to an unnecessary hardship, including the payment of an extra fee to its counsel to be present before the commission for the examination of a witness, it can order that the expenses of the counsel be, paid by the other party for whose benefit the commission is being issued. The order for

payment of expenses and the quantum of the expenses should be measured in terms of the real necessities of the situation. (**PLD 1961 Peshawar 36)**

19.12. Local Commissioner to follow instructions in High Court (Lahore) Rules And Orders

High Court (Lahore) Rules and Orders , Vol. I, Part-M (i) . Report of local commission and his statement recorded after objections by one of the parties was in derogation of instructions contained in High Court (Lahore) Rules and Orders, Vol. I, Part M (ii)---local commission had to follow the law and not to act upon the directions of the Court---Impugned order confirming report of local commission was not sustainable---orders passed by the courts below were set aside---Trial Court was directed to appoint fresh local commission for inspection of spot according to High Court (Lahore) Rules and Orders. (**2017 YLR 16 Peshawar)**

20. COSTS AND COMPENSATORY COSTS

20.1. Relevant provisions

- Section 35 CPC deals with costs of litigation
- Section 35-A CPC deals with compensatory costs in respect of false or vexatious claims or defenses
- High Court (Lahore) Rules and Orders Vol. I, Part-E of Chapter 11

20.2. Object of granting costs

The object of granting such costs may be two-fold. One, to compensate the aggrieved party, who in successful assertion/defence of his right, has been put to unnecessary litigation and harassment. The other object is to penalize a party who may have initiated any action or passed the order in complete disregard of the obvious and glaring facts and provisions of law which a reasonable person would not do unless he acts with highhandedness, arbitrarily, mala fide or ulterior motive. **(1993 SCMR 639)**

20.3. General rule

General rule is that costs follow the event and successful party can be denied costs of litigation only for some good cause. Without being exhaustive some of the reasons for not allowing the costs are that the successful party has been guilty of misconduct or negligent or has made false claims or raised dishonest pleas. If there is nothing wrong in the conduct of the successful party which disentitles him to costs, the Court cannot refuse to grant costs to him. (**1997 MLD 3025)**

20.4. Actual costs

- Actual costs are awarded by a Court in order to secure the expenses undergone by a successful litigant in the assertion of his rights before a Court. They are not awarded by way of penalty or punishment against the unsuccessful party nor are they to be made a source of profit for the successful party. They are also not awarded by way of compensation, but by

its very nature, actual costs are awarded to reimburse a successful party for the expenses incurred by him. (**PLD 1990 SC 28)** However, while exercising this discretion relating to awarding of actual costs such direction is subject to conditions and limitations as provided in Order IX, rule 3, Order XIII, rules 2 and 4, Order XIX, rule 3(2), Order XXI, rule 72(3), Order XXIII, rule 1(3), Order XIV, rule 4, Order XXXII, rules 4 (4) and 5(2), Order XXXIII, rules 10,11 and 16, Order XXXIV, rule 10 and Order XXXV, rule 3. (**PLD 2010 Karachi 182)**

- **When there is no proof of expenses** incurred by the respondents in the matter under discussion, section 35, C.P.C. is not applicable. (**2009 CLC 1039)**
- **Court must record reasons if refuses to award cost:** According to section 35 of C.P.C., normally a party succeeding in the cause brought by him before the Court is entitled to have the costs of the litigation. But if the Court refuses to award costs to him, the reasons must be recorded by the Court for doing so. **(1997 MLD 3025)**

20.5. Compensatory costs

Under section 35-A "Costs are compensatory and are not awarded as penalty against an unsuccessful party'. All this shows that though the costs awarded under section 35-A, CPC can be taken into account when awarding “damages”, they are not even by statutory dispensation, the same as the "damages". (**PLD 1990 SC 28, PLD 2010 Karachi 182)**

20.6. Compensatory costs and suit for damages

- The conditions for application of section 35-A are different and much less than the elements set out earlier for an action for malicious prosecution.
- The actual costs of the suit under section 35, C.P.C. are at a much lower level when considered in this behalf.

- Besides this, a combined reading of subsection (4) of section 35-A and subsection (2) of section 95, which deal with the effect of the orders under these provisions on actions for "damages", are clearly indicatives of the legislative intent that unless a case is fully covered by section 95(2), the award of costs, under sections 35 and 35-A, instead of barring a suit for damages supports the right for such an action." (**PLD 1990 SC 28)**

20.7. Discretionary power of Court

As the order granting costs is discretionary, it should be based on well recognized principles of justice and equity and should not be fanciful, arbitrary, whimsical or capricious. Such discretion is exercised with regard to the party that will be charged with costs, the amount and the manner in which costs are to be paid. (**1993 SCMR 639, (1997 MLD 3025))**

20.8. Order of cost when Court has no jurisdiction over the matter

Even after the decree attained finality, the petitioner was reluctant to accept it, which compelled the respondent to file execution application in the year 2003 and till date, the respondent could not get his right. The conduct of the petitioner compelled the respondent to start the second round of litigation. He has naturally spent a huge amount upon the litigation, including travelling and lodging expenses. The respondent was entitled for the actual cost of the litigation, but the same has not been granted to him by the Courts below. The Courts have power to determine by whom or out of what property and to what extent such costs are to be paid and to give all necessary directions for the purposes of aforesaid. A Court can make an order as to cost, even though it may not have jurisdiction to entertain a suit. (**PLD 2014 Balochistan 71)**

20.9. Separate suit to claim cost

No separate suit was maintainable for recovering costs incurred by the respondent in the earlier suit. (**2007 MLD 1764)**

21. DECREE OBTAINED BY FRAUD - SECTION 12(2)

21.1. Relevant Provision

Section 12(2) CPC

21.2. Grounds for application u/s 12(2)

Such an application could only be made on the ground of fraud or mis-representation or an order or decree was passed by a Court lacking jurisdiction. (**2014 SCMR 1059)**

21.3. Ingredients of fraud must be alleged

Mere assertion of element of fraud or forgery is not sufficient rather the plaintiff should be very specific in this respect. (**2014 YLR 1748)**

21.4. Application u/s 12(2) have all attributes of a suit

Section 12 (2), C.P.C. was a substitute for a separate/independent suit for setting aside of a decree. Application under S. 12 (2), CPC had all the relevant attributes of a suit and therefore, the person against whom an allegation of fraud was made was a necessary party and must be impleaded in the application as a respondent. (**2015 SCMR 615)**

21.5. Treating application under S. 12 (2), C.P.C as plaint

Application under S. 12 (2), CPC could hardly be treated as plaint within meaning of O. VII, R. 1, CPC so as to be dismissed under O.VII, R. 11. CPC (**1996 SCMR 1528)** Order VII, R. 11, CPC was not applicable for rejection of an application filed under S.12 (2), CPC (**2019 MLD 1 Lahore).**

21.6. Treating plaint as an application u/s 12(2) CPC

Mere fact that the plaint in the suit was described as a plaint and was registered as plaint could not deprive the Court of its jurisdiction to decide it as an application under S.12 (2), C.P.C. (**1992 SCMR 1744)**

21.7. Who can file application u/s 12(2)

- **Any person, whether party or not:** Legislature purposely used word `person' only and not intended to restrict right of filing application under S. 12 (2) CPC only to "judgment-debtor" or his "successor-in-interest" or a "person who was party thereto". (**1984 SCMR 586)**
- **Not necessarily all persons:** No condition has been imposed under S.12 (2), CPC that all persons interested in getting decree set aside must join proceedings. Every person is allowed under S.12 (2), C.P.C. to challenge validity of judgment and decree or order. (**2016 YLRN 203 Lahore)**
- **Rejection of application for impleading party, not bar:** Filing of application to be impleaded as party or its rejection did not preclude the petitioner to file an application under S.12 (2), C.P.C. nor did it take away his right to pursue the remedy which was available to him under law. (**2017 CLC 305 Lahore)**

21.8. Procedure to decide application

- **Not a regular suit:** Such remedy would not be available like a regular suit and the Court may dispose of an application under S.12 (2), C.P.C. without framing issues, recording evidence of the parties and following the procedure for trial of the suit. (**2003 SCMR 1050)**
- **When evidence is not required:** When fraud was apparent and visible from the record then it was not necessary to record evidence for deciding application filed under S.12 (2), C.P.C. (**2017 CLC 1601 Lahore)**
- **When evidence is required:** Application under S.12 (2), CPC containing serious allegations of forgery and fraud could not be decided without recording of evidence. (**2008 SCMR 236)**

21.9. Dismissal of application forthwith

Where no case of fraud or misrepresentation was made out and ground for setting aside the decree was not at all such ground as envisaged by S.12 (2), C.P.C. but

pertained to the merits of the case, application under S.12 (2), C.P.C. was liable to be dismissed. (**PLD 2008 SC 591)**

21.10. How to prove plea of fraud?

It is settled law that a person who takes a plea of fraud must prove each and every aspect of the fraud... When fraud is the basis of the action or defence then its particulars have to be furnished. (**2012 CLC 1846)**

21.11. Application u/s 12(2) against consent decree

Petition under S.12 (2), C.P.C. is maintainable against consent decree. (**2016 YLR N 203 Lahore)**

21.12. Second application, not maintainable

When applicant had filed application under S.12 (2), C.P.C. before Trial Court and it was dismissed, the applicant was bound under law to challenge the dismissal order before a higher forum. Applicant, in the present case, had filed another application before High Court, which was not maintainable. (**2013 YLR 1308 Lahore)**

21.13. Dismissal of suit while allowing application u/s 12(2)

- Where there is a controversy of facts or of law between the parties in the main lis, while accepting the application (under S.12 (2) C.P.C.), the suit could not and should not be dismissed. (**2015 SCMR 1708)**
- Suit could not even be dismissed in those cases where for the determination and resolution of the application under S.12 (2), C.P.C. either one of the parties or both had brought some evidence on record which had or may have had nexus to the merits of the suit as well, if and when it went to the trial(**2015 SCMR 1708)**

21.13.1. Exception

It was in very exceptional, special and extra-ordinary circumstances where suit may be dismissed while allowing application u/s. 12(2) e.g. (**2015 SCMR 1708)**

i. the plaint did not disclose a cause of action or

ii. barred under the law,

iii. Even dismiss the suit for want of jurisdiction. In appropriate cases of want of jurisdiction, the Court while accepting the application under S.12 (2), C.P.C. may order for the return of the plaint so that the matter was tried by a Court of competent jurisdiction. (**2015 SCMR 1708)**

21.14. Limitation

- In terms of Art. 181 of First Sched. to the Limitation Act, 1908, the period of limitation to file an application under S. 12 (2), C.P.C. would be three years, and the crucial starting point for the period of limitation would be the date when the impugned decision based on fraud and concealment was passed (**2019 PLD 504 SC)**
- Article 181 of the Limitation Act, 1908 would apply to such application and period of 3 years provided there under could be calculated from date of knowledge of alleged fraud and misrepresentation committed by a party. **(PLD 2019 SC 504, 2013 CLC 746 Lahore)**

21.15. Remedies against ex-parte decree

Where civil suit was decreed ex parte, various remedies available to aggrieved person were: firstly, filing application under O.IX, R.13, C.P.C.; secondly, application under S.96(2), C.P.C.; thirdly, petition for review under S.114 read with O. XLVII, C.P.C. and fourthly, petition under S.12 (2), C.P.C. (**2000 SCMR 296)**

21.15.1. Application u/s 12(2) when any other remedy exhausted

Petitioner having exhausted remedy by filing an application under O.IX, R.13, C.P.C., could not be permitted to reagitate same issue by means of fresh petition under S.12 (2), C.P.C. (**2000 SCMR 296)** After exhausting one of the remedies under S.12 (2), C.P.C. against the order striking out defence, judgment debtor could not be allowed to go on expedition to venture another remedy for the same malady, which though available was not invoked. **(PLD 2018 SC 828)**

21.16. Provisions of special law prevail

Where special law provided elaborate mechanism and procedure to challenge a certain action under the scheme of special law, recourse to general law and or challenge to such action, that too through collateral proceedings (such as application under S. 12 (2), C.P.C.) was not approved. (**2017 SCMR 831)**

21.17. Imposition of suitable cost on false application

Frivolous application under S.12 (2), C.P.C. bearing no merits. Supreme Court observed that in such situation it was high time for the Courts to take effective measures to curb the uncalled for and frivolous litigation and imposition of suitable cost could be one of the deterrent modes to eliminate the concocted litigation. **(PLD 2009 SC 397)**

21.18. Revision against order upon application

If an application under S. 12 (2), C.P.C., was accepted or rejected, no plea was available under S. 104, C.P.C., read with O. XLIII, R. 1, C.P.C., and only revision was competent under S. 115, C.P.C. (**2017 CLC N 188 Lahore)**

21.19. Applicability of Order VII Rule 11 CPC

The application under section 12(2), C.P.C. is a substitution of the fresh suit and it is to be decided like that of a suit, as such, the application under Order VII, rule 11, C.P.C. was maintainable. (**2018 CLC 1115)**

22. DISPOSAL OF SUIT AT FIRST HEARING AND FIXATION OF INTERMEDIATE DATES

22.1. Relevant provisions

Order XV CPC & Order IX-A CPC

22.2. Parties not at issue

Order XV rule 1 provides that where the parties are not at issue on any question of law or of fact, the Court may at once pronounce judgment. (**1990 CLC 1609 Peshawar)**

22.3. Some defendants not at issue

Order XV Rule 2, where some of the defendants are not at issue with the plaintiff on any question of law or of fact, the Court may at once pronounce judgment against the same defendants and allow the suit to proceed against the others. (**1990 CLC 1609, 2006 CLC 1161 [Lahore])**

22.4. Discretion

Provision of Order XV, Rule 1 is not mandatory in nature. There is discretion vesting with the Court to pass a decree. Satisfaction of the Courts is necessary. The Court must be satisfied as to the good faith and identity of the parties. (**2007 SCMR 1684**

22.5. Instances of disposal

22.5.1. Admission in written statement

Once an admission is made in the written statement, no issue is required to be struck nor any further proof is required.(**2004 SCMR 704)**

22.5.2. Admission by counsel in his statement

Main grievance is adjudged while putting it in juxtaposition to the statement made by learned counsel for the defendants before the trial Court, it appears that claim of the plaintiff stood admitted and no cause of action was left with the respondent/plaintiff. In this situation, provisions of Order XV, rule 1, C.P.C. come

into play and the Court can dispose of the suit forthwith. **(2014 C L C 238 Lahore).** Remedy against consent decree passed on the basis of statement of the counsel lies against the counsel. (**1989 SCMR 201)**

22.5.3. No specific denial in written statement

The appellants had not denied contents of para.3 in specific terms, which under Rule 8 of Order V, C.P.C., be taken to be admitted. Learned trial Court under Order XII, rule 6, C.P.C., has to pass judgment on the strength of admission by the respondents in para.3 of the written statement as per Order XV, rule 1, C.P.C. (**2007 CLC 1885 Lahore)**

22.5.4. Rejection of plaint under Order VII Rule 11 CPC

Prima facie the plaint does disclose cause of action and the parties are at variance. The plaint could, however, be rejected under Order VII, rule 11 of the Code of Civil Procedure. (**PLD 1973 Lahore 572)**

22.5.5. Legal issues

Legal issues going to the root of the subject matter of suit and not involving question of fact, should be decided first in order to dispose of the whole cause and the same in no manner will amount to piecemeal decision. (**2000 CLC 904, PLD 1976 Lah 1433)** Where matter could be disposed of on decision of such issues, then by treating same as preliminary issues could be decided in isolation of other issues. (**2006 MLD 187)**

23. EXTENSION OF TIME

23.1. Relevant Provision

Section 148 of Code of Civil Procedure, 1908

23.2. General Rule enshrined in section 148 CPC

Section 148 gives discretion to Court including appellate Court to extend time for doing any act prescribed or allowed by CPC, even though period originally fixed or granted expired. Discretion is to be exercised in a judicious manner and not arbitrarily. (**1984 SCMR 588)**

23.3. Applicability of section 148 CPC

Power/discretion of the Court to extend time as envisaged by S.148, C.P.C was only available to the Court where the time had been fixed by the Court itself or under the Civil Procedure Code, 1908, but where the time for the performance of an act had been fixed by some other statute, the Court in terms of S.148, C.P.C had no jurisdiction at all to enlarge and extend that time. (**PLD 2012 SC 764**)

23.4. Extension of time, after passing conditional decree

Ex-parte decree with direction to deposit the remaining sale consideration within specified time with condition that the suit shall stand dismiss in case of default. Application for extension after lapse of given time is to be dismissed as on the date of filing of such application the Trial Court had become functus officio. The Appellate Court was competent to allow an application seeking extension of time for deposit of balance sale consideration if justifiable grounds were found (**2016 SCMR 179)**

23.5. Extension of time when Court has not fixed time

Trial Court or Appellate Court had not fixed time for deposit of remaining sale price. Executing Court in such circumstances would be competent to grant time for short deposit (**2003 SCMR 436)**

23.6. Extension of time to deposit amount by auction purchaser

Article 166 of the Limitation Act, 1908, require such an application as well as the deposit there under, both to be made within the period of 30 days from the date of sale. The Court could not extend time for deposit of the amounts under S.148, C.P.C. (**2014 SCMR 1222)**

23.7. Extension of time to deposit court fee

- The Court may enlarge time for deposit of court-fee and filing of amended plaint. (**2004 SCMR 119; 1986 SCMR 405).** Unless the plaintiff is guilty of contumacy or positive mala fides in putting in deficient court fees along with his plaint. **(PLD 1990 SC42, 2009 S C M R 1378, PLD 1984 SC 289)**
- Once opportunity to make good the deficiency in court-fee was provided to pre-emptor and if she had failed to discharge her legal obligation then she was not entitled to any relief. (**2007 SCMR 494)**
- Deficiency, however, made up about 25 days after time allowed by Court. Trial Court, held, justified in rejecting plaint in exercise of its discretion. **(PLD 1979 SC 821)**
- When considering the options for exercise of discretion for grant of time for supply of deficiency in the court fee, considerations relevant to bar of limitation shall not be taken into account. **(PLD 1984 SC 289).** Question of bar of limitation does not arise in such case (**PLD 1983 SC 227)**
- Power vested in Court under S.148, Civil Procedure Code, can be exercised successfully and even after time under previous such order has expired and nothing turned on fact that there was a gap between periods covered by two orders. (**1986 SCMR 1005)**

23.8. In case private agreement of parties , extension of time by Court

Time for payment of money fixed as result of agreement between parties-----Time could not be altered by Court without consent of all parties. (**1974 SCMR 191)**

23.9. Compromise decree, time not to be extended by Court

Compromise decree; compromise entered into between parties fixing certain date for payment of pre-emption money. Time fixed under compromise, held, could not be extended under S. 148. **(1979 SCMR 593)**

23.9.1. Extension of time to pre-emptors

- If pre-emptor is not vigilant in exercising right of preemption, no discretion can be exercised in his favour and he must face consequences of dismissal of suit as the Court in such cases is not supposed to condone the default while exercising power under S.148, C.P.C. (**2004 SCMR 418)**
- Consent decree in pre-emption suit effected through compromise requiring pre-emptor to deposit decretal amount within specified time, failing which suit would stand dismissed. Pre-emptor did not comply with decree, but prayed for extension of time in a time barred appeal. No such extension can be granted. (**2005 SCMR 1664)**
- Application for extension of time was allowed by High Court on the ground that pre-emptor had deposited major amount within stipulated time, while remaining amount being a minor portion could not be deposited due to lack of knowledge about passing of order regarding such charges. (**2004 SCMR 1600)**
- The failure of the plaintiff to deposit pre-emption money in time was not intentional but was due to error of the Trial Court in calculating the amount. The plaintiff was entitled to the extension of time under sections 148, 151 and Order XLI, rule 33 of the Civil Procedure Code. (**1999 SCMR 342)**
- Pre-emptor was declined extension. (**1986 SCMR 1269)** Pre-emptor handing over $1/5^{th}$ of pre-emption money to her counsel for deposit in time who failed to deposit same and time thus expired-----Courts below satisfied

that default on part of pre-emptor not intentional or wilful considering fit case for extension of time--- (**1984 SCMR 588)**

23.9.2. Suo moto extension

The extension can be on the basis of an application or suo moto **(PLD 1972 SC 69).** A Court can extend time as long as it has jurisdiction. (**2004 SCMR 418).**

24. EXAMINATION OF PARTIES AT FIRST HEARING

24.1. Relevant Provision

Order X Rule 1, CPC

24.2. Object

- By such examination the real points in controversy between the parties do not escape consideration. The procedure laid down in Order X, rule l should be followed so that the matters in dispute are clearly explained and the difference narrowed down. If the allegations made in general terms are not clear and Court requires further elucidation the Court should carefully ascertain with precision what the parties are at issue upon. (**1980 CLC 121 [S C (A J & K)])**
- A statement recorded under this rule is, therefore, on the same footing as pleadings in the case and admissions of fact made under this rule can be treated as conclusive for the purpose of the suit.[2] The Court would be competent on the basis of such admission to pronounce judgment under Order XII; rule 6, C. P. C. (**1983 SCMR 1265)**

24.3. Date of hearing

Date on which the allegations made in the pleadings are to be ascertained within the meaning of Rule 1 of Order X, C.P.C., would be a 'date of hearing ' within the meaning of the relevant provisions. (**2000 M L D 2047 [Supreme Court (A J & K)])** Order X, rule 1, of the Code of Civil Procedure relating to the first hearing of the suit which, according to Chidambaram Chettiar v. Parvathi Achi (A I R 1926 Mad. 347), is the date on which issues are framed. (**P L D 1981 Lahore 95)**

24.4. Presence of parties

Under Order X, Rule, 1, CPC, the Court is to ascertain from the parties or their counsel whether they admit or deny the allegations made by the opposite party in its

[2] (AIR1926Al1.710)

pleadings. Obviously, the presence of the concerned party or its counsel is necessary on such a date. (**2000 M L D 2047 [Supreme Court (A J & K)])** All these provisions fairly well indicate that this hearing (settlement of issues) was to be a meaningful hearing. On that date the absence of the plaintiff necessarily entailed the dismissal of the suit. (**PLD 1991 SC 443)**

24.5. Ascertainment of admissions or denials from parties or pleaders at first hearing

Rule 1 of Order X postulates that at the first hearing of the suit the Court shall ascertain from each party or his pleader whether he admits or denies such allegations of fact as are made in the plaint or written statement of the opposite party, and as are not expressly or by necessary implication admitted or denied by the party against whom they are made. The Court shall record such admission and denials. (**2014 CLC 538 [High Court (AJ&K)])**

24.6. Ignorance about claim by defendant

The claim was not specifically denied by the respondents but only ignorance about their claim was expressed. In these circumstances it was incumbent upon the trial Court to examine the parties as required by the procedural safeguard contained in rule 1 of Order X, Civil Procedure Code. (**1980 CLC 121 [S C (A J & K)])**

24.7. Adjournment to answer questions during proceedings u/O X

In the event of inability of a counsel for a party to answer questions the matter was required to be adjourned and an opportunity was to be granted to the party to appear in person. Law required that cases should be decided on merits. (**2007 YLR 1677)**

24.8. General procedure of trial, dispensing with

The examination of the parties to the lis under Order 10, C.P.C. is for the purposes of ascertaining the real matter in controversy and such better statements cannot be used as a means of trial. (**2004 CLD 821).** A perusal of sub-rules 2 and 3 of the aforesaid Order reveals that procedure adopted by the Court only for the purpose of

clarifying the pleadings of the parties and the general procedure laid down for trial of the suit cannot be dispensed with. In AIR 1931 Privy Council 175, it was opined that Order X, Rule 2 can be invoked by the Court to obtain information on material questions and not for superseding ordinary procedure at trial. (**2014 CLC 538 [High Court (AJ&K)]**)

25. EXECUTION OF DECREE

25.1. Relevant Provisions

Order XXI, Rules 1 to 36

25.2. General Rule

- Not judgment, but decree is executable and same has to be executed. (**2005 SCMR 668)**
- Executing Court cannot go behind the decree and has to execute it as it is, unless same is patently a nullity. (**1989 SCMR 640)**
- This is an established rule that the executing court cannot extend its jurisdiction to go behind the decree and question of its correctness. It cannot entertain an objection relating to the dispute of title and its determination which may change and alter the terms of decree (**2003 SCMR 1202).** Thus executing Court neither can go behind it nor can reopen matters which have been heard and decided in the proceedings in which, the decree has been passed. (**2012 C L C 4 [Sindh])**

25.3. Exceptions

Where decree is silent as to what property was subject matter of the execution the executing Court can look into the judgment in order to find out that property brought for the satisfaction of decree actually belonged to the judgment debtors. (**2003 SCMR 1202)**

25.4. Questions to be determined by Court, executing decree. [Sec. 47. Ord. 21]

Questions relating to execution, discharge or satisfaction of decree

Executing Courts are empowered to determine all questions relating to execution, discharge or satisfaction of decree and not by a separate suit. (**1991 SCMR 2457).**

25.4.1. Terms and conditions of decree to be observed

The decree is executable in the light of the terms and conditions mentioned in the decree. It is the duty and obligation of the Court to dispose of the objections filed by the objectors in the light of the terms and conditions of decree. (**2007 SCMR 818)**

25.4.2. Decree executable or not - determination of

The Court can see whether the decree or part thereof was executable or not and if for any reason the decree had become in-executable, the executing Court was empowered to declare so and if a part of the decree was not executable and that part was severable from the other part(s) of the decree then the executing Court was empowered to refuse the execution of said part of the decree and may proceed with the execution of the rest of the decree. (**PLD 2009 SC 760)**

25.4.3. Questions relating to arrears and adjustments

Question of amount of arrears of rent due and adjustment of its payment would be settled by executing Court. (**2011 SCMR 1557)**

25.5. Execution of decree where time essence of compromise

Time being essence of the consent order passed by the High Court and appellant having not complied with the terms of the compromise arrived at between him and the respondent before the High Court, O.XXI, R.1, C.P.C. would not help him to make the payment of the decretal amount beyond the time granted by the High Court as the executing Court could not go beyond the decree and had to execute the same as it was, unless the same was patent nullity. (**2009 SCMR 684)**

25.6. Converting foreign currency into Pakistani rupees

Plaintiff himself claimed the foreign currency or the Pakistan rupees equivalent thereof as on the date of institution of suit. No steps were later taken so as to amend the plaint to substitute the Pakistan rupees equivalent as on the date of payment-Date which Court should impose for converting the foreign currency into Pakistan rupees should be the date which the plaintiff itself chose, namely, the date of suit. **(1992 SCMR 2238)**

25.7. Proof of payment out of Court

No evidence other than information either by the decree-holders or the judgment-debtors and subsequent certification by the Executing Court was required to prove the payment of decretal amount out of court. (**2016 YLR N 90 Lahore)**

25.8. Notice of deposit of decretal amount to decree holder

If a notice is not given to the decree-holder regarding the deposit of the decretal amount in Court, the decree-holder can justifiably demand the interest as the deposit of the decretal amount in the Court without notice is not payment of the amount to the decree-holder in terms of O.XXI, R.1, C.P.C. (**PLD 2003 SC 290)**

25.9. Accrual of further interest

Deposit in Court under O.XXI, R. 1, CPC of money payable under a decree entitled a judgment debtor to the relief of suspension in the accrual of further interest. (**2015 SCMR 1461)**

25.10. Resistance to delivery of possession to decree holder or purchaser [Order XXI Rule 97-103]

- Executing Court duty bound to execute the decree and not to find fault with it on mere technicalities so as to deprive decree holder of fruit of decree. (**1992 SCMR 2175).**
- Through objection petitions executing Court could not allow introduction of issues which changed the complexion of execution proceedings to that of original rent proceedings. (**2014 SCMR 1210).**
- Where a person who was not a party to ejectment proceedings and who claimed to have been ejected from the property owned by him, opted to file a suit in respect of an ejectment order on the ground that same was obtained by practising fraud on Court, his suit would not be barred either under S. 12(2) or OXXI, R.103, Civil Procedure Code, 1908. (**1992 SCMR 1908).**

- The provisions of section 3 of the Ordinance were not intended to permit a party to file a separate civil suit in disregard to the provisions of rule 103 of Order XXI, C.P.C. and to frustrate the execution of decree (**2004 S C M R 1325).**

25.11. Transfer of Decree & Precept [Sec.39-46, O. XXI, R. 4-9]

- **"May" in section 39 CPC:** Use of word "may" has made the provisions of S.39, C.P.C. as directory and not mandatory in nature. (**2000 CLC 1425 [Karachi])**
- **Simultaneous execution proceeding** in more places than one is possible but the power is used sparingly in exceptional cases by imposing proper terms so that hardship does not occur to judgment-debtors by allowing several attachments to be proceeded with at the same time. (**AIR 1970 SC 1525).**
- **Questions to be decided by transferee Court**
    - Locus standi for putting in the application for transfer of decree.
    - limitation
    - Whether there was a decree in existence which was capable of execution
    - Whether the decree had been varied by a compromise. (**PLD 1964 SC 471).**
- **Transferee Court should issue certificate of non-execution:** If a Court sends a decree for execution to another Court, it has to state the extent to which the decree is still capable of execution.. (**PLD 1964 SC 471).**
- **"Competent jurisdiction":** The term "competent jurisdiction" definitely refers to territorial and pecuniary jurisdiction to deal with the decree and not the competence of the Court to entertain the suit in which the decree was passed. The transferee Court can exercise the same powers as possessed by a

transferor Court and Section 42, C.P.C. deals with the said aspect, which is also reproduced hereunder for reference. (**2016 CLC 1085 [Lahore])**

- **Order of attachment:** The proper procedure for the executing Court was to issue a precept for the attachment of the property/Bank accounts of the judgment debtor to a Court in whose territorial jurisdiction the same located in accordance with subsections (1) and (2) of Section 46 of C.P.C. (**2016 CLC 1085 [Lahore])**

25.12. Non filing of execution application not a bar to file objection Petition

Right to file objection petition conferred on judgment-debtor by the Civil Procedure Code, 1908, was a vested right which could not be denied. Pendency of application for execution of decree was not a condition precedent for filing of an objection petition under S. 47, C.P.C. (**2003 SCMR 181).**

25.13. Objections to execution petition

- An Executing Court has limited jurisdiction. It can neither entertain any objection petition on the issues already decided by it nor could it consider objection Petition on the basis of issues pending in collateral proceedings before any other forum. (**2014 S C M R 1210)**
- Objector filed an objection petition contending that he had been fraudulently dispossessed from the property in question without being made a party in the suit filed by the plaintiff. Remedy of O. XXI, R. 95, C.P.C. was not available to objector. Objector had also filed an application under S. 12(2), C.P.C. challenging the decree in favour of the plaintiff, therefore, when such application was already pending, the objection petition in any case was not maintainable. (**2016 SCMR 2150)**

25.14. Appeal against order of executing Court

Party aggrieved by an order made by the executing Court could not institute a suit, as, it could bring an appeal under O.XLIII, R.1(ii), C.P.C. (**2004 SCMR 1325)**

25.15. Review of order passed during execution proceedings

Court dealing with a review petition and re-examining an order passed during execution proceedings was constrained not only by the limited scope of exercise of jurisdiction of review but also by the settled principle that the executing Court could not go behind the decree. (**2014 SCMR 1481)**

25.16. Procedure of Order XXI CPC not binding on Banking Courts

Once the Banking Court adopted the summary procedure provided under S.19 of Financial Institutions (Recovery of Finances) Ordinance, 2001, it was not bound to follow the procedure provided under O.XXI, CPC in execution proceedings. (**CLD 2014 SC 1404)**

25.17. Section 47, not bar to another suit

This section [Section 47 of CPC] does not bar filing another suit regarding the same subject-matter, when based on fresh/distinct cause of action. (**PLD 2011 S C 520)**

25.18. Nothing to execute when suit dismissed for want of cause of action

When the suit was dismissed for want of cause of action and trial Court prepared no decree-sheet, there was no question of filing execution application nor such order could be executed. (**2006 SCMR 1157)**

25.19. Pre-condition for issuance of new proclamation when auction proceedings has been postponed:

Proviso of Order XXI, Rule 69, C.P.C. is amended through High Court Amendment and period of 07 days is substituted by 30 days. When auction is not postponed for more than 30 days, requirement of fresh proclamation under Rule 69 of Order XXI, C.P.C. is not applicable. **P L D 2018 Lahore 60**

26. EXECUTION OF FOREIGN DECREE

26.1. Relevant Provisions

- Civil Procedure Code 1908: Sections 13 and 14
- High Court (Lahore) Rules and Orders Vol. I, Chap. 12

26.2. Legal Status

Foreign judgments are presumed to be pronounced by Court of competent jurisdiction within the contemplation of S.14, CPC. (**PLD 2011 Karachi 257)** Foreign judgment or decree do not operate proprio vigore in Pakistan and is not capable of automatic execution by Pakistani Courts. (**PLD 1993 Karachi 449)**

26.3. Section 13 CPC & 44-A CPC

Provisions of S.44-A, C.P.C. and S.13, CPC are not independent of each other and are in fact interlinked and dependent in as much as even a final judgment of a foreign Court, after its approval from appellate Court (of a country with whom there is an international treaty) cannot be executed directly without recourse to the provisions of exceptions as contained in S.13, CPC. (**PLD 2014 Karachi 209)**

26.4. Execution by proceeding u/s 44-A.

Where a certified copy of a decree of any of the superior Court of the United Kingdom or any reciprocating territory has been filed in a District Court, the decree may be executed in Pakistan as if it had been passed by the District Court (**1997 SCMR 323)**.

26.4.1. Executing Court of foreign judgment

Plaintiff can out rightly obtain execution of the decree from District Court of concerned district of Pakistan and plaintiff need not file suit even and need not go through procedure prescribed for trial of suit. (**PLD 2011 Karachi 257, PLD 2017 Pesh. 1)**

26.4.2. Filing of certified copy

Jurisdiction to execute a foreign judgment is entrusted to a District Court which arises with the filing in such Court of a certified copy of a decree of any of the superior Courts of the reciprocating territories. (**PLD 1993 Karachi 449)**

26.5. Filling of suit on basis of foreign judgment

Plaintiff can file suit in Pakistan on the basis of foreign judgment treating it as cause of action.

26.5.1. Conditions for filing suit as prescribed in S.13 C.P.C.

i. The judgment is conclusive between parties and
ii. it is res judicata between them and
iii. such Courts in Pakistan are bound by its findings. (**2011 CLD 733, PLD 2011 Kar 257. 2006 CLD 1592)**

26.5.2. Limitation

Such suit is to be filed within the period of six years from the date of that judgment as provided under Art.117 of Limitation Act, 1908. (**PLD 2011 Kar. 257, PLD 2017 Pesh. 1)**

26.5.3. Filling of suit on original cause of action

Course against foreign judgment is that plaintiff can file suit on the original cause of action as it does not come to an end after passing of foreign judgment but remains intact until and unless that foreign judgment is satisfied. If conditions mentioned in S.13 C.P.C. are not satisfied, then the decree remains open to collateral attack in Pakistan. (**PLD 2011 Kar. 257)**

26.6. Judgment by Court of incompetent jurisdiction

Courts in Pakistan may not consider a foreign judgment to be conclusive if it had been pronounced by a Court of incompetent jurisdiction. (**PLD 2016 SC 174)**

26.7. Foreign judgment under challenge before foreign appellate forum

Execution of foreign decree could not be filed in Pakistan, if same had not attained finality for being under challenge before foreign Appellate forum. Period of six years

provided under Art. 117 of Limitation Act, 1908 for filing such suit on basis of foreign judgment/decree would start running from date when such decree attained finality after dismissal of such appeal. (**2011 CLD 963)**

27. EXEMPTION OF WOMEN FROM PERSONAL APPEARANCE

27.1. Relevant Provisions

- Section 132 of Code of Civil Procedure, 1908
- Section 18 of Family Courts Act 1964
- Order 26 rule 1 of Code Of Civil Procedure, 1908

27.2. Parda Nasheen Lady

Lady would not become Pardanashin merely because she observed "Pardah" or was an illiterate person. Pardah observing illiterate lady could not necessarily be deemed to be a "Pardanashin" lady. **(1995 CLC 896)** Generally, a pardahnashin woman is one who by the custom of the country or the usage of the particular community to which she belongs, is obliged to observe complete seclusion (Pardah) covered her face with a veil, cloak or cover and avoids coming in public. A woman will be a pardahnashin, if she does not go to the Court and use to stay away from communications in matters of business with men other than the members of her family. For Pardah, it is not necessary that a woman may be educated or illiterate. No doubt, the veiling was initially a custom in the ancient Greeks in Romans Empires. They had also adopted Pardah as a custom, but when Christianity was established and starting spreading; Pardah was deemed mandatory for women. The Holy Qura'n justifies Pardah for women as a religious obligation as listed in Verse 53 of Surah 33. (**2013 CLC 1813**)

27.3. Proof of being a pardanasheen lady

Provision of S.132, Civil Procedure Code, 1908, was although mandatory, yet it must first be established that case of plaintiff really fell within the purview of S.132, Civil Procedure Code 1908. **(P L D 1994 Karachi 372)**

The privilege of being a `Pardahnashin' lady now cannot be claimed as a matter of presumption and in order to have the legal benefit of section 132, C.P.C. it has to be established as a fact with direct and rather much more strong evidence of fact. In

the wake of changing social, political, economic, educational norms the Courts have to look into this issue, receive evidence and decide the same more carefully, if not jealously, before taking measures for legal proceedings in relation to and recording evidence of a lady as a `Pardahnashin'**. (PLD 2009 Lahore 71, 1995 CLC 896)**

27.3.1. Claim to be pardanashin must be mentioned in plaint

Where lady had never claimed to be a Pardanashin lady in her plaint, she would not become "Pardanashin lady" merely because she happened to be a woman. **(1995 CLC 896)**

27.4. Exemption from personal appearance

Provisions of S.132(1), C.P.C. once attracted, then exemption from personal appearance in court could be claimed as a matter of right. (**2013 CLC 1813, PLD 2009 Lah 71**)

27.5. Exemption as per prevailing customs and traditions

While determining entitlement of a woman to such exemption, criterion would be current custom/ and manner and not which prevailed years ago and not of whole country, but of particular community/class/section to which she belonged. Woman once having claimed to be pardahnashin and declined to attend court, then no evidence would be required for satisfaction of court in support of her plea, though denied by other side. Pardahnashin lady could not be compelled to attend court either as party or witness. (**2013 CLC 1813**)

27.6. Exemption of Pardanasheen Lady family Court (2019 M L D 401)

Whereas, under Section 18 of the Act, Parda Nasheen lady, party to a family suit, may be permitted to be represented by a duly authorized agent. For better understanding the language of Section 18, the same is reproduced:--

27.7. Procedure for recording evidence of pardanasheen lady

Order V, Rule 3, C.P.C. can also be pressed in aid of the claim for non-appearance in the court, on the ground of being `Pardahnashin lady'. ..Order XXVI, rule 1 read with these provisions of law, namely, section 132 and Order V, rule 3,

C.P.C. may provide the scope for examining a `Pardahnashin lady' on commission. (**PLD 2009 Lahore 71)**

27.8. Revisable order

An order directing a pardanashin woman to appear personally in Court is in breach of her right to exemption under section 132 Civil P. C. and is therefore revisable. **(PLD 1955 Sindh368)**

28. FRAME OF SUIT

28.1. Relevant Provision

Order II Code of Civil Procedure, 1908

28.2. Object of frame of suit

The object of order II Rule 1 is that all matters in dispute between the same parties arising and relating to the same transaction should be disposed off in the same suit (**PLD 1970 SC 63, 1990 CLC 33)**. The object of the Rule 2 of Order II is to prevent a party being vexed twice **(2004 YLR 2200).**

28.3. Cause of action

Cause of action means entire bundle of acts which a party is required to prove, if denied by other party (**2002 PLC 323)**. The term "cause of action" has not been defined in CPC. It means all material facts which would be necessary for the plaintiff to allege and prove in order to succeed. Every allegation, however, would not form part of cause of action unless plaintiff has to prove the same in order to succeed in his case. **(1996 CLC 69)**

28.4. When "cause of action" for two suits the same

The expression "cause of action" in Order II, Rule 2, CPC means the cause of action for which a suit is brought. In order that the cause of action for the two suits may be the same, it is necessary not only that the facts which would entitle the plaintiff to the right claimed must be the same but also that the infringement of his right at the hands of the defendants complained against in the two suits, must have arisen in substance out of the same transaction (**PLD 1970 SC 63)**.

28.5. Joinder of all claims in one suit

There may be number of cause of actions in one transaction but Rule 2 do not require the joinder of all such cause of actions in one suit (**PLD 1970 SC 63, PLD 2006 Karachi 593)** as it only require the joinder of all claims (**2018 CLC 459)**. Every suit is to include the whole of the claim arising out of the same cause of

action, otherwise the penal provision of sub rule (2) of Order II Rule 2 will be applicable (**1991 SCMR 525, 2015 CLC 1066).** The plaintiff should have been aware of the existence of the claim or the facts which would entitle him to sue for it (**PLD 1970 SC 63).**

28.6. Effect of omission to sue a claim

A plaintiff cannot sue for any portion of his claim which he has either omitted to sue or relinquished in the earlier suit (**2013 SCMR 238, 2010 SCMR 501, 1991 SCMR 525, 1991 SCMR 1176)**. Omission to sue a claim will not only include a deliberate omission but also includes accidental or involuntary omission (**2003 YLR 894)**

28.7. Condition Precedent to apply bar to further suit

Two conditions must be fulfilled in order to apply the bar and those are:-

- **Relief must arise out of same transaction:** The suit must be between the same parties and the relief /claim must arise out of same transaction (**PLD 1970 SC 1**, **PLD 1999 Lahore 340).**
- **Entitlement of plaintiff:** It is must to establish that the plaintiff was entitled to such relief at the time of instituting the former suit (**1999 SCMR 177)**.

28.8. Exception to bar

- **Where plaintiff unaware of his right:** The bar to claim relief relinquished earlier by plaintiff will not be attracted if the plaintiff was unaware of the claim (**2006 CLC 1352)**.
- **Where cause of action is different:** Where the cause of action is different, the bar is not attracted (**2007 SCMR 373, 2002 SCMR 300).**
- **Where earlier suit not competent:** This bar will not be applicable if the earlier suit was not competent or the claim could not legally be made in the earlier suit (**2002 SCMR 1877, 2015 MLD 763)**

28.9. Joinder by one plaintiff against same defendant

The first part of rule 3 of Order II permits the joinder by one plaintiff of several causes of action against the same defendant jointly (**1992 SCMR 2375).**

28.10. Joinder by several plaintiffs jointly against same defendants

The second part permits the joinder by several plaintiffs jointly of several causes of action against the same defendants jointly. Therefore, there cannot be a joinder of causes of action where the plaintiffs or defendants are not interested, except where such joinder is permissible under Order 1 (**AIR 1928 Pat 674).**

28.11. Jurisdictional issue when several causes of action joined

Where the plaintiff combines several causes of action in one suit, the jurisdiction of the Court depends upon value of the aggregate of the subject matter (**2011 CLC 1239).**

28.12. Power of Court to order separate trials

Even the Code permits the joinder of several causes of action, the Court is empowered to order separate trials when it appears that such causes of action cannot be conveniently tried or disposed of together (**1992 SCMR 2375, 2011 CLC 294).** Order II rule 6 will apply where the causes of action joined in the same suit are essentially of a different character and not where the facts relating to the different causes of action are common (**PLD 2006 Karachi 593).**

28.13. Objection to non-joinder

Any such objection is analogous to misjoinder of the causes of action in terms of O.II, R.7, CPC and ought to be taken at earliest possible opportunity (**2002 CLC 566).**

29. FUNCTUS OFFICIO

29.1. Meaning

- The expression 'functus Officio' as per law of Lexicon Venkatraramaiya means having fulfilled the functions, having discharged the duty, having discharged the office or accomplished the purpose and, therefore, of no further force or authority. (**2019 CLC 634)** The meaning of functus officio is well understood. To quote from Black's Law Dictionary (7th ed., 1999, pg. 682):--
- 'functus officio'... (of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished." (**PLD 2013 Sindh 117)**

29.2. General Provisions

Once a case is finally decided, the Court becomes “functus officio”. (**2018 SCMR 359, 2018 YLR 1749)** Where the order sought to be varied or cancelled was communicated to other party, a very valuable right would accrue to the party and the issuing Authority would become “functus officio” to vary, rescind or cancel its earlier order. (**2010 PLC(C.S.) 1391)** and Court could not re-open the matter except under available provisions of law. (**2019 CLC 369)**

29.3. Applicability of principle in judicial and quasi judicial authorities

The rationale is obvious, an adjudicating authority, judicial or quasi judicial, cannot change its determination in an adjudication, after signing the order judgment as doctrine “functus officio” comes in the way. (**2011 PTD (Trib. 936)**

29.4. Instances of forum where principle of “functus officio” applicable

High Court

- High Court had become “functus officio” and could not adjudicate upon the matter because the matter was not only decided by the High Court but also by the Supreme Court. (**PLD 2005 Lahore 279)**

- High Court was "functus officio" after passing the withdrawal order. (**2010 YLR 904)**
- High Court, after having disposed of murder reference and criminal appeal had become "functus officio" and had no jurisdiction to clarify or interpret the judgment of the Supreme Court**. (PLD 2004 SC 911)**

Tribunal

When matter was sub judice before the higher hierarchy (the Tribunal) the lower Officer would become "functus officio". (**2018 PTD (Trib.) 2310)**

Department

After issuance of the notification removing the civil servant from service, Department had become "functus officio". (**PLD 2000 SC 104)**

Settlement Authority

With the issuance of title documents i.e. Transfer Order, property absolutely vests in the transferee and the Settlement Authorities become "functus officio". **(2001 YLR 887)**

Collector

Collector where once passes the award he becomes "functus officio" and is not competent to cancel same. (**2007 CLC 1587, 2009 CLC 948)**

Rent Tribunal

Rent Tribunal having passed final eviction order against the tenant, rendered itself "functus officio" and could not proceed any further. (**2009 CLC 1334)**

29.5. Instances of proceedings where principle of "functus officio" applicable

Impleading of party after passing decree

No new person could be impleaded even as a defendant in suit after passing of decree. (**2016 CLD 454)**

Conditional decree

Once having passed conditional decree and suit having stood automatically dismissed for non-deposit of pre-emption money, the Court decreeing the suit had become functus officio. (**PLD 2006 SC 140)** Judgment and decree itself having provided that in the event of non-deposit of amount suit would stand dismissed, same already stood dismissed before filing of application for extension of time and Court had become functus officio. (**2002 MLD 1010)**

Disposal of suit by consent

Court passes a final order for disposing of a Suit and specially by consent, the Court becomes functus officio, and is, thereafter, precluded from passing any order, which could disturb or modify the same. (**2019 CLC 526)**

Effect of subsequent correction

After announcement of judgment and decree, the Trial Court had become functus officio, therefore, correction made by Trial Court subsequent to its pronouncement was not sustainable in the eyes of law. (**2003 YLR 1277)**

29.6. Exceptions

- **Review:** The only provision which allows making change in the final order is the provision of review, scope of which is very limited i.e. to correct an error that is floating on the face of the record. (**2018 SCMR 359)** It is also a settled law that a review of a determination in an order or judgment can only be made if the same is specifically allowed by the legislature in any enactment. (**2011 PTD (Trib.) 936)**
- **Extension of time in suit for specific performance:** Since Court after passing a decree had become functus officio, it had no power under S.148, C.P.C. to extend the time for depositing the sale consideration by modifying the terms of decree---Exception to said rule was a decree passed by a Court in a suit for specific performance of agreement. Court in such a suit would

neither lose its jurisdiction after grant of a decree for specific performance nor became functus officio. (**2018 CLC 1505)**

- **Preliminary decree:** If the Court has passed a preliminary decree and the matter is sub judice before the Court, then the Court has power to extend time. In preliminary decree the Court doesn't become functus officio but still retains control over actions and has power to make orders including extension of time. (**2013 MLD 514)**
- **Amendment of decree:** Once the Court had passed decree, it became functus officio except for amendment of decree as provided under law. (**2016 CLD 454)**

29.7. Section 151 CPC when Court becomes functus officio

In such a situation, S. 151, C.P.C. was of no help, as the inherent jurisdiction could only be exercised by a Court of law during pendency of the suit/lis and that too when no other appropriate provision of law/remedy was available. (**2019 CLC 369)**

30. GARNISHEE - PRINCIPLE

30.1. Relevant Provision

Order 21 Rule 46

30.2. Nature of debts that can be attached

Debt as envisaged in S.60 and OXXI, R.46, CPC is the equivalent of existing obligation to pay whether immediately or in future. Concept of debt in section 60 and Order 21, rule 46, C.P.C. signifies a specified sum of money, which was payable, in praesenti or in futuro, on the basis of a subsisting obligation, which had become fixed. To put it differently, the sum involved would either be payable on demand or in future but, in each case, it should have become due for payment. Thus, a debt was the equivalent of an existing obligation to pay, whether immediately or in future. The liability, however, must be an existing, a perfected and an absolute one. (**1991 CLC 424)**

30.3. Attachment of debt

Only an existing debt due by the garnishee to the judgment-debtor could be realized following upon an attachment of such debt in a decree. (**1991 CLC 424)**

30.3.1. When attachment cannot be acted upon

Where such debt stood extinguished, discharged or lawfully assigned creating third party interest in relation thereto, prior to an effectual order of attachment, there would either be left nothing to be attached or only such interest, right or entitlement in the debt, as might still be vesting in the judgment-debtor and no more. (**1991 CLC 424)**

30.3.2. Question of fact

It would, however, always be a question of fact whether there had actually been any such satisfaction, discharge, extinction, assignment or other creation of charge in respect of the specified debt owing by a garnishee to the judgment debtor. (**1991 CLC 424)**

30.3.3. Jurisdiction

For an attachment order to be effected against garnishee, he should be within the territorial jurisdiction of the executing court or the debt should be payable within the territorial jurisdiction of such court. (**1991 CLC 424)**

30.4. When debts effective fully and partially and when totally ineffective

The principle governing attachments of moneys in the hands of third parties was that the same were effective fully if moneys involved undoubtedly belong to the judgment-debtor, effective partially if limited rights of the judgment-debtor were found to subsist therein and such are ineffective totally if the judgment-debtor had never had any right or interest therein or if, having had such right or interest, had, in due course of law but not collusively or fraudulently, lost it. (**1991 CLC 424)**

30.5. Examples of debts

- Debt due to judgment-debtors from bank, being actual, existing, perfected and absolute was aptly amenable to attachment. (**1991 CLC 424)**
- Service of garnishee order by Court-Amount deposited with Bank in current account could be attached as debt and prohibitory injunction could validly issue on Bank. (**PLD 1969 SC 301)**
- Fixed deposit can be attached in garnishee proceedings.. (**2001 PTD 3610)**
- Garnishee order cannot be issued to Stock Exchange. (**2001 PTD 2679)**

30.6. Notice to garnishee

Notice of execution to garnishees would be essential. (**1991 CLC 424, 1992 MLD 1007)** Fact that a notice under S.226(3) mentions a lesser amount would not render it invalid.(**2000 PTD 3053)**

30.7. Garnishee is bound to pay debts in court

The answer is fairly obvious and it is that the garnishee cannot refuse to pay the money into Court for the plaintiff on account of its contract with the defendant; nor can it do so on account of the defendant's interest in the money... If the garnishee

has money, which the defendant can demand on account of the money deposited by her, then that money is movable property and the plaintiff can get it attached irrespective of whether it consists of those particular notes or coins which she had deposited or not. (**PLD 1963 (W. P.) Karachi 269)**

30.8. What Objections garnishee can raise

Garnishee can resist the plaintiff's claim on the basis of its own right. The garnishee could contend that the attached money was wholly or partly its own property but then the objection would not be to the attachability of the money but to the adverse effect on its interest in the money. (**PLD 1963 (W. P.) Karachi 269)**

30.9. Opportunity of hearing to garnishee

Alleged creditor contending that no amount was due from him to defaulter---
Petitioner had to be given opportunity to be heard. (**2000 PTD 2281)**

30.10. Attachment before decree

Within the contemplation of the Code such an order can be passed in execution proceedings under Rule 46 of Order XXI but only after the debt had been judicially determined. Since all that the plaintiff has today is a disputed claim, the order sought really falls within the purview of Order XXXVIII Rule 5 of m the Code which empowers a Court to order attachment of property before judgment. Such an order, however, cannot be passed lightly and the person seeking it must satisfy the Court, by affidavit or otherwise, that there is imminent danger of the defendant disposing of the whole or any part of his property or of the defendant removing the whole or any part of this property from the local limits of the jurisdiction of the court. Und rule 5 it is not only this that the Court must be satisfied about but also that the defendant is about to do so with the intention of obstructing or delaying the execution of any decree that may be passed against him. (**2009 MLD 892, 2009 CLD 1077)**

30.11. Procedure

In Punjab no garnishee procedure is adopted, however, Sindh Chief Court has enacted garnishee procedure in Rules 46-A.

31. HEARING OF THE SUIT AND EXAMINATION OF WITNESS

31.1. Relevant Provision

Order XVIII Code of Civil Procedure, 1908

31.2. Right to begin Evidence

Right to give evidence and the right to cross examine witness strictly in terms of CPC read with relevant provisions of Qanun-e-Shahadat Order, 1984 was part of substantive law (**PLD 2014 SC 89).** The burden of proof should be on the party that would fail if no evidence is given by either side (**2007 SCMR 870).** Where the parties have fully led evidence, it is for the Court to arrive at proper conclusions and the onus of proof need not be further considered (**PLD 1971 SC 334).**

31.3. Complete evidence of one party

The party having the right to begin must first state his case and lead evidence regarding matters raised in the pleadings (**2000 SCMR 1172, 2000 YLR 1130).** The party beginning must produce all its evidence before the other party can be called upon to produce its evidence (**2007 YLR 2858, 1993 CLC 1580).**

31.4. Production of evidence in case of several issues

The party beginning may, in the first instance, produce evidence only on such issues the burden of proving which lies on it and reserve the evidence on issues the burden of proving which lies on the other party and disprove such issues by leading evidence in rebuttal after the other party has produced its evidence on all issues (**2006 SCMR 1304, 1996 SCMR 662, 1996 SCMR 351).**

31.5. Witness to be recorded in open Court

Order XVIII, R. 4, C.P.C. provided that the evidence of the witnesses in attendance shall be taken orally in open Court in the presence and under the personal direction and superintendence of the Judge. This rule by no stretch of imagination provided for examination of witnesses who were not mentioned in the list of witnesses (**2016 SCMR 1976)**.

31.6. Protocols of recording evidence

Evidence should be recorded in the form of a narrative, in the presence of the parties, and failure to do so would amount a material irregularity (**1990 MLD 588).** It is mandatory to the Court that the evidence shall be read over to the witness and the Judge shall correct the same, if necessary and shall sign the same (**2011 Y L R 496, PLD 1966 Lahore 455).**

31.7. Scope of memorandum in examination of witnesses

Court was bound to follow the law and proceed with the trial as per procedure laid down in CPC. If Judge was unable to make memorandum then he should record reasons of his inability to record evidence (**2019 CLC 1392).**

31.8. Demeanor of witness

Remarks regarding demeanor of witness should be written during the examination of the witness and not thereafter (**PLD 1980 Karachi 96).**

31.9. Evidence recorded in one case to be considered in other case

The practice of recording evidence in one case and treating it or reading it as evidence in other connected cases is not legal but in exceptional cases it is permissible (**2008 SCMR 350).**

31.10. Objection to questions

Where a question is objected during evidence, the objection and the decision of the Court should be recorded (**AIR 1936 Lah 183).**

31.11. Recording of statement of witness by Reader of the Court

Statement of witness was recorded by Reader of the Court but same was signed by the Judicial Officer and no objection was advanced by the defendants. Provisions of procedural law were meant to help and not to create obstacles for the litigants to achieve their rights. Non compliance of provisions of O. XVIII, Rr. 8 & 14, C.P.C. in absence of any allegation of prejudice was not of invalidating nature and the same was irregularity and not illegality **(2016 MLD 1271)**. Evidence of parties is recorded by Reader of the Court in the presence of their counsel under supervision

of Judge without his certificate as required under law. Such omission on part of Trial Court could not be termed as an illegality in absence of any prejudice caused thereby to any party or inaccuracy of record (**2012 CLC 844)**. Non-compliance of O.XVIII, Rr. 8 & 14, C.P.C. in absence of any allegation of prejudice was not of invalidating nature **(1990 MLD 588).**

31.12. Recording of evidence out of turn

On application and for reasons, like leaving Court jurisdiction or "other sufficient cause" a witness (or a party) can seek and Court on recording reasons of its satisfaction thereto, can allow recording of out of turn statement.

(**2007 YLR 2675)** Examination of a witness, de bene esse, can be ordered to be made at any time, after the institution of the suit. Such examination is not restricted merely to the case of a witness likely to leave jurisdiction of the Court but can be resorted to where "sufficient cause" is shown. Rule of "ejusdem generis" applied (**1989 CLC 1138).**

31.13. Deposition of witness recorded on commission

Omission to take signature of witness on it; correctness and authenticity of deposition not disputed; defect of not taking signature is not fatal to reception of deposition in evidence. (**1990 MLD 486 Supreme-Court-India)**

31.14. Recalling of a witness by Court for re-examination

Order XVIII, R.17, C.P.C. was an independent provision of law by virtue of which the Court had ample powers to re-summon any witness at any stage of the case before the pronouncement of the final decision (**2012 CLC 828).** True object of re-examination of a witness, as matter of fact and law, was to clear any obscurity and/or ambiguity which might have arisen during the course of his examination/statement, which had to be clarified as otherwise obscurity etc. might lead to injustice and the Court shall find it difficult to adjudicate the matter to do justice. Order XVIII, R.17, C.P.C was not meant and designed for the purpose of enabling a party to fill up the omissions in the evidence of a witness who had already

been examined. **(PLD 2014 SC 89).** Petitioner having no right to recall witness for cross-examination could not be prevented from examining such witness in his defence (**1981 SCMR 336**, **2017 CLC 950).**

31.15. Local Commissioner's report regarding inspection of property

Local commission report not exhibited by examining Local Commissioner as same was not objected to by any of the parties. Court could refer such report to explain evidence on record but such report independently could not form basis for grant of relief (**PLD 2004 SC 633).**

31.16. Inspection of location by a Court

Court, though was empowered to inspect the site but at the same time it was under an obligation to record the evidence of the parties with opportunity to the other side of cross examine the witnesses if it wanted to form an opinion in respect of particular factual controversy (**PLD 2005 SC 24).** It can be necessary and helpful in deciding a case, but it cannot be substituted as an evidence, which otherwise is required to be produced by a party (**1994 SCMR 2163).**

32. INHERENT POWERS OF CIVIL COURT

32.1. Relevant Provision

Section 151 Code of Civil Procedure, 1908

32.2. Concept

The concept of "inherent jurisdiction" is of the law of England, where there is no written Constitution. There, most of the jurisdiction which the Courts exercise, including the supervisory jurisdiction of the High Court to issue writs, is inherent jurisdiction. (**PLD 1987 Lahore 633).**

32.3. Scope

The provisions of section 151 CPC and of 561/A Cr.P.C, are analogous but section 151 CPC is wider and exercisable by every civil Court. (**2011 SCMR 1813)**

32.4. Purpose

Section 151 CPC will be attracted, firstly, where the case is not covered by the express provision of the Code (**PLD 2000 SC 820)** and secondly, where the procedure as laid down and provided is being abused so as to obstruct the ends of justice. **(2007 SCMR 351, PLD 2006 SC 66, 1997 SCMR 1692)**

The power is to make such orders as are necessary for the ends of justice or to prevent abuse of the process of the Court. The words 'ends of justice' have reference to the purposes which by judicial process are intended to be secured and 'justice' necessarily means justice as administered by the Courts and not justice in the abstract sense or justice administered by agencies other than Courts. (**PLD 1971 SC 677)**

32.5. Underlying principle

"The Court ought not to act on the principle that every procedure is to be taken as prohibited unless it is expressly provided for. The Court should proceed on the principle that every procedure which furthers administration of justice is

permissible even if there is no express provision permitting the same. (**PLD 1969 SC 65, PLD 2016 Lahore 602)**

32.6. Exercise of inherit powers

- **No express provision:** Court can exercise inherent powers under section 151 C.P.C, where there is no express provision of law applicable to the case, catering for the particular situation. (**1972 SCMR 73, 2009 YLR 2423, 2002 CLC 1947, 2012 CLC 229 [Sindh], (PLD 1967 SC 317, 325, PLD 1987 Lahore 633)).**
- **To further administration of justice:** A Court should proceed on the principle that every procedure which furthers the administration of justice is permissible even if there is no express provision permitting the same. (**PLD 1969 SC 65)**
- **Consolidation of suits:** Court had the inherent power to consolidate suits and the purpose behind it was to avoid multiplicity of litigation and to prevent abuse of the process of law and Court and to avoid conflicting judgments. (**PLD 2016 SC 409)**

32.7. Inherent powers cannot be exercised

- **Not at the pleasure of Court:** It is not intended to invest the Courts with powers to make any order which it may be pleased to consider in the interest of justice. **(PLD 1967 SC 317, 325, PLD 1987 Lahore 633).**
- **Courts to follow prescribed procedure:** Where the Code has prescribed any procedure for the doing of a thing, such procedure is to be followed. (**1972 SCMR 73, 1997 SCMR 1849).**
- **Powers procedural and not affect substantive rights:** Powers as conferred upon a Court under Section 151 C.P.C. can only be exercised with respect to procedural matters; exercise of such inherent powers must not affect the substantive rights of parties. (**2007 SCMR 351)**

- **Specific prohibition:** Where there is a specific prohibition of a particular act, the Court cannot circumvent the prohibition in the exercise of inherent powers. (**PLD 2001 Karachi 442)**
- **Exercise of powers conflicting general principles of law:** Court cannot exercise inherent powers in matters conflicting with the general principles of law or to defeat the provisions of the Code. (**PLD 2011 Karachi 605, PLD 2003 Lahore 148)**
- **Where party guilty of laches:** The power under section 151 will not be exercised to assist a party guilty of laches. (**PLD 1985 Karachi 60)**
- **Where remedy is available:** Inherent powers cannot be used when some other remedy is available and more so, it cannot be exercised as appellate powers. (**2007 SCMR 351)**
- **Do not confer jurisdiction:** Inherent powers as conferred upon a Court under S.151 C.P.C. applies only to the exercise of jurisdiction, where some lis is pending before the Court and does not confer jurisdiction to entertain a matter which was not pending adjudication. (**2007 SCMR 351)**

32.8. Limitation

Limitation Act, 1908 did not contain any specific Article which would prescribe the limitation period for the exercise of such inherent power of the Court, therefore, the residuary Art.181 of the Limitation Act, 1908 shall be attracted. (**PLD 2016 SC 712)**

33. PRESENTATION OF PLAINT

33.1. Relevant provision

Order IV CPC

33.2. Meaning of word "sues"

The word 'sues' according to its ordinary connotation means institutes and according to rule 1, Order IV, C.P.C. a suit is instituted by the presentment of the plaint to a Court of competent jurisdiction. Therefore, the suit is instituted as soon as the plaint is presented and it is accepted by the Presiding Officer any defect notwithstanding. (**2000 SCMR 847, PLD 1976 SC 572)**

33.3. Proper and legal institution of suit

Suit is properly and legally instituted when the plaint is presented to a Court or officer competent to receive it. (**1986 CLC 1451 [Lahore])**

33.4. Cause of action

Plaint must disclose a cause of action i.e. contain statement of material facts necessary for plaintiff to allege and prove in order to succeed in his cause. (**PLD 2012 SC 211)**

33.5. Pleadings of the parties, not substitute of evidence

Pleadings of the parties are not substitute of evidence and it being not substantive evidence, the averments of pleadings would carry no weight unless proved through evidence in Court or admitted by the other party. (**2007 SCMR 870)**

34. INTERPLEADER SUIT

34.1. Relevant Provision

Sec 88 and Order XXXV of CPC

34.2. Definition

- A suit to determine a right to property held by a usually disinterested third party (called a stakeholder) who is in doubt about ownership and who, therefore, deposits the property with the Court to permit interested parties to litigate ownership[3]
- Interpleader suit is defined to be "one where two or more persons severally claim the same debt, duty or thing from the complainant under different titles or in separate interests and he, not claiming any title or interest therein himself, and not knowing to which of the claimant he ought of right to render the debt or duty or deliver the property, is either molested by an action, brought against him or fears that he may be compelled to interplead and state their several claims so that the court may adjudge to whom the matter or thing in controversy belongs"[4].

34.3. Important rules about the interpleader suit

- **Plaintiff does not have any interest in the suit except for costs:** A party to file an inter-pleader suit should be in a position to walk out of the suit with a mere claim for costs and shall not be entitled to have any other matter of contest between himself and the claimants (**AIR 1952 Madrass 564**).
- **Condition precedent for an interpleader suit:** There are certain conditions precedent which are required to be satisfied before an Interpleader suit can be competently filed. **Firstly,** there must be rival

[3] Black's Law Dictionary, 11th Edition page 978
[4] Adams Vs Dixon, (65 Am. Dec. 608), reported in Advanced Law Lexicon, Vol 2 Page 2503

claimants. **Secondly,** the same debt, sum of money or other property, moveable or immoveable must be claimed by two or more claimants. **Thirdly,** the person from whom such debt, sum of money etc. is being claimed must claim no interest in the same. These conditions are set out in Section 88, C.P.C. and re-inforced by Order XXXV, Rule 1, C.P.C **(PLD 2017 SC 1)**.

34.3.1. Interpleader suit, dismissal of

Where the plaintiff/appellant colludes with one of the claimants or has taken indemnity from one of the claimants or has entered into an agreement with one of them to receive less than what is actually payable, an interpleader suit has to be dismissed (**2015 CLC 934 Lhr)**

34.3.2. Interpleader suit by the tenant against landlord {(1999) 121 PLR 161, (1991-1)99 PLR. 181}

- A tenant cannot sue his landlord for compelling him to interplead with any person other than persons making claim through such landlord. If the other person is claiming the property through the previous landlord and then asking for the rent from the tenant, then to settle such different claims by two or more persons, the tenant can file interpleader suit but if the other person is claiming the right and interest in the property independently without any reference to the previous landlord and claiming the rent from the tenant, then the interpleader suit filed by the tenant is not maintainable **[(2006) 142 PLR 791]**.
- Reference may also be had to the provisions of Order XXXV, Rule 5, C.P.C. which reads as follows:

> "5. Agents and tenants may not institute interpleader suits.-- Nothing in this Order shall be deemed to enable agents to sue their principals, or tenants to sue their landlords, for the purpose of compelling them to interplead with any persons

other than persons making claim through such principals or landlords."

From the aforesaid provision it is apparent that said order shall not enable an agent to sue his principal, or tenants to sue their landlords for the purpose of compelling them to interplead with another person or persons other than the persons making claim through such principal or landlord. (**2005 (4) AWC 3514)**

35. JUDGMENT AND DECREE

35.1. Relevant Provisions

Sec 2 (2), 144, Order VII Rule 11, Order XXI Rule 60, 98, 99, 101, 103, sec 2 (9), Order XX, Order XLI CPC

35.2. Definition

- **"Judgment"** means the statement given by the Judge of the grounds of a decree or order. **(Section 2(9) of CPC**
- **"Decree"** means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint [the determination of any question within section 144 and an order under rule 60, 98, 99, 101 or 103 of Order XXI] but shall not include

  a. any adjudication from which an appeal lies as an appeal from an order, or

  b. any order of dismissal for default **(Section 2(9) of CPC)**

35.3. How judgment should be recorded?

That Court/Authority/Forum while passing a judicial order needs to consider the facts narrated before him, peruse the record, if deciding as an appellate court judgment or finding rendered by the fora below, arguments of the parties, pro and contra and thereafter give his own independent reasons/findings. (**2017 CLC 1078)**

35.4. Duty of court while deciding a case ex-parte:

Though when defendants were proceeded ex parte, trial court has jurisdiction to pass decree without recording evidence under Order IX Rule 6 of C.P.C., yet it is not

absolved from duty to apply judicious mind on the basis of available record. (**2016 CLC 482)**

35.5. Nature of decree

The decree should be of such a nature that the Executing Court should execute the same, without going beyond it or making its own interpretation with regard thereto. **(2013 CLC 1171 Peshawar)**

35.6. Purpose of decree

The purpose of final determination of the issues through a final decree is to settle the issues and if this principle is not adhered to, the issues shall never attain finality and there would be chaos and anarchy and the concept of finality of decree shall be eroded and the decree passed by the competent Court of jurisdiction shall become redundant and otiose.....In such a situation would be totally disastrous, shattering the entire warp and woof of the" fabric of judicial system". **(PLD 2005 Karachi 695)**

35.7. Drawing of a decree, postponement of

On judgment being passed, decree automatically follows. Obligation is on the part of the Court to draw up decree in terms of various provisions of Order XX, C.P.C. Drawing up of decree cannot be withheld. The Court cannot evade the performance of its duty of drawing up the decree, which may be preliminary or it may be final, and is not concerned whether such a decree will be executable or not. Once a judgment is delivered and signed, there is no option left with the Court except to draw decree in terms of the judgment. Drawing up of a decree cannot be postponed. (**PLD 2016 Lahore 602)**

35.8. Duty of Court to prepare a proper and complete decree sheet

- It is well settled that a party cannot be penalized for the act or neglect of the Court, or, its officials. None can deny that it was the duty of the Court to prepare a proper and complete decree sheet in line with its

judgment. If it fails to perform its duty, was it fair to punish the party for default of the Court. **(1993 CLC 1202 Lahore)**

- A failure to draw a decree sheet does not operate to change the status of a Civil Court into a Revenue Court and thus, the learned Additional District Judge must have kept the appeal pending and would have called upon the lower Court to draw a decree sheet and send the same to the First Appellate Court. (**2001 CLC 1847)**

35.9. When appeal filed without decree sheet

The requirement of a decree cannot be dispensed with and has to be filed along with the memo of appeal and it is for this reason that where an appeal is admitted without a copy of the decree, time may be granted by the Court in appropriate cases to file the decree sheet **(PLD 2016 SC 409)**

35.10. Common Judgment in two or more suits

A judgment is followed by a decree in a case. But where a common judgment is delivered disposing off two or more suits, how many decrees are to be drawn up in such a case? In this respect in case cited as (**PLD 1969 SC 65)**, august Supreme Court held as under:

> *Order XX Rule 6 of the C.P.C. provides for the contents of a decree including necessary particulars inter alia, the number of the suit, the names and descriptions of the parties, the particulars of the claim, the relief granted or any other determination of the suit. In the circumstances it would be more appropriate that separate decrees are drawn up for each of the consolidated suits.* (**PLD 2016 Lahore 602)**

35.11. Time taken for obtaining certified copy

The time taken by the office or the Court in drawing up a decree after a litigant has applied for a certified copy of judgment being pronounced would be treated as a part of the time taken for obtaining certified copy of the said decree. (**AIR 1961 SC 832)**

36. LIABILITY OF SURETY AND REPRESENTATIVE

36.1. Relevant Provisions

Sec.145, 146, 49, 50 of Code of Civil Procedure, 1908

36.2. Legal representative, liability and obligation

36.2.1. Extent of liability of legal representatives for the satisfaction of decree:

Pecuniary obligation undertaken by deceased promisor would be binding on his legal representatives to the extent of estate of deceased promisor in their hand. **(2015 CLD 1377 SC, 2015 SCMR 1341).** A legal representative is not liable to account for property which could have come into his hands and will not be liable under this section but a separate suit may lie in this respect **(1999 CLC 1244)**. The liability of a legal representative is co-extensive with that of the deceased judgment debtor but it does not extend beyond the assets of the deceased actually received by the legal representative and not duly disposed of **(2016 MLD 493).**

36.2.2. Contractual obligation of legal representatives

Promises contained in the contract bind representatives of the promisor in case of death of such promisor before performance unless a contrary intention appeared from the contract or the performance is dispensed with or excused under provisions of any law. Extent to which contractual obligation was binding on the legal representative of a party to such contract elucidated. **(PLD 1988 SC 67).**

36.2.3. Proceedings by or against representatives

Section 146 CPC is to be treated as supplemental to all the provisions of the Code **(AIR 1958 SC 394)**. This section entitles a person claiming under another, to continue proceedings instituted by or against such person, or against those claiming under such persons **(1997 SCMR 171)**. Where a judgment debtor dies pending execution, the legal representative may continue the same **(PLD 1986 Karachi 206)**. Where a party dies prior to the passage of a decree, the executing Court

cannot substitute legal representatives, as it cannot go behind the decree but this can be done by application to the Court which passed the decree or to the appellant Court (**PLD 1969 Dhaka 658).** In order to maintain an application under section 146 it is not necessary to first implead the persons claiming under a party (**AIR 1947 M 34)**.

36.3. Transferee

36.3.1. Doctrine of "lis pendens" bind the transferee by decree

Any alienation of property pendent lite would be barred by the rule of lis pendens and it could not prejudice the rights of decree holder. Transferee would be bound by the decree against the transferor (**PLD 2019 Lah 148).** Transferee should have performed his part of contract to take benefit of S.53-A of Transfer of Property Act, 1882 (**2017 CLC 1368)**. Provision of S. 52, Transfer of Property Act, 1882 do not preclude the transferee pendent lite from being made a party to the pending proceedings on the basis of such transfer (**1997 SCMR 171).**

36.3.2. Transferee by assignment

Under order XXI Rule 16, the transferee of a decree by assignment in writing or by operation of law, may execute a decree (**2004 YLR 2898)**. Decree holder's interest transferred by operation of law, transferee should apply for execution and for bringing his name on record to Court which passed decree and not to Court to which decree transferred for execution. Application to executing Court is not step-in-aid. (**PLD 1950 Sindh-Chief Court 167).**

36.4. Liability of surety

A surety is one who takes upon himself and guarantees an obligation which rests primarily upon another (**2006 SCMR 619).** Section 145 CPC describes that the liability of a surety may be enforced by means of execution proceedings against the surety, as if the surety was a party to the decree even though his name is not mentioned in the decree (**2000 CLC 451).** A surety is only liable up to extent to which he is bound **2015 YLR 1946.**

36.5. Personal liability of Surety

Proceedings under section 145 CPC can only be taken if the surety has rendered himself personally liable (**PLD 2012 Baluchistan 151).**

36.6. Liability of Surety in Execution:

A decree or order may be executed against the surety in the manner prescribed for the execution of a decree, provided the security was given for any of the purpose enumerated in section 145 CPC. (**2005 SCMR 72).**

36.7. Test for discharge of Surety

(2015 C L C 1704)

a. **Where compromise discharge surety:** If the terms of the bond indicate that the surety undertook the liability on the basis that the dispute should be decided on the merits by the Court and not amicably settled, the compromise will affect a discharge of the surety.

b. **Where compromise do not discharge:** If the terms of the bond show that the parties and the surety contemplated that there might be an amicable settlement as well and the surety executed the bond knowing that he might be liable under the compromise decree, there can be no discharge and the surety will be liable under the compromise decree.

c. **Matters extraneous to the judicial proceedings:** Where the surety bond was executed in favour of Court and by it the surety undertook to pay certain amount of money on behalf of the defendant if decreed by the Court and compromise decree between the parties to the suit introduces complicated provisions or include matters extraneous to the judicial proceedings in which the surety bond was executed, the surety is discharged from his liability.

d. **Fraud or Collusion of parties:** If there is fraud or collusion or any of the matter on which a contract can be set aside, the surety can claim exemption

on these grounds, for consent decree is treated on the same footing as agreements.

e. **Applicability of sections 133 to 141:** Sections 133 to 141 of the Contract Act, 1872 do not in terms apply to the surety bond executed in favour of the Court but their equitable principles apply to it.

f. **Compromise without consent of surety:** Where the plaintiff and defendant have entered into compromise without the consent of the surety by which he is seriously prejudiced and according to which substantial departure is made from the terms of the surety bond under which the surety engages himself to pay the decretal money then of course surety would be discharged.

36.8. Effect of furnishing of surety bonds

Same would not at all constitute embargo upon surety to alienate land subject matter of bond. Such alienation would be subject to consequences provided in S.145, CPC. (**2003 MLD 1382)**

36.9. Surety cannot restraint any action against him

The surety under the law has no right to restrain an action against him rather having stood guarantor, he had substituted himself for his principal and afterwards it was the choice of the decree-holder to proceed any of them severally or both of them jointly. (**2020 CLD 492)**

37. PARTIES TO SUIT

37.1. Relevant Provision

Order I, Code of Civil Procedure, 1908

Parties are persons whose names appear on the record of suit as plaintiff or defendant (**2001 SCMR 1680).**

Only a natural or juristic person can be a party to a suit and suit cannot be brought by or against assumed names (**PLD 1971 Karachi 625).**

37.2. Who may be joined as plaintiff?

- Rule 1 of Order I, CPX permits all persons to join in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, where if such persons brought separate suits any common question of law or fact would arise. (**1988 SCMR 1311)**
- If the plaintiffs have different interests, they may join together as co-plaintiffs provided the right to relief arises out of same act (**PLD 2006 Karachi 593)**
- Where common questions of law or fact would arise, if such persons to institute separate suits, they may join together as co-plaintiffs (**2014 CLC 1714).**
- Where a number of persons are entitled to individual right to relief, arising out of the same act or transaction etc., they may join together as co-plaintiffs, provided any common question of law or fact would arise, were they to institute separate suits (**1985 CLC 1629).**

37.3. Representative Suits

Generally all persons interested in a suit should be made parties to the suit, as number of persons as res judicata in respect of such persons (**AIR 1933 PC 183).** The following conditions must be fulfilled in order to institute representative suit (**2007 SCMR 741):**

i. Persons interested in the suit must be numerous.
ii. They all must have same interest in the suit.
iii. The permission of the court under order I rule 8 should be obtained.
iv. Notice must be given to all the persons whom it is sought to present.

37.4. Who can be impleaded as party

For purpose of Order I rule 10, the parties can either be classified as a necessary party or a proper party. (**2013 SCMR 602)**

37.4.1. Necessary party:

A person who ought to have been joined, it is a necessary party. (**2013 SCMR 602, 2005 SCMR 564, 2003 SCMR 965)**. A suit cannot be preceded in the absence of a necessary party (**PLD 1982 SC 46).**

37.4.2. Proper party

A person against whom no relief is asked for is not a necessary party but may be a proper party (**1983 SCMR 849).** A person whose presence is necessary to effectually and completely adjudicate upon and settle all points involved in a suit, is a proper party (**2013 SCMR 602, 2011 SCMR 882).** The object of the making such persons parties, is to prevent needless multiplicity of suits (**PLJ 1975 SC 345).**

37.4.3. Addition of parties, judicial discretion

The power of adding parties is not a question of initial jurisdiction but of judicial discretion which has to be exercised in view of all the circumstances of the case (**PLD 2002 SC 615).**

37.4.4. Suo moto power of Court

The Court may order the addition of a person as a necessary party or proper party suo moto (**PLD 2001 SC AJK 21).**

37.4.5. To add plaintiff with consent

A person cannot be added as plaintiff without his consent and without the consent of the original plaintiff (**1992 CLC 700).** If party refuses to be added as plaintiff he can be added as defendant.

37.4.6. Striking out parties

Parties, who have no connection whatsoever with the relief sought, may be struck off from the record as parties (**PLD 1972 SC 59)**

37.4.7. Stage of adding or striking parties

Parties can be added or struck out by the Court where the matter is pending at any stage (**2007 SCMR 882).**

37.5. Transposition of parties

Transposition should be allowed where it is necessary for a complete adjudication upon the questions involved in the suit and to avoid multiplicity of proceedings. (**2009 SCMR 1368).** Transposition can be ordered on application made orally or in writing or even sou moto (**PLD 1992 SC 590).**

37.6. Amendment of plaint after adding, striking or transposing parties

The Court should only allow such amendments as are necessitated by the addition or striking out the parties. But the Court cannot permit amendments which will add to or alter the nature of the suit (**1989 SCMR 476).**

37.7. Conduct of Suit

Where a number of persons join together in filling a plaint or written statement, all should not have separate counsel and the Court can give the conduct to one of them otherwise the very object of their joinder will be defeated (**AIR 1928 Cal 143).**

37.8. Appearance of one of several plaintiffs or defendants for others

Where there was common cause or common defence, it was not necessary that each of the defendant should appear to defend their suit, any of them could appear as witness; each party may be separately and individually represented, the Court may put the conduct of the suit in the hands of any one of them (**2010 CLC 191).**

37.9. Misjoinder or non-joinder cannot defeat the suit

Misjoinder or non-joinder of parties cannot defeat a suit **(2009 SCMR 1368).**

37.9.1. Objections to be taken at earliest

Objection to misjoinder or non-joinder of parties should be taken at the earliest possible opportunity (**2013 CLC 135).** All objections in relation to non-joinder or misjoinder if not taken at the earliest possible opportunity, shall be deemed to have been waived (**2011 SCMR 1591)**. The objections cannot be raised before the appellate Court if they were not raised in time before the trial Court (**1992 CLC 784)**

38. PAUPER SUIT AND APPEAL

38.1. Relevant provisions

- Order XXXIII Code of Civil Procedure, 1908
- Volume I, Rules and Orders of the Lahore High Court
- Chapter 1 Part M—Special Features of Certain Classes of Cases- (e) Suits by Paupers

38.2. Definition

Rule 1 of Order XXXIII, CPC, a person is a pauper when he has not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint in such suit, or, where no such fee is prescribed, when he is not entitled to property worth rupees one thousand other than his necessary wearing apparel and the subject matter of the suit. The phrase "sufficient means" refers to all kind of assets which can be realized and converted into cash for the purpose of paying court fee. (**PLD 2012 Sindh 158)**

38.3. The purpose and scope of Order XXXIII

The purpose of law is of three fold: (i) to protect the bona fide claim of a pauper; (ii) to safeguard the interest of the Revenue; (iii) to protect the defendants' right not to be harassed. (**2000 CLC 1442 [Lahore])**

38.4. Suit by pauper

Order 33 rules 1 and 2 permit the filing of a suit by a pauper by making an application for permission to sue. (**1991 CLC 1826 [Lahore])**

38.5. Application to be filed in Court.

Order XXXIII, Rule 3, C.P.C. provides presentation of application in the Court so that examination of applicant under Rule 4 can take place. (**PLD 2012 Sindh 158)**

38.6. Application turns into plaint

Although an application turns into a plaint only on account of permission but for all purposes it is a plaint. The only extraordinary thing about this is that it is asking for

exemption of the court fee and is submitted to the test prescribed by Order XXXIII meant to safeguard the interest of the Provincial Government etc. while also providing a facility to the petitioner. (**2000 CLC 1442 [Lahore], PLD 2012 Sindh 158)** It will be seen that the application to sue in forma pauperism is to be treated as a plaint under rule 8 of Order XXXIII, only after the necessary permission has been granted. There thus appears to be no difficulty as to why if the Court refuses permission to the applicant to sue as pauper, the application should not be treated as the plaint. (**1991 CLC 1826 [Lahore])**

38.7. Power of Court

Under Rule 4, the powers are vested in Court to examine the applicant with respect to his pauperism as well as for the purpose of determining whether a cause of action exists or not. (**PLD 2012 Sindh 158)**

38.8. Application not maintainable if no cause of action

Where, of course, a suit was not otherwise competent and where an application in forma pauper did not show a cause of action, the application is not maintainable. (**2000 CLC 1442 [Lahore])**

38.9. Jurisdiction of Court.

The application under Order XXXIII of the Civil Procedure Code in *forma pauperis* has to follow the dictates of law with respect to jurisdiction, both pecuniary and territorial, although it qualifies to be a suit upon a plaint on the date it receives the permission which itself has a retrospective effect because it is then allowed to be registered as a suit from the date of the filing of the application. (**2000 CLC 1442 [Lahore])** Rule 5 of same order pertains to the rejection of application and lays down the circumstances in which the application for permission to sue in forma pauperis may be rejected (**PLD 2012 Sindh 158)**

38.10. Rejection of plaint at preliminary stage

Plaint can be rejected at the preliminary stage and without issuing any notice to the opposite side and the Government Pleader. The rationale behind this provision is

self obvious that an incompetent application must be rejected in its infancy, so that the applicant can move a fresh application after removing the defects. **(1996 CLC 512)**

38.10.1. Grounds of Rejection

i. **Reject application if there are no ground to sue as pauper:** Order 33, Rule 5, CPC casts a duty on the Court to reject an application for permission to sue in forma pauperis if any of the factors or prohibitions provided in clauses (a) to (e) is present in a case. One of them is whether the allegations contained do not show a cause of action. (**1988 CLC 1210 [Lahore])**

ii. **Application not properly presented:** That the application has not been framed or presented in the manner prescribed by rules. **(1996 CLC 512 [Lahore]).**

38.11. Notice to opposite party

If the plaint does not merit rejection under the provisions of Order 33, rule 5 of the C.P.C. then a notice has to be given to the defendants/petitioners as well as the Government Pleader by virtue of the provisions of rule 6 of the CPC.(**1994 CLC 1300 [Lahore], 1996 CLC 512 [Lahore]))**

38.12. Proof of pauperism

Rule 6 provides that where the Court sees no reason to reject the application on any of the grounds stated in rule 5, it shall fix a day for receiving such evidence as the party may adduce in proof of his pauperism. (**1988 CLC 1210 [Lahore])**

38.13. Decision after examining evidence

Rule 7 provides that after examining the evidence, if any, produced by either party and examining the applicant or his agent the Court shall hear any arguments on the question whether the applicant is or is not subject to any of the prohibitions specified in rule 5. (**1988 CLC 1210 [Lahore])**

38.14. Recording of evidence necessary to declare a person pauper

The plaintiff could only be declared pauper after recording of evidence as laid down in rules 6 and 7 of Order XXXIII, C.P.C. **(1995 C L C 1995 [Lahore])**

38.15. Issuance of injunction at time of decision of application to sue as pauper

Before the grant of such permission, there is no plaint before the civil Court, therefore, the provisions of Order XXXIX could not be invoked for the grant of a temporary injunction at this stage. **(1974 SCMR 461).**

38.16. Date of institution of suit

A suit by a pauper or a person claiming to be a pauper must be regarded as instituted on the date of the presentation of the application for permission to sue in forma pauperis.[5] (**1991 CLC 1826 [Lahore])**

38.17. Principles for filing appeal as a pauper

When appellant is unable to pay the requisite court fee on the memorandum of appeal then

- **a.** he has to present the same with an application praying that he may be allowed to file the appeal as a pauper; and
- **b.** such application is to be presented by the applicant in person unless he is exempted from appearing in the Court, in that case it shall be presented by an authorized agent. **(1995 MLD 1042[Lahore])**

38.18: Inqiry into pauperism

The inquiry into the pauperism is dealt with by rule 2 which provides that the inquiry may be made either by the appellate Court or under its order by the Court from whose decision appeal is preferred. **(1995 MLD 1042[Lahore])** This is again subject to proviso that if the applicant was allowed to sue or appeal as pauper in the Court below then no further inquiry in connection with the pauperism shall be necessary unless the Appellate Court feels necessary.(**1995 MLD 1042[Lahore])**

[5] . (AIR 1962 SC 941, (AIR 1973 SC 2508)

39. PLACE OF SUING [TERRITORIAL & SUBJECT MATTER JURISDICTION]

39.1. Relevant Provisions

- Sections 15 to 24-A of Civil Procedure Code, 1908
- High Court (Lahore) Rules And Orders Vol. I, Chap. 2

39.2. Ordinary suits and special suits (Section 15 CPC)

Ordinary suits were instituted and regulated under Civil Procedure Code, 1908, and were instituted in the Court of the lowest grade competent to try it but suits or proceedings instituted under any other special law had to be instituted in the forum specifically provided in such special law. (**2017 CLD 650)**

39.3. Immoveable property (Section 16 CPC)

Subject to pecuniary or other limitation prescribed by any law suit for determination of any right to or interest in immovable property is to be instituted under S.16(d), CPC within the territorial jurisdiction of the Court where the immovable property is situated. (**2002 MLD 1783)**

39.4. Subject matter jurisdiction

Suit is to be instituted where subject matter situated. (**PLD 2016 SC 174)**

39.5. Immoveable property within jurisdiction of different Courts (Sec 17 of CPC)

Suit for immovable property situated within jurisdiction of different Courts, plaintiff can file suit in either of the Courts, where any portion is situate subject to its value. (**2003 YLR 894)**

39.6. Objection to jurisdiction

Objection regarding territorial jurisdiction could not be raised later unless raised before the Court of first instance "at the earliest possible opportunity". Appellate or revisional Court would only consider such objections provided all three conditions as set down in S. 21, C.P.C. were met; **firstly**, objection as to territorial jurisdiction was raised in the Court of first instance; **secondly**, such objection was raised at the

earliest opportunity and in case the issues were settled, before settlement of issues; and, **thirdly**, there had been consequent failure of justice. (**2018 SCMR 2121, 2003 SCMR 686)**

39.7. Jurisdiction in respect of defendant (Section 20 of CPC)

Section 20, C.P.C. provided that every suit would be filed in a civil Court within whose local limits or jurisdiction the defendant resided or carried on business or where the cause of action wholly or in part occurred. (**2016 CLC 1197)**

39.8. Jurisdiction in respect of cause of action

Suit could be instituted in a Court within the local limits of whose jurisdiction cause of action wholly or in part had arisen. (**2017 CLC 918, 2016 CLC 1197)**

39.9. Transfer of cases (Section 24 A of CPC)

- Section 24-A of CPC was meant for expeditious disposal of cases and it obliged the parties to the proceedings not only to keep track of the case but also about the date fixed in the matter. Said provision was an equitable principle to foster the interest of justice by providing expeditious disposal of the case. (**2014 SCMR 1694)**
- Notice to parties on transfer of case from one Court to another Court was mandatory. (**1997 MLD 2145)**
- Power under S.24, C.P.C should be exercised with due care and diligence because frequent transfer of cases was one of the main causes for delay in administration of justice. Suit could not be transferred from one district to another only on the basis of self-concocted or feared apprehensions. (**2013 MLD 739)** Such application require more substantial grounds than mere comparative convenience of the parties (**PLD 1978 LHR 249)**

39.10. Jurisdiction in case of defamation

Jurisdiction of Courts in defamation cases lay both where the newspaper was published and where it was circulated, with the option to be used by the plaintiff. (**PLD 2015 SC 42)**

39.11. Parties bound by their choice of venue

Parties having chosen the venue for adjudication of their dispute, were bound by their choice. **(1999 YLR 2201)**

40. PLEADINGS AND AMENDMENT OF PLEADINGS

40.1. Relevant provisions

- Order VI of CPC deals with pleadings generally and amendment of pleadings
- Order VII & VIII of CPC deals with Plaint and Written statement and set-off, respectively.
- High Court (Lahore) Rules and Orders Vol. I, Chap. 1, Part C and E.

40.2. Importance of the pleadings and its legal value (2015 SCMR 1698, 2014 SCMR 914)

- On the basis of pleadings, the issues are framed.
- The pleadings by themselves are not the evidence but the parties have to lead the evidence strictly in line and in consonance thereof. A party cannot travel beyond the scope of its pleadings.
- If some evidence has been led which is beyond the scope of its pleadings, the Court shall exclude and ignore such evidence from consideration.

40.3. The rule of *secundum allegata et probata*

The rule of *secundum allegata et probata*, not only excludes the element of surprise but also precludes the party from proving what has not been alleged or pleaded. **(2014 SCMR 914, PLD 2007 SC 582)**

40.4. Particulars of fraud to be mentioned in pleadings

Order 6, Rule 4 of CPC says that in all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, willful default or undue influence and in all other cases necessary particulars shall be stated in the pleading. **(1991 CLC 752)** but the term particulars reference to the detail vary on case to case basis, it is also an established principle of law that parties to the suit cannot be ordered to reveal his evidence. **(2011 CLC 343)**

40.4.1. Purpose of mentioning details

Necessary details are to be furnished for the purpose of making out a prima facie case to establish that a cause of action has accrued for invoking the jurisdiction of the Court **(PLD 2007 SC 302)**

40.4.2. Mention name of witnesses in pleadings

There is no necessity of mentioning the name of witnesses because then it would be a departure from the ordinary law of pleading as provided in Order 6 Rule 5, CPC. as evidence is not required to be noted in the pleadings.

40.4.3. Better statement instead of rejecting plaint

Order VI, Rule 5 is enacted only for clarification of any ambiguity in the pleadings of the parties. The trial Court, if of the opinion that particulars of fraud arc not given in the plaint or some material facts are not clear and are ambiguous, should ask the parties for a better statement under Order VI, Rule 5 instead of rejecting the plaint. **(2011 CLC 343)**

40.5. Amendment in pleadings

If any party to a lis wants to prove or disprove a case and some material has to be brought on the record as part of the evidence, which (evidence) otherwise is not covered by the pleadings, it shall be the duty of such party to first seek amendment of its pleadings. (**2015 SCMR 1698, 2014 SCMR 914)**

40.5.1. Delay in filing application for amendment

Delay alone in applying for the amendment cannot be a determining factor for deciding an application under Order VI, rule 17, CPC. (**PLD 1985 SC 345)**

40.5.2. "Proceedings"

The use of the expression "at any stage of the proceeding" in Rule 17 is not without significance. The word "proceedings" has been interpreted by this Court in a liberal manner so as to give a proper scope as including the appellate stage and that too up to the Supreme Court. (**PLD 1985 SC 345)**

40.5.3. Determination of real controversy

All such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy. Once the Court decides that the amendment is necessary for determining the real question, the Court is required by law to not only to allow an application made by a party but is also bound to direct the amendment for said purpose. (**PLD 1985 SC 345)**

40.5.4. When amendment discretionary and when mandatory

The rule can be divided into two parts. In the cases falling under the first part, the Court has the discretion to allow or not to allow the amendment, but under the second part once the Court comes to a finding that the amendment is necessary for the purpose of determining the real question, it becomes the duty of the Court to permit the amendment. **(PLD 1985 SC 345)**

40.5.5. Cause of action not changed

The nature of the suit in so far as its cause of action is concerned is not changed by the amendment whether it falls under the first part of rule 17 or in the second part, because when the cause of action is changed the suit itself would become different from the on initially filed. (**PLD 1985 SC 345)**

40.6. Effect of filling amended pleadings

Framing of issues

It is on the basis of the amended pleadings that the issues shall be framed and if already so framed, shall be modified to either score off any existing issue or to add the issues arising out of the amended pleadings. **(2015 SCMR 1698)**

Determination and resolution of issues

For the determination and resolution of issues in dispute before the Court, it is the amended pleading which shall be taken into consideration and not the former pleadings. **(2015 SCMR 1698)**

40.6.1. Unauthorised additions in amended pleadings

In cases where there is any unauthorized addition in the amended pleadings for scoring it off or for the purposes of confronting someone within the earlier pleadings as a previous statement, the earlier pleadings may have some relevance. **(2015 SCMR 1698)**

40.7. Amendment not allowed on account of language of pleading

The ground for amendment was that the earlier written statement was in English language which was not understood by the petitioner. As the petitioner having himself submitted written statement in English through a counsel cannot legitimately claim any prejudice. (**PLD 1996 Lahore 429)**

41. PRODUCTION OF DOCUMENTS, ADMISIBILITY AND RETURN OF DOCUMENTS

41.1. Relevant Provision

Order XI, XIV Rule 4, XIII CPC

41.2. Time of production of documents

(1991 SCMR 1935, 2002 CLC 655 Lah. 1991 SCMR 1935)

i. **Filling of pleadings:** First stage in a suit for production of documents for the plaintiff is at the time of filing of suit or presentation of plaint (Order 7, Rule 14 CPC) and for the defendant is at, the time of filing of written statement.

ii. **Order XI Rule 1:** If first stage is not availed of and a party considers that a document he seeks to rely upon in support of its claim or defense is in possession or control of other, then recourse to Order XI, rule 1, C.P.C. may be had whereby a party may be called upon to deliver interrogatories.

iii. **Order XI Rule 12:** In case it is not followed then a party to the proceedings may take recourse to Order XI, rule 12, C.P.C. and call upon other party to disclose all the documents in his possession relating to the question in issue under the order of the Court.

iv. **On the first date of hearing:** On the first date of hearing i.e. date of framing of issues, parties to the suit are required to produce all the documentary evidence of every description in their possession or power on which they intend to rely and which has not already been filed in Court (Order XIII, rule 1, C.P.C.)

v. **Order XIV Rule 4:** Where the Court is of opinion that issues cannot be correctly framed without inspection of some documents not produced in suit, it may compel the production of any such document by the person in whose possession or power it is (Order XIV, rule 4, C.P.C.)

41.3. Production of document at subsequent stage

Where genuineness of the document is beyond doubt it ought not to be shut out of evidence if produced at a late stage. **(2001 YLR 2272).** Public documents of unimpeachable authenticity might be entertained at a late stage. **(2009 YLR 2265)**

41.4. Object of O. XIII , Rr.1 & 2, C.P.C.

- That nobody should be taken by surprise and there should be transparency about the procedure. **(2006 CLC 534 Lahore)**
- To exclude forged documents and to expedite trial and not to exclude genuine documents. **(999 CLC 1142 Lahore)**
- To prevent fraud and not to penalize the parties for non-production of documents on the first hearing of the suit or at the time of filing of plaint or written statement. (**PLD 2020 Quetta 5, 2018 CLC 1569 Islamabad**, **2016 YLR 2197 Karachi and 2009 YLR 2265 Lahore)**

41.5. Effect of non-filing of documents along with plaint

- **Not fatal:** Such non-filing has never been considered fatal in view of provisions of O.XIII , R.2 C.P.C. which empowers the Court to receive documentary evidence during the trial. (**2005 SCMR 152)**
- **Court can consider documents:** Order XIII, R. 1 & 2, C.P.C. empower the court to allow consideration of documents even during recording of evidence or even after the evidence had been completed. (**2016 YLR 2197 Karachi)**
- **Documents which should not be allowed at belated stage:** Private documents, which can be very conveniently prepared by the parties any moment are normally not allowed to be produced at a belated stage. **(1990 MLD 1934)**
- **Good Cause:** Good cause and reasons to the satisfaction of Trial Court for producing documentary evidence at a subsequent stage of proceedings is necessary. (**1999 SCMR 951)**. 'Good cause' for placing documents could be

interpreted as documents in absence of which no effective decree could be passed. **(2017 CLCN 180 Lahore).** Expression "good cause" as used in O.XIII , R. 2, C.P.C. being wider than "sufficient cause" would be construed liberally. **(2012 MLD 417 Lahore)**. Inadvertence, could not be considered a good cause to allow the production of documents, which were neither relied upon in the list of reliance nor appended with the plaint. (**2012 CLC 234 Lahore)**

41.6. Exhibit of document- Meaning

Word 'exhibit' means a document or tangible object produced before Court for its inspection or shown to a witness while giving evidence or referring the same in his deposition so that it can be taken into possession and retained by Court on the lis file for reference as well as identification in judgment. Ex-Hypothesi exhibit means a document exhibited for purpose for being taken into consideration in deciding some question or other in respect of proceedings in which it is filed. **(PLD 2018 Lahore 132)**

41.6.1. How document is exhibited

When a party intends to prove a document through witnesses, he only refers that document for its proof, the Court exhibits the same. Witness has no role in marking document as exhibit rather it is sole duty of Court to assign exhibit number to document so that in latter part of proceedings it may be referred as identified from said number **(PLD 2018 Lahore 132)**

41.7. Effect of exhibiting document without objection

41.7.1. Once any document was exhibited without objection from opposite side such document cannot be termed as inadmissible evidence. **(2014 SCMR 630)** It shall be considered to have waived right to resist the mechanics of the proof thereof. (**2015 SCMR 21)** Document having been produced and exhibited without any objection, cannot be challenged either in appeal or before any other forum superior in hierarchy. **(2011 SCMR 1162)**

41.7.2. Objection at "earliest point of time"

Objection as to formal proof of document must be taken at "earliest point of time"- Cannot be taken subsequently and "certainly not in appeal" - Document marked as an exhibit becomes admissible in evidence. (**1968 PLD 140 SC)**

41.7.3. Documents exhibited in statement of counsel

Documents exhibited in statement of plaintiff's counsel---Non-raising of objection by defendant at relevant time before trial Court---Held: defendant was estopped to raise objection to admissibility in evidence of such documents. **(2006 YLR 2517 Lahore)**

41.7.4. Power of Court to consider non-exhibited document

Court was fully competent to consider all documents whether these were exhibited or not for reaching the true conclusion of the controversy. **(2010 MLD 1162 Lahore)** Documents exhibited in evidence or not---Validity---Court had power to consider all such documents to arrive at a just conclusion. **(2011 CLD 1361 Lahore)**

41.8. Certain formalities not complied

- **Failure to make endorsement on those documents**: Failure of trial Court to make endorsement on documents produced in evidence was nothing but a procedural irregularity, which was curable under provision of S. 99 CPC. **(PLD 1994 Lahore 399, 2001 YLR 2230 Karachi)** Mere failure to exhibit a document formally would not make any difference and if same was found necessary for -just decision of the case **(1993 CLC 1158 Lahore)**
- **Document marked instead of exhibit:** No objection was noted on the record produced by witness during his evidence. Marking of such documents would not derogate from the probative value of the same. **(2005 MLD 1577 Lahore)** Documents not produced and proved in

evidence but only marked could not be considered by courts as a legal evidence of a fact. (**2011 SCMR 1013, 2016 CLR at p.563)**

- **Judge failing to sign and initial documents:** Omission to mark documents produced by parties-Mere irregularity-Documents placed on record; Court competent to look into and consider, even if documents are not exhibited. **(1975 PLD 1170 Lahore, 2003 CLC 547 Lahore)**

41.9. Irrelevant or inadmissible documents if exhibited

Mere admissibility of document as evidence was not ipso facto the proof of its execution ---Due execution of document was required to be proved in consonance with the provisions of Qanun-e-Shahadat, 1984. **(2018 CLC 1569 Islamabad, 2018 YLR 2118 Lahore, PLD 2006 Lahore 48)**

41.9.1. Opposite party can object admissibility

Receiving a document in evidence and marking it as an exhibit does not debar the other party from questioning its admissibility later---Merely exhibiting a document does not dispense with onus to prove the same. **(2018 CLC 1569 Islamabad)**

41.9.2. Court can reject

Even if no objection was taken by the other side when the document was exhibited, the Court is not prevented from adjudicating its nature, whether it is valid or not, or whether it is fake or not. **(2007 SCMR 1719)** Court could reject a document at any stage which was found irrelevant or inadmissible. **(2018 CLC 1569 Islamabad, 2014 MLD 303 Quetta)**

41.9.3. Document cannot be removed from record

Expression 'de-exhibit' was not defined nor mentioned in C.P.C. No provision existed in C.P.C. for removing a document from record which had been marked as 'exhibit'. **(2018 CLC 1569 Islamabad)**

41.9.4. Marked documents

Document not produced and proved in evidence but only marked could not be considered by Courts as a legal evidence of a fact. (**2011 SCMR 1013, 2005**

SCMR 152, 2019 CLC 1096-Balochistan, 2003 MLD 67 Lahore, LHC Civil Revision No.5379 of 2019)

41.9.5. Effect of exhibiting photo copy instead of original

Exhibiting photo copy instead of original document without obtaining leave from Trial Court to lead secondary evidence after proof of loss or destruction of original one---Effect-- Presumption would be that had same been produced in Court, same would have been unfavourable to plaintiff---Plaintiff, held, was guilty of withholding best available primary evidence. **(PLD 2003 SC 410)**

41.10. Document compulsorily registerable but not registered

Such document would be inadmissible in evidence and could not he relied upon for conferring rights and interest on parties, even if same was allowed to be produced and exhibited in evidence. **(2007 YLR 2440 Lahore)**

41.11. Documents not to be treated as substantive evidence

i. **Written statement:** Written statement could neither be exhibited in evidence without examining person having filed same nor be treated as substantive evidence except where same amounted to admission of plaintiff's plea. Such document could not be taken into consideration by Court. **(2010 PLD 604 SC)**

ii. **Local Commissioner's report:** Local Commissioner's report regarding inspection of property---Report not exhibited by examining Local Commissioner as same was not objected to by any of the parties---Validity---Court could refer such report to explain evidence on record. Such report independently could not form basis for grant of relief. **(PLD 2004 SC 633)**

iii. **Non-exhibited documents:** Non-exhibited document could not be used against the valuable rights of the parties. **(2011 YLR 1189 Lahore)**

iv. **Entries in Bankers' Books:** Documents relating to entries in Bankers' Books not attested by Bank, but exhibited in evidence---Validity---Such documents would have no evidentiary value. **(2007 CLD 667 Lahore)**

41.12. Admissibility of certified copies of documents

Non-production of documents according to provisions of C.P.C. would be merely an irregularity, Certified copies of such documents were available on record---Nothing in law prevented Court from looking into such documents even if they were not exhibited, provided these had been placed on record by party concerned---Such documents were admissible in evidence. **(2017 CLC 495 Karachi, PLD 2007 Lahore 358 and PLD 2003 Lahore 255)**

41.13. Order XIII not to be strictly observed by Rent Controller

Strict observance of provisions of O. XIII , Rr. 4 & 5, C.P.C. in respect of documents admitted and exhibited in evidence before Rent Controller is not required and non-observance of such provisions would not vitiate his order. **(PLD 1987 Lahore 468)**

41.14. Receive back documents

Party filing documents in Court-Held, only such party entitled to receive back and not any other party. **(1982 CLC 2191 Karachi)**

42. PUBLIC NUISANCE

42.1. Relevant Provisions

- Section 91 of the Code Of Civil Procedure, 1908
- Section 2(44) of the General Clauses Act, 1897

42.2. Definition

- Under section 91, C.P.C. word `nuisance' has not been defined, therefore, to find out its meanings, reference has to be made to section 3(47) of the General Clauses Act, 1897, wherein it has been defined as under:--
  "Public Nuisance".--In the Pakistan Penal Code `public nuisance' has been defined as under:- "Section 268. A person is guilty of a public nuisance who does any act or is guilty of an illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right." "A common nuisance is not excused on the ground that it causes some convenience or advantage." (**PLD 2004 SC 633)**
- The term public nuisance as mentioned in Black's Law Dictionary, American Jurisprudence, Words and Phrases is discussed in detail in (**PLD 2004 SC 633)**
- Expression of `public nuisance' had also been defined/explained in the following terms:--

> "The word `nuisance' is derived from French word `Nuire' which means to injure, hurt or harm. According to Shorter Oxford Dictionary, it means `anything injurious or obnoxious to the community or to the individual as member of it, for which some legal remedy may be found'. Liberally anything that causes annoyance or that works hurt or injury, harm or

prejudice to an individual or the public or anything wrongfully done or permitted which injures or annoys another in the legitimate enjoyment of his legal rights would constitute nuisance. In short anything done which unwarrantably affects the right of the others, endangers life or health, gives offence to the sense, violates the laws of decency or obstructs the comfortable and reasonable use of property may amount to nuisance." **(1991 MLD 1340)**

42.3. Difference between public and private nuisance

From the plain reading of the section, difference seems to be prevalent between a public nuisance and a private nuisance. In a public nuisance the act done by a defendant is supposed to be primarily illegal whereas in a private nuisance, even a legal act could cause injury, danger or annoyance to another person. The very opening sentence of the section presupposes that a person can be held guilty of a public nuisance only when any act or omission done by him is illegal. The doing of any act or being guilty of an illegal omission are joined in the section by conjunction 'or' which preconditions the act as well as omission with illegality. **(2007 SCMR 1157, 2005 SCMR 142)**

42.4. Procedure of filing suit

Before amendment of S. 91(1), C.P.C, consent of Advocate General was required to file civil suit regarding public nuisance---After amendment of S. 91(1) by Code of Civil Procedure (Punjab Amendment) Act (XIV of 2018) now only 'leave of the Court' was necessary for filing such a suit. Now after aforementioned Amendment... "91. Public nuisance.- (1) In the case of a public nuisance the Advocate General, or two or more persons [with the leave of the Court], may institute a suit, though no special damage has been caused, for a declaration and injunction or for such other relief as may be appropriate to the circumstances of the case. **(PLD 2019 Lahore 751)**

42.5. Right of individual

Under common law, an individual cannot maintain an action in respect of public nuisance without proof of special damages. **(PLD 2004 SC 633)**

42.6. Damages not necessarily to be pecuniary

The damage need not necessarily be pecuniary but should be material or substantial i.e. not merely sentimental, speculative or trifling or merely temporary. **(1995 CLC 846)**

42.7. Relief in suit for injunction and damages

Relief for filing a suit for injunction and damages would be available in both kinds of nuisance. **(PLD 2004 SC 633, 2007 SCMR 1157**)

42.8. Nuisance, question of fact

The existence of nuisance occurring or apprehended is a pure question of fact which, in cases of permanent injunction or damages, is to be proved through evidence. **(2007 SCMR 1157, 2005 S C M R 142)**

42.9. Proof of nuisance

Evidence would not be judged by its volume. Testimony of few witnesses might be sufficient to prove that nuisance was injurious to physical comfort of community. Even a noise made in carrying on of lawful trade, under licence, if injurious to physical comfort of community, would be a "public nuisance". **(PLD 2004 SC 633)**

42.10. Nuisance and constitutional jurisdiction

Causing of nuisance to inhabitants of locality was a matter which could not be adjudicated upon by High Court as not only disputed questions of fact were involved but also such inhabitants would have alternative remedy both under civil law as well as Criminal Procedure Code, 1898 (**2007 C L C 1345)**

42.11. Examples of nuisance

- Any person in the immediate neighborhood and entitled to use public thoroughfare would have a special cause of action, where it was obstructed and he could sue without proof of special damage. (**1994 C L C 1401)**
- Conversion of a residential property into commercial **(1999 CLC 66)**
- Opening and establishing of a school in the residential area **(1999 CLC 66)**
- Shops/Khokhas established by petitioners beside the wall of the government hospital (**1999 M L D 411)**
- Blockage of a road (**P L D 1999 Lahore 305)**
- Interference with the use of a public street resulting in annoyance to public constitutes a `public nuisance'. **(P L D 2004 Lahore 744)**
- On the criminal side even a noise made in carrying on of lawful trade under licence, if injurious to physical comfort of community is a public nuisance. **(PLD 1968 Dacca 823)**

43. REJECTION OF PLAINT

43.1. Relevant Provision

Order VII Rule 11 CPC

43.2. Object

Object of powers conferred upon trial Court under O.VII, R.11, C.P.C. is that the Courts must put an end to litigation at the very initial stage, when on account of some legal impediments full-fledged trial would be a futile exercise. (**2014 SCMR 513)**

43.3. Mandatory provision

Word "shall" as used in O. VII, R. 11, C.P.C., made mandatory on Court to reject plaint in case of finding one or more of its four clauses applicable thereto. (**PLD 2012 SC 247)**

43.4. Situations not exhaustive

Order VII, R. 11, is not exhaustive of all situations in which a plaint can be rejected or a suit can be dismissed summarily. (**1981 SCMR 878)**

43.5. Without application of any party

The Court is not only empowered but under obligation to reject the plaint, even without any application from a party, if the same is hit by any of the clauses mentioned under rule 11 of Order VII, C.P.C. (**2007 SCMR 741)**

43.6. Rejection of plaint on technical ground

Rejection of plaint on technical grounds would amount to deprive a person from his legitimate right of availing the legal remedy for undoing the wrong done in respect of his such right. (**PLD 2008 SC 650)**

43.7. Plaint can be rejected on point of Limitation

Plaint can be rejected if the suit is time barred. Expression "barred by any law" occurring in O. VII; R. 11(d) includes the law of limitation. (**2000 SCMR 1305).** Where suit was patently barred by limitation, no recording of evidence was

required, and Court could reject the plaint under O. VII, R. 11, C.P.C. (**2016 SCMR 910)**

43.8. Rejection of plaint and res judicata

Since rejection of plaint did not operate as res judicata against the plaint if in the subsequent suit, it could not operate as such against a party who was a defendant. (**2017 SCMR 172)** Order of trial Court rejecting plaint of subsequent suit on ground that an earlier suit of same nature had concluded under O. VII, r. II, CPC.- Held, unexceptionable. (**1983 SCMR 1022)**

43.9. Distinction between rejection & dismissal

Rejection of plaint and dismissal of suit---Distinction highlighted. (**PLD 2012 SC 247).**

43.10. Rejection amounts to decree

Order rejecting a plaint is certainly a decree in terms of the definition of the expression "decree" contained in S.2(2), C.P.C. and would carry the same degree of finality and enforceability unless provided otherwise by law. (**2009 SCMR 1079)** Rejection of plaint was not an adjudication on merits and it was decree only by fiction. (**2007 SCMR 945).** Being decree, it is challengeable in appeal under S.96, CPC. (**2003 SCMR 157)**

43.11. When plaint cannot be rejected

- **Application u/s 12(2) is not plaint and cannot be rejected**

Application under S. 12(2), C.P.C. could hardly be treated as plaint within meaning of O. VII, R. 1, C. P. C. so as to be dismissed under O.VII, R. 11. CPC. (**1996 SCMR 1528)**

- **Plaint cannot be rejected on basis of written statement**

Order VII, R.11, CPC could not be attracted on basis of written statement as initial burden would remain on plaintiff/applicant to prove his case on basis of assertions made in pleadings of parties could not be taken as evidence, particularly when its

maker was not even examined in its support and cross-examined by his opponent. (**2008 SCMR 236)**

- **Plaint cannot be rejected on basis of defendant plea**

Court while rejecting the plaint cannot take into consideration the plea of defendant when such plea is disputed and denied by the plaintiff. (**1994 SCMR 826)**

- **Opportunity to make up deficiency of court fee**

Court was obliged under provision of O.VII, R. 11(c), C.P.C. to afford one opportunity to plaintiff to supply deficiency in court-fee before rejection of plaint. (**1994 SCMR 1756)** Opportunity to make up deficiency in Court fee having not been afforded to plaintiff, he could have assailed order of rejection of plaint by means of appeal. (**PLD 1996 SC 246)**Where plaint was written upon insufficiently stamped paper, the court was duty bound to first determine the exact amount of court-fee payable, and secondly, to afford plaintiff opportunity to make good for its deficiency and thirdly to take further steps in a suit after getting requisite stamp paper of the court-fee. (**2018 MLD 2070)**

- **Piecemeal:** Plaint cannot be rejected in piecemeal. **(2013 SLJ 1116)**

44. RETURN OF PLAINT

44.1. Relevant provision

Order VII Rule 10 CPC

44.2. Mandatory

Provisions of O.VII, R. 10, C.P.C. are mandatory and when the Court has no jurisdiction to hear the suit it is under a compulsion to return the plaint for presentation before the proper Court. (**1995 SCMR 584)**

44.3. Return of plaint

Suit cannot be dismissed on account of its having been instituted before a wrong forum. Plaint should be returned for being filed before competent Court. (**1979 CLC 186)**

44.4. Plaint should be returned if Court lacks territorial jurisdiction

Subject matter of case was within territorial jurisdiction of place "M", whereas plaintiff instituted suit in civil Court at place "L", which Court lacked territorial jurisdiction to entertain the Suit. Trial Court, should have returned the plaint for its presentation before proper forum for adjudication in accordance with law. (**2016 MLD 1077)**

44.5. Plaint partially returning of

Prayer of a plaint and the facts pleaded are to be considered fully while applying Order VII, Rule 10 & 11of CPC. A plaint cannot be rejected partially or partially returned. Plaint in which even there is a small point determinable by the civil Court and even the major portion of cause of action or a prayer is not within the jurisdiction of the civil Court to determine, even then a plaint cannot be partially returned. **(2014 YLR 1222)**

44.6. Limitation in case of return of plaint

The plaint on its return is to be presented in the Court of competent jurisdiction in fresh suit. The period of limitation will be computed from the date of accrual of

cause of action till filing of the suit in the Court of competent jurisdiction. (**2009 CLD 1671)**

44.7. Return of plaint not decree

Order returning plaint or appeal being not a decree, no appeal would lie against order returning plaint or appeal for presentation in proper Court. (**2000 CLC 1290)**

44.8. Return of plaint after decree in Suit

Trial Court having become functus officio after decreeing the suit, could not have returned plaint. (**1997 CLC 768 Lahore)**

45. REMAND OF CIVIL CASE

45.1. Purpose of remand

To meet the ends of justice it was deemed proper and for doing complete justice to afford opportunities to both the parties to lead fresh evidence on the material issues. **(1996 S C M R 1921)**

45.2. Remand to be avoided

- By avoiding remand the parties are saved of the torture of another round of litigation. **(2007 S C M R 1867)**
- Remand of the case should be ordered in exceptional circumstances when it is found necessary by the Appellate Court to determine the question of fact which appears to the Appellate Court to be essential for a right decision of the suit upon the merits. **(2010 SCMR 1119).** This power should not be exercised lightly but sufficient care should be taken in remanding the case. **(1997 SCMR 524)**
- This Court has, on a number of occasions, reiterated that if evidence on record is sufficient, the Court of appeal should finally decide the matter rather than remanding it to the subordinate forum. **(2010 SCMR 1119, 2007 SCMR 1867, 1993 SCMR 216, PLD 1965 S C 434)**
- The Court should examine the evidence and if it comes to the conclusion that it is not sufficient to pronounce the judgment or decide the issues between the parties, it can remand the case or may itself record the evidence and decide it. **(1997 SCMR 524)**

45.3. High Court fully entitled to dispose of issues left rather than remand of case

The learned Judge of the High Court was under no obligation to make an order of remand and was fully competent to dispose of the issues left undetermined by the

first Appellate Court. Learned counsel could not place before us any statutory provision or a judicial authority to the contrary effect. (**1975 S C M R 221)**

46. RES-JUDICATA

46.1. Relevant provisions

- Section 11 Code of Civil Procedure, 1908
- Chapter 1, volume I, Rules and Orders of the Lahore High Court
  a. Part-E, Written Statement Rule 6, about plea of *Res Judicata*.
  b. Part-F- Settlement of Issues Rule 8, about examination of parties or their pleaders and that the statement should fully elucidate facts constituting plea of *Res Judicata*.

46.2. Object

- The rule of *res judicata* is based on the consideration that same cause should not be tried for the second time between the same parties and there must be an end to the litigation between the parties. (**PLD 2005 SC 511)**
- Res judicata is the Latin term for "a matter (already) judged" and entails the concept of claim preclusion; once a matter has been decided and adjudicated on merits by an adjudicatory body, the same cannot be raised again. **(PLD 2018 SC 322)**
- The purpose of this principle is to create repose and to prevent multiple and possibly contradictory findings on the same issues and to curb unnecessary delays in proceedings. **(PLD 2018 SC 322)**

46.3. Conditions to attract principle of res-judicata

- **Matter in issue is same in both suits:** The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue either actually or constructively in the former suit. (**2000 SCMR 1172)** The principle is that since the cause of action in a suit merges in the judgment, therefore, no second suit can be filed on the basis of same cause of action unless it is shown that it was recurring in nature. (**PLD 2005 SC 511)**

- **Between same parties:** The former suit must have been a suit between the same parties or between parties under whom they or anyone of them claim. (**2000 SCMR 1172)**
- **Title in both suits the same:** The parties, as aforesaid, must have litigated under the same title in the former suit. (**2000 SCMR 1172)**
- **Former Court must be competent:** The Court which decided the former suit must have been a Court competent to try the subsequent suit in which such issue is subsequently raised. (**2000 SCMR 1172)**
- **Matter heard and finally decided:** The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the Court in the first suit. (**2000 SCMR 1172).** If matter in issue in the subsequent litigation was not substantially decided in the earlier litigation, it would not be res judicata actually or constructively because for res judicata, it is essential to show that earlier decision in the matter was based on proper adjudication on the relevant issue either of law or fact or mixed issue of law and fact. (**PLD 2005 SC 511)**
- **Mere observation on facts would not operate res judicata:** The adjudication on question of law or fact or mixed question of law and fact on the basis of established set of facts and the determination of such questions in the judgment, would essentially be res judicata if the facts were found to have satisfied the requirement of law but the finding or mere observation on a question of fact without proper adjudication and any evidence would not operate as res judicata. (**PLD 2005 SC 511)**

46.4. Decisions rendered finally, even if erroneous on question of law, res-judicata between the parties

Even erroneous decision on the question of law operates as "res judicata" between the parties to it.[6] The question whether decision is correct or erroneous has no bearing upon the question whether it operates or does not operate as res judicata. The doctrine is that in certain circumstances the Court shall not try a suit or issue but shall deal with the matter on the footing that it is a matter no longer open to contest by reason of a previous decision. In these circumstances it must necessarily be wrong for a Court to try the suit or issue, come to its own conclusion thereon, consider whether the previous decision is right and give effect to it or not according as it conceives the previous decision to be right or wrong. **(PLD 1987 SC 145, 2019 SCMR 998, PLD 2005 SC 430)**

46.5. Interlocutory applications

Interlocutory applications cannot be regarded as 'suits'; hence, strictly speaking section 11 of the CPC would not be attracted to such applications. **(PLD 2018 SC 322)** An order passed pursuant to any interlocutory application at one stage of the proceedings would operate as a bar upon similar interlocutory applications made at a subsequent stage of the proceedings based on the general principles of res judicata. **(PLD 2018 SC 322)**

46.6. Constructive res-judicata

The doctrine of actual res judicata bars the subsequent adjudication of a matter which was actually alleged by a party in a former suit. The doctrine of constructive res judicata on the other hand, bars the trial in a subsequent suit of matters not alleged by either of the parties in the former suit, but which might and ought to have been alleged. (**2005 SCMR 699)**

---

[6] AIR 1968 SC 1328, AIR 1953 SC 65)

46.6.1. Rationale of constructive res judicata

The rationale behind the constructive res judicata is that if the parties have had an opportunity of asserting a ground in support of their claim or defence in a former suit and have not done so, they shall be deemed to have raised such ground in the former suit and it shall be further deemed that such ground had been heard and decided as if such matter had been actually in issue. Thus, such parties shall be precluded from raising these grounds in a subsequent suit. **(2005 PTD 2286 SC, 1997 SCMR 1796)**

46.7. Non-applicability of doctrine of res-judicata - instances

- **Rejection of plaint:** Rejection of plaint has not an adjudication on merits. It is a decree only by fiction, therefore, there is no bar to file fresh suit. (**2017 SCMR 172, 2007 SCMR 945, PLD 1973 Lah. 495, 1984 CLC 2392).** It is evident from Order VII, rule 13, C.P.C. that rejection of plaint does not preclude the presentation of fresh plaint and the plaint was also not liable to be dismissed on the well-known principle of res judicata. (**2007 SCMR 945, PLD 1992 SC 256, 1995 MLD 1563, 2001 YLR 1241, 1989 SCMR 58).**
- **Withdrawal of suit:** It is established law that a mere withdrawal of a suit does not operate as res judicata for the reason, if for nothing else, that there was no adjudication on merits." **(2007 S C M R 289, PLD 1983 SC 344)**
- **The proof of new facts or circumstances in respect of interlocutory application:** The proof of new facts or circumstances is necessary in order to exclude the application from the bar of res judicata in respect of interlocutory applications during the pendency of a suit. A further exception is where an application is dismissed as being premature; this is not a decision on merits and would not operate as res judicata. **(PLD 2018 SC 322)**

47. RES SUB-JUDICE/ STAY OF SUIT

47.1. Relevant provision

Section 10 Code of Civil Procedure, 1908.

47.2. General rule of res sub judice

Under Section 10 has been desired by the legislature that the proceedings in the second suit will be stayed until and unless the first suit on the same subject is decided by the court. Meaning thereby the second suit can be filed by the plaintiff in presence of the first suit but the proceedings in the second suit will be kept in abeyance till decision of the first suit. **(PLD 2018 Lahore 678)** Section 10 encapsulates the principle of res sub judice. Section 10 provides that a Court shall stay its hands in proceeding with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties. **(2017 CLD 959 [Lahore])**

47.3. Object

The multiplicity of litigation should be avoided and no one should be troubled twice for the same cause (**2006 SCMR 1262)**

47.4. Conditions of res sub judice

- **Matter in issue is same in both suits:** A plain reading of section 10, C. P. C. makes it abundantly clear that an essential condition for the application of the section is that the matter in issue in the subsequent suit is "also directly and substantially in issue in the previously instituted suit between the same parties." (**1977 SCMR 166)**
- **Courts of concurrent jurisdiction:** That both the Court which entertained the first suit, and the Court before which the subsequent suit is pending should be Courts of concurrent jurisdiction. (**1999 YLR 2659)**

47.5. No bar to file fresh suit

The phrase "no Court shall proceed with the trial of any suit" does not debar a party to institute a second suit but bar is to the extent of trial of the suit and stay would be operative so far as final decision of the suit is concerned. **(2006 CLC 1664)**

47.6. No bar to decide interlocutory application

That stay operates against the final decision, it cannot deprive the civil Court from passing orders on interim applications and granting interlocutory reliefs such as interim injunction or attachment before judgment and appointment of receiver etc. **(2006 CLC 1664)**

47.7. Withdrawal of earlier suit

As far as the maintainability of the subsequent suit is concerned, there is no bar under the law to file a subsequent suit in the presence of the earlier one and when earlier suit is withdrawn after institution of the subsequent suit, then the provisions of Order XXIII of CPC are also not attracted and fresh suit could not be declared to be barred by law. (**2018 MLD 401[Lahore], PLD 1983 SC 344)**

47.8. Principle of res sub-judice and suits under the Family Courts Act, 1964

By virtue of section 17 of The Family Courts Act, 1964 all the provisions of The Civil Procedure Code were exempted from the applicability to the proceedings before the Family Court except its sections 10 and 11. (**2016 YLR 1316 [Lahore])**

47.9. Revival of suit stayed under section 10 C.P.C

A suit can be revived or restored if its proceedings are stayed under section 10, C.P.C. or it is dismissed for non-prosecution. (**2011 YLR 2863 [Lahore])**

48. RESTITUTION

48.1. Relevant Provision

Sec 144 and 151 of CPC

48.2. Object

- The object of section 144, CPC is to place the parties in the same position as they were prior to the decree which has been varied/reversed by a Court of competent jurisdiction **(PLD 1999 Quetta 56).**
- Once the judgment and decree had been set aside, the entire superstructure built thereon fell to the ground and the parties were restored to the same position as if no judgment and decree had been passed by the High Court **(2016 SCMR 1773, 2001 MLD 1044 Lhr)**

48.3. Conditions precedent for restitution

A plain reading of the aforesaid section reveals that principle of restitution is applicable or attracted where the applicant fulfils the following conditions:--

a. The restitution must be in respect of the decree which had been varied or reversed,
b. The party applying for restitution must be entitled to benefit under the reversing decree,
c. The relief must be properly consequential on reversal and variation of decree and is not opposed to any other principle of equity (**PLD 2013 Lahore 264)**.

48.4. Restitution against the decree holder

It is settled law that restitution is ordered against the holder of a decree who has deprived the other party of some benefit on the basis of such decree and upon variance or reversal of the decree, the Court calls upon him to restitute said benefit **(2016 SCMR 1773, 2009 CLC 1136 Lhr)**

48.5. Reversal/variation of decree by Court

- A decree may be varied or reversed not only by an appeal but by revision to a superior Court which may either affirm, set aside or modify the decree. A Court may review its own decree and set it aside **(1949 Patna 133)**
- If an applicant under section 144 shows to the Court that decree passed against him has been varied or reversed by the first appellate Court or by the superior Court, the provision as contained in section 144 would be applicable and such party would be entitled to restitution under said provision **(PLD 1977 Lahore 409).**

48.6. Specific direction by the appellate Court about restitution not necessary

It is not at all necessary that the appellate order should specifically direct the restitution of the property whenever the order passed by the Court of first instance is varied or reversed (**PLD 1965 (W. P.) Lahore 374)**

48.7. Remedy of restitution before Court of first instance

Upon variation or reversal of order or decree, the right of restitution arises automatically and claimable before the Court of first instance (**2009 CLC 513 Lhr)**.

48.8. Power to order restitution is inherent in the Court

The concept of restitution is as old as the law itself. Section 144, C.P.C. provides the procedure, therefore, while the power to order restitution is inherent in Court **(2001 MLD 1044 Lhr, 1998 CLC 1043 Lhr)**.

48.9. Limitation

Because Article 182, by virtue of the Law Reforms Ordinance, 1972, has been repealed, any discussion in this behalf, shall be of academic interest alone. Therefore, the only provision, which remains in field, is the residuary Article 181 and therefore the application under section 144 C.P.C, should be governed by the

said Article **(2001 YLR 2497, PLD 2005 Lahore 129, PLD 1996 Lah 582 & 1979 CLC 16)**

48.10. Order of restitution u/s 151 CPC

Section 144 can apply only if a decree of the Court is varied or reversed. An order of restitution should be treated to have been passed, as it was actually passed, under section 151, CPC and an order passed under that section is revisable (**1979 CLC 530)**

48.11.Separate suit for restitution

The Court where it wants to repair the injury done to the party by his action, can grant restitution on the principle that a Court of justice has a duty to repair the injury done to the party by his acts and that duty the Court can exercise under section 144 or section 151 of the Civil Procedure Code, 1908. Therefore, a person who has these remedies open to him, cannot file a separate suit for getting restitution of the property from the person who got the property by transfer from the auction-purchaser during the pendency of proceedings for setting aside sale. **(PLD 1960 Dacca 452)**

48.12. Transferee Court - order restitution

The decree was sent from the Jamtara Court to the Asansol Court for execution. The Asansol Court executed the decree and thereupon it became functus officio....the Patna High Court reversing the order of the Jamtara Court, restored the sale of the property in the Jamtara Court and declared it to be valid ... therefore the judgment debtors had the right to go the Court of first instance for such restitution....; the court of first instance was the Court at Jamtara **(AIR 1938 Cal 554)**

48.13. Determination of question u/s 144, a decree - appealable

The power of the 'Court to direct restitution on a Court sale being set aside is inherent in the Court and is not confined to section 144 and rests upon the principle that a Court of justice has a duty to repair the injury done to a party by its own act. The Court may allow tile application for restitution either under section 144 or

under section 151 of the Civil Procedure Code, 1908. If the Court purports to act under section 144 then certainly the order of the Court is appealable, however wrong that order may be, because it is an order or at least purports to be an order under section 144 which is appealable, as it is a decree within the definition of decree as given is the Civil Procedure Code, 1908. If, however, the Court purports to act in the exercise of its inherent power under section 151 then certainly the order is not appealable, because the right of appeal is the creation of statute and no appeal has been provided in the Code against an order under section 151. (**PLD 1960 Dacca 452)**

48.14. Interest, damages, compensation and mesne profits

This section empowers the Court of first instance to whom an application under section 144, C.P.C. is made, not only to order for restitution but also to make orders "for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal (**2017 CLC 646)**

48.15. Restitution against person not party to the proceedings

Restitution can be ordered against the person who has benefited under such order or decree as well as his transferee or assignee, even though such person may not have been party to the proceeding in which such order or decree was varied or set aside **(2009 CLC 513 Lhr)**

49. REVIEW

49.1. Relevant Provision

Sec 114 & Order XLVII of CPC

49.2. Object

The intent of Legislature is thus clear that while incorporating the power of review in the Statute it is meant that no error in the judgment/order which is so manifest or floating on the surface should be allowed to perpetuate (**PLD 2019 Lahore 111)**

49.3. Scope

The powers of review are not wide but definite and limited in nature (**PLD 2010 SC 483)**. After having an overview of the principles referred hereinabove, it can be inferred that though review has a very limited scope but it does not mean to abdicate the power of review in an omnibus fashion. (**PLD 2019 Lahore 111)**

49.4. Grounds for review

i. **Clerical or arithmetical mistake:** Scope of review is limited only to rectify the clerical or arithmetical error or mistake apparent on the face of the case and this Court cannot afford re-hearing or re-appreciation of the entire evidence afresh (**2018 M L D 1955 Lhr)**

ii. **Error may be of facts and law but self evident:** Such error may be an error of fact or of law but it must be self evident and floating on surface and not requiring any elaborate discussion or process of ratiocination. (**2010 S C M R 1049)**.

iii. **Points earlier considered cannot be re-agitated:** The points already raised and considered before the Court cannot be re-agitated in review jurisdiction which is confined to patent error or a mistake floating on the face

of record which if not corrected may perpetuate illegality and injustice (**2007 SCMR 755, 2017 MLD 827 S Lhr)**

iv. **Discovery of new and important matter/evidence:** A review petition is not competent where neither any new and important matter or evidence has been discovered nor is any mistake or error apparent on the face of the record. (**2010 SCMR 1049, 2004 SCMR 1213)**. There must be some new point based upon discovery of new evidence which could not with diligence, have been found out on the previous occasion (**2016 CLC 1655 DB Lhr)**. Review also cannot be allowed on the ground of discovery of some new material if such material was available at the time of hearing of the trial, the appeal or the revision, as the case may be. A ground not urged or raised at such earlier stages cannot be allowed to be raised in review proceedings. **(2003 SCMR 1501)** The mere fact that another view of the matter was possible or the conclusion drawn in the judgment was wrong, would not be a valid ground to review the judgment unless it is shown that the Court has failed to consider an important question of law (**2007 SCMR 755).**

49.5. Exercise of Suo Moto powers

The Court has also suo moto powers to review the judgment or order on its own or on receipt of any information through any source in any manner, either written or oral. The person supplying information can be treated as informer and if the Court finds that the information is such where any of the grounds for review is attracted then the matter can be heard to do complete justice (**PLD 2010 SC 483)**.

49.6. Application for Review, by a person not party in the suit

A bare reading of the section reveals that right to apply for review has been given to "any person" but subject to condition that he should be aggrieved by a decree or order of the Court. The phrase "any person" means a person, no matter who or a person of any kind. Words "a person" appearing in Section 12(2), C.P.C. has been defined as a person not party to the suit by this Court in the cases of "Muhammad

Yousaf v. Federal Government (1999 SCMR 1516) and Ghulam Muhammad v. M. Ahmad Khan (1993 SCMR 662)". Thus there is no restriction placed under Section 114, C.P.C. to debar any person other than the parties to the suit to file review application (**PLD 2010 SC 483)**

49.7. After Review, challenge of Original order/decree

In case after grant of review the Court re-considers the entire case afresh separately and passes fresh judgment, it would be a case of extinction of the original judgment and bringing into existence a new one which could be appealed against on merits irrespective whether the order granting review is challenged or not (**PLD 2002 SC 277)**

49.8. Limitation

While section 14 applies to civil suits, section 5 of the Limitation Act is applicable to appeals, applications and review petitions (**1992 SCMR 424)**

49.9. Discovery of new evidence does not enlarge the period of limitation

For the proposition that on the discovery of new facts/evidence the period of limitation for review shall commence from the date of disclosure and attaining knowledge thereof, it may be held that the discovery of new facts/evidence per se does not enlarge or extend the period of limitation; such period shall also not be reckoned from the date of discovery, but at the best it can constitute in appropriate cases a "sufficient cause" for the condonation of delay, obviously subject to the application (attraction) of section 5 of the Limitation Act, 1908 (however not relevant for the Supreme Court) (**PLD 2011 SC 235)**.

50. REVISION

50.1. Relevant provision

- Sec 115 CPC
- High Court Rules and Orders Vol I Chapter 14

50.2. Meaning of term "case decided"

The expression `case decided' is not necessary confined to the final order rather it may, in the peculiar facts and circumstances of the case, relate to an interlocutory order passed at any stage of the proceedings including an interim order requiring application of judicial mind **(2016 SCMR 177, 2006 SCMR 21, 1992 SCMR 718, PLD 1973 SC 507)**

50.3. Powers of revision - nature

In other words, the provisions of section 115, CPC under which a High Court exercises its revisional jurisdiction, confer an exceptional and necessary power intended to secure effective exercise of its superintendence and visitorial powers of correction unhindered by technicalities **(2014 SCM R 161)**

50.4. Grounds for interference with the findings of lower Courts

- **Misreading/non reading of evidence:** Concurrent findings of the Courts below can be set aside by the High Court in its revisional jurisdiction if the same, "were based on misreading or non-reading of the material available on record"(**2016 S C M R 986)** or while assessing or evaluating the evidence had omitted from consideration some important piece of evidence, which had direct bearing on issues involved in the case. **(2006 S C M R 1304)**
- **Failure to exercise jurisdiction or illegal exercise of jurisdiction:** The scope of revision is narrow and requires to examine whether the Courts below have failed to exercise jurisdiction so vested in them or have acted in exercise of its jurisdiction illegally or with material irregularity and have misread the evidence brought on record by the parties.

- **When illegality or irregularity resulting in miscarriage of justice:** It is a settled law that the learned High Court while sitting in revisional jurisdiction is not supposed to interfere in the concurrent findings of the Courts below unless it is established that the judgments of the Courts below were without jurisdiction or the two Courts below committed illegality or with material irregularity resulting into miscarriage of justice **(2007 SCMR 236).**

50.5. Concurrent findings not be interfered with

The Revisional Court does not normally go beyond concurrent findings of facts recorded by the Courts below unless it is shown that the findings are perverse, patently against evidence, or so improbable that acceptance thereof would tantamount to perpetuating a grave miscarriage of justice. **(2009 SCMR 54, 2008 SCMR 1639, 2006 SCMR 50, 2006 SCMR 1304, 2005 S C M R 135, PLD 1994 SC 291).**

50.6. Objection to jurisdiction of trial Court before revisional Court

No objection to the jurisdiction of the civil Court could be entertained at the revisional stage **(2005 SCMR 772)**. The Appellate or Revisional Court would only consider such objections provided all three conditions as set down in section 21, CPC are met viz firstly, objection as to territorial jurisdiction was raised in the Court of first instance, secondly such objection is raised at the earliest opportunity and in case the issues are settled, before settlement of issue and most importantly and thirdly, there has been consequent failure of justice **(2018 SCMR 2121, 2009 SCMR 706, 2005 SCMR 772, PLD 2003 SC 930)**

50.7. Revision, dismissal for non prosecution

A civil revision cannot be dismissed for non prosecution and should instead be decided on merit, as it leaves absolutely no room for the revisional Court to exercise its discretionary powers rendering them (discretionary powers) nugatory and redundant **(PLD 2016 SC 712).**

50.8. Limitation & revision

Through amendment Act 2018 second proviso of sub sec 1 of sec 115 CPC is amended and words within 90 days of the decision have been deleted.

50.8.1. Limitation when Court itself exercise power of revision

A limitation of 90 days is relevant only when some revision petition is filed by some person or party to the proceedings. Such impediment is non-existent when Court itself exercises the power of revision under subsection (1) of section 115, C.P.C **(2014 SCMR 1358, PLD 2012 SC 400, PLD 2010 SC 582).**

50.8.2. Revision beyond limitation

The revision petition before the High Court was admittedly time barred and no plausible explanation could be offered in the High Court for the condonation of delay, as such, the learned Judge in Chambers was right to dismiss the same as barred by time **(2006 SCMR 69, 2014 SCMR 1358)**

50.8.3. Revision filed within limittkl but on office objections returned

Where a revision petition has been filed within time but the office objection(s) points out certain deficiencies in respect of the institution, for all intents and purposes, it shall be deemed to have been instituted within the period of limitation and where the petitioner does not remove the office objections and make up the deficiencies in the time provided by the office, the matter shall be placed before the Court on the judicial side and the Court shall decide about the fate of the petition in accordance with law. **(PLD 2013 SC 392)**.

50.8.4. Limitation, application for restoration of revision, dismissed for non prosecution

As there are no specific provisions in the CPC for the dismissal and for the restoration of a civil revision, therefore, the civil revision can both be dismissed and restored by the Court while exercising its inherent powers and resort may also be made to Section 107 of the C.P.C. As there is no specific article of the Limitation Act

which would prescribe the limitation period for the exercise of such inherent power of the Court, therefore, the residuary Article 181 of the Limitation Act shall be attracted **(PLD 2016 SC 712)**.

50.9. Revision against interim orders

Normally a revision petition against an interim order is not maintainable but an interim order which is passed after considering the facts, if is found perverse or suffering from jurisdictional defect, the revisional Court may in the interest of justice, interfere in such order. **(2006 SCMR 21, 1992 SCMR 718)**

50.10. Revision, prayer to withdraw civil suit for the purpose of filing a fresh one

In terms of Order XXIII, rules 1 and 2, CPC permission to withdraw a civil suit for the purpose of filing a fresh one can be granted by the appellate and revisional Court at any stage of proceedings **(2005 SCMR 1405)**.

50.11. Revision Petition may be treated as appeal and vice versa

Courts have been treating and or converting appeal into revisions and vice versa and Constitution Petitions into appeal or revision and vice versa (**2017 SCMR 56)**.

51. SETTLEMENT OF ISSUES

51.1. Relevant Provision

Order XIV CPC

51.2. Duty of Court to frame issues

The mandate of Order XIV, Rule 1, CPC reveals that it is incumbent upon the Court to frame issues in the light of the controversies raised in the pleadings and after examination of the parties, if necessary. (**2008 SCMR 1384)**

51.3. Purpose of issues

Issues of law and facts are to be illustrated clearly, to enable the parties to understand the points at issue to support their respective claims by recording evidence on all material points. (**2008 SCMR 1384)**

51.4. No specific issue on fraud in suit for specific performance

Trial Court had framed a composite issue i.e. whether plaintiff was entitled to have decree for specific performance of agreements to sell---Such issue when examined in the context of the pleadings of the parties and written statement of the defendant, left no doubt as to the real controversy between the parties, which required adjudication by the Court---Both parties were fully cognizant of the real matter in controversy and the facts, which were required to be proved by them in support of their respective stands and they led evidence accordingly---In such an eventuality, contention that no specific issue on fraud was framed lost significance as no prejudice was caused to the plaintiff. (**2015 SCMR 1)**

51.5. Evidence beyond the purview of issues

- When any evidence beyond the purview of issues did come on record, no party could, on basis of such evidence, set up altogether a new case and press the same for getting relief merely on basis of an out of context evidence. (**2014 CLD 625)**

- Parties are not entitled to set up a case or to lead evidence on issues which do not arise from their pleadings---Parties are legally bound by their pleadings and thus evidence must be restricted to the points in controversy stricto senso. (**2000 SCMR 1172)**

51.6. Effect of non framing of issues - parties conscious of real points of controversy

- When parties to a lis are alive to the controversy and contentions raised by either of them, framing or non-framing of a particular issue is of no consequence.

  (2016 YLRN 203 LAHORE,2005 YLR 2994 Lah,2002 YLR 2227 Lahore, 2002 YLR 3247 Lahore)

- Allegations made in plaint were challenged in written statement. No specific issue was framed. Parties being aware of controversy led evidence, on the basis of which, case was finally decided. Open to Court to allow parties to lead evidence on such point and give decision thereon without framing any issue. (**2004 SCMR 1130**, **PLD 2003 SC 271**)
- Non-framing of a specific issue on a particular question of fact involved in the case. Powers of trial Court to decide such question on the basis of evidence led by parties in support of their respective stances. (**2012 SCMR 212)**
- Parties having led evidence keeping in view the precise grounds pressed by plaintiffs, no prejudice was caused to parties due to framing of an omnibus issue by Trial Court. It was also duty of parties to get proper issues framed, if they had any objection or suggestion regarding framing of issues--No question requiring further examination being involved, leave to appeal refused. (**1988 SCMR 4)**
- If Court had omitted to frame any particular issue then parties were not denuded of their right to lead evidence on such point and Court in such circumstances could render decision without framing of issues. When parties

being conscious of the real point had led their evidence then omission to frame any particular issue would not cause my prejudice. **(2019 CLC 1706 Lahore)**

- Trial Court framed only one issue whereby it required defendant to prove that plaintiff had failed to pay the outstanding amount. Civil matter could not be decided in piecemeal by framing a single issue with regard to factual controversy. **(2019 CLC 1320 Lahore)**
- Legal issue could be framed as preliminary issue but issue relating to factual controversy could not be framed as such---Trial Court had framed preliminary issue relating to factual controversy and had placed its onus on defendant as such it was pre-determination of the suit that if the defendant failed, the suit would stand decreed. **(2019 CLC 1320 Lahore)**
- When issues had not been framed in accordance with pleadings, the edifice and superstructure built on the same had no value in the eye of the law. **(2015 YLR 1789 Lahore)**

51.7. No issue on admitted facts

Once admission is made in written statement, no issue is required to be framed nor any further proof is required. **(2007 CLC 1885 Lahore)**

51.8. Party not to be prejudiced on action or inaction of Court

"action or inaction" on the part of the Court cannot prejudice a party to litigation and the failure of Courts below to determine material issue amounted to exercise of jurisdiction illegally or with material irregularity. **(2008 SCMR 1384, 005 CLC 970 Lahore)**

52. SUITS BY OR AGAINST CORPORATION, MILITARY, FIRMS AND TRUSTEES

52.1. Relevant Provisions

- Civil Procedure Code 1908 : Orders XXVIII & XXIX
- High Court (Lahore) Rules and Orders Vol. I, Chap. 6

52.2. In case of firm

- **Partner not required:** Partner was not required to have an authority from other partners before initiating any action by way of a suit. (**2019 CLC 1472)**
- **Pre-requisites for institution of suit by firm:** Two pre-conditions to be satisfied before a suit to enforce the right under a contract can be instituted by a firm are: firstly, that the firm should be registered, and secondly, the person suing must have been shown in the Register of Firms as partner in the firm. (**1989 CLC 2229)**

52.3. In case of Company

- **Suit to be filed by authority in terms of AOA or Board Resolution:** A lis could not be initiated on behalf of a company, which was a juristic person, without having due authority either in terms of its Articles of Association or the Board Resolution. (**2014 CLD 415 SC)**
- **Suit not filed by duly authorized person:** The law requires that the person filing/instituting legal proceedings on behalf of a company should be duly empowered/authorized to do so. Therefore, if any legal proceedings on behalf of a company are filed by a person not duly empowered/authorized to do so such legal proceedings would be nullity in the eye of law. (**2010 PLC (CS) 1150)** Where the plaintiffs, in order to prove that the authorized officer had instituted the suit, had not filed such documents, it was established beyond doubt that an unauthorized person had filed the suit on behalf of the

plaintiffs, who also could not have signed or verified the plaint as required under O.XXIX, R.1 of the Civil Procedure Code, 1908. (**2006 C L D 85)**

52.4. In case of Proprietor

Suit by or against proprietor

Under provisions of O.XXX, R.10, C.P.C. a person carrying on business in a name and style other than his own may be sued in such manner or style as if it were a firm name, however, the person could not sue in such name because a proprietary firm/concern did not have any legal status separate and distinct from its proprietor. Proprietor and proprietary firm/concern were one and the same person. Proprietary concern may be sued in its name but the proprietary concern could not bring a legal action as it did not have any legal character/status separate and distinct from its proprietor. Where a person mistakenly sued in his trade name, then exceptionally necessary corrections/amendments were allowed subject to the law of limitation. (**PLD 2014 LHR 570, 2001 CLC 419)**

52.4.1. Identity of proprietor

Description of a plaintiff given in the title of the plaint must be carefully examined, and if such examination revealed, or could reasonably be regarded as revealing the true identity of the party (that is the proprietor) then the suit must be held to have been brought in the name of the latter. However, if the true identity of plaintiff could not be determined, then it could be said that the suit had been brought by an entity that had no existence in the eye of the law (that is the proprietary concern) and it may be that such suit was to be dismissed or the plaint rejected. (**2015 CLD 89)**

53. SUITS BY OR AGAINST GOVERNMENT

53.1. Relevant provisions

- Civil Procedure Code 1908: Sections 79-82, Order XXVII
- High Court (Lahore) Rules and Orders Vol. I, Chap. 8

53.2. General rule

No suit can be filed against provincial government without impleading the Province as a party and the procedural pre-condition is mandatory in nature and no relief can be sought without its strict compliance and suit would not be maintainable. (**2010 SCMR 115)**

53.3. Signatures and verification of pleadings

Plaint or written statement in any suit by or against the Government would be signed by any person appointed by Government by a general or special order and be verified by any person appointed by the Government and who was acquainted with the facts of case. (**1996 CLC 412)**

53.4. Modes of process of service

Recognized modes of process of service against Government were through the Government pleader, through recognized agent or through persons authorized to accept service apart from delivering the notice to the party concerned. **(1989 SCMR 1407)**

53.5. Stay of execution without furnishing of security

Where appeal is filed by Government or any public officer, there cannot be automatic grant of stay of execution of decree. If the appellant is Government or public servant and a convincing ground is made out, stay of execution can be ordered without furnishing of security. (**2001 SCMR 377)**

54. SUIT BY OR AGAINST MINOR etc

54.1. Relevant Provision

Order XXXII of CPC

54.2. Next friend

54.2.1. Omission of suing without next friend

Omission of minor plaintiff suing without aid of next friend... Father of minor acting as his next friend in first appeal as also in revision... No defect in minors' representation before Court thus was found. (**1991 MLD 1523)**

54.2.2. Permission of Court for a mother to become next friend of minor

Petitioner being mother of minors on instituting the suit would automatically become the next friend of minors and permission of the Court was not necessary in the case, unless it was shown that she was disqualified to act on account of her interest being in conflict with the interest of minors. (**PLD 2007 Quetta 91)**

54.2.3. Next Friend cannot exercise right of pre-emption

Father, grandfather or other guardian, as indicated in Islamic Law, could best look after minor's interest in exercising his right of pre-emption but not his next friend as defined in O.XXXII, C.P.C. **(PLD 2008 Peshawar 116)**

54.3. Guardian ad litem

- **Formal order of appointment of guardian ad litem:** Object of the provisions, laid down under O.XXXII, C.P.C., suggested that when a suit was filed against minor through natural guardian and the Court, if satisfied for such suggestion, formal order of the Court regarding appointing a person to be guardian-ad-litem, was not necessary. (**2015 MLD 1672, 2003 SCMR 1199).** If the appointment of the guardian ad litem of the minors by a formal order of the Court was not made and no prejudice had

been pleaded or shown, then it would remain only a formality that guardian ad litem was not appointed, which made no difference. (**2011 MLD 1726, 2003 CLC 945).** Otherwise such objection was only of technical nature. (**2010 MLD 1976).** Mere fact that minor was not sued through guardian ad literm would not make decree invalid and same would be binding on minor (**2003 SCMR 480)**

54.3.1. Appointment of guardian ad litem before final decision

Where a minor is already party in the suit although he is not represented through a duly appointed guardian ad litem by Court, the defect can be cured by appointment of such guardian by the Court before the final decision of the case either on the application of any of the parties to the suit or by the Court at its own accord. (**1997 SCMR 134**)

54.3.2. Appointment of guardian ad litem on oral motion of counsel of applicant

Where no separate application had been filed for appointment of such guardian for two minors, mother of the minors was appointed guardian ad litem on the oral motion of the counsel for the applicants. (**2000 MLD 702)**

54.3.3. Compromise on behalf of guardian ad litem with plaintiff

Guardian-ad-litem, without permission of trial Court, could not enter into an agreement with plaintiff on behalf of minor defendant---Duty of trial Court was to enquire as to whether such compromise was in the interest of minor or not, and whether interest of such guardian was in clash with that of minor defendant or not. (**PLD 2013 AJ&K 8)**

54.3.4. Effect of negligence of guardian ad litem:

If father of the minor was not doing his duty of filing written statement, some other proper person should have been appointed as guardian like a court official or pleader---Trial Court without considering that defendant was a minor, struck off the

defence of defendant---Order passed by trial Court was illegal. **(2008 PLD 11 Islamabad)**

54.3.5. Denovo trial in ex parte decree

On objection having been raised in execution proceedings that ex parte decree passed without appointment of guardian ad litem was nullity, plaintiff applying to trial Court under S. 151, C. P. C. for proceeding with suit de novo-Held, plaintiff not precluded, in circumstance, from applying to Court for revival of suit. **(1968 SCMR 991)**

54.3.6. Limitation

The minor who was already party in the suit though un-represented through duly appointed guardian ad litem by the Court, would not become time barred for the reason that the Court had appointed guardian ad litem of the minor defendant on a date when the limitation prescribed for filing of such suit had already expired--Question of expiry of limitation period, in case of such a nature, would not arise, for there is neither any addition nor substitution of new party in the suit: **(1997 SCMR 134)** Appointment of guardian "ad litem" under O. XXXII , r. 3--Neither a substitution nor an addition of a new party-Held, provisions of S. 22, Limitation Act not attracted to such a situation. **(1980 SCMR 254)**

54.4. Elaboration of term “taken off the file”

The expression "taken off the file" occurring in Rule 2, Order XXXII of the C.P.C. was not synonymous to rejection of the plaint or dismissal of the suit and such expression was taken to mean that proceedings would be stayed. **(1989 CLC 833 Lahore, 1987 CLC 2224 Karachi, 1991 MLD 1523 Lahore)**

54.5. When minor attains majority during pendency of suit

Minor, on attaining of majority is to approach the Court and to make a report and opt to continue with the suit himself as major---On failure to adopt such procedure

the authority of guardian ad litem continues and minor is bound by act of the guardian**. (2003 CLC 1792 Lahore)**

54.6. Elaborate inquiry, into question of unsoundness, not necessary. (**1975 PLD 871 Lahore)**

55. SUMMONING AND ATTENDENCE OF WITNESSES

55.1. Relevant provision

Order XVI CPC

55.2. Object

Provisions of O.XVI, R. 1, C.P.C. did not fall within purview of "sheer technicalities" but were strictly in accordance with principles of natural justice that a party should have knowledge of witnesses of its rival so as to enable same to test veracity of those witnesses and prepare cross-examination in advance. (**1999 SCMR 799)**

55.3. Power of Court to summon witnesses

Power to summon witness was not only inherent but was also allowed by O.XVI, CPC to a Civil Court. If a Court was not considered to have been invested with such power, then no party could summon any person for any purpose in Court. Summoning of parties/witnesses through process provided was the basic power upon which whole fabric of trial of suit dependent. If such power was not presumed to lie with Court, whole actions of Court would become farcical. (**2005 CLC 1330 Lah)**

55.4. List of witnesses Language of O.XVI, R.1, CPC stipulated that parties to a lis were required to furnish the list of witnesses, whom they proposed to give evidence or to produce documents, within seven days of the framing of issues. (**PLD 2013 SC 255)** Court could permit examination of only those witnesses who were mentioned in list of witnesses. (**1999 SCMR 799)**

55.4.1. Power of Court to summon witnesses - conditional to list of witnesses

Process and the authority of the court in terms of O.XVI, R.1, CPC to call and summon a witness by a party, had been made subject to, rather conditional to the list of witnesses which a party was mandated to file in terms thereof. (**PLD 2013 SC 255)**

55.5. Exception to general rule

Main object of O. XVI, Rr. 1(2) & 14, C.P.C. was that entire evidence, which was relevant and necessary for ascertaining truth and deciding issues involved completely and effectively, should come before the Court at any stage of trial before passing of judgment--Mere on the pretext of non-submission of list of witnesses and non-mentioning of names of witnesses in list of witnesses, plaintiff could not be thrown out of arena of litigation. (**2016 CLC N 127)**

55.6. Discretionary power

O. XVI, R.14---Court witness---Powers of Court to summon a witness are discretionary but such discretion will not be exercised by the Court to fill in the gaps or to remedy the omissions by examining such witness. (**2007 CLC 1587)** Court was not free to grant such permission as per its own whim and caprice and in an arbitrary manner, rather it should record reasons for such a permission. Conditions of recording reasons obviously was a check on the unbridled and absolute discretion of the Court, which (reasons) should have nexus to the good cause as set out by the delinquent party. (**PLD 2013 SC 255)**

55.7. Showing good cause after failing to submit list of witnesses

i. **No absolute criteria of good cause:** No absolute criteria could be set forth as benchmark to test if a case of omission to file the list of witnesses or a name in such list was on account of "good cause", as it depended upon the facts of each case---Party in default had to show a legally sufficient reason, as to why its request should be granted or its inaction/omission should be excused, in other words, the judicial conscious of the Court should be satisfied with justifiable reasons. (**PLD 2013 SC 255)**

ii. **Party cannot claim it as matter of right:** Party in default could not, as a matter of right or as a matter of course, without assigning or establishing any good cause for the omission, ask for calling/summoning or even producing witnesses only on account of a lame excuse/reason and a bald assertion that

it shall be in the interest of justice and/or it shall facilitate the Court in deciding the matter. (**PLD 2013 SC 255)**

iii. **No prejudice to other party:** If a reasonable explanation is given and no prejudice is caused to the opposite-party in its defence and the Court no unduly inconvenienced the party's evidence should not be shut out for its failure to file the list within 7 days of the framing of the issues**. (1981 SCMR 150)**

iv. If there is a reasonable explanation for not filing the list of witnesses within time, it could be allowed later on. **(2019 CLC 183; 2020 CLC 10)**

55.8. Instances of not a good cause

i. **Inadvertence not a good cause:** Party seeking such permission was to show "good cause" for failing to submit list of witnesses before Court or for omitting the name of such witness in the list. Inadvertence, as claimed by petitioner, was not a "good cause" for allowing a party to produce the list of witnesses after the time fixed for the same had expired. (**2019 CLC 183)**

ii. **Ignorance of law is not sufficient ground:** None of reasons furnished, a sufficient cause for defendants' omission to file list of witnesses as ignorance of law could not be entertained as a good ground for non-compliance of law

55.9. Powers of Court in respect of attendance of witness and production of documents:

55.9.1. To cause attendance to obtain signatures for comparison

Court was empowered under S.32, C.P.C. to cause attendance of any person in his Court to obtain his signatures for the purpose of comparison (**2005 CLC 1330 Lah)**

55.9.2. Interlocutory order

Court had been granted power under the provisions of S.94, C.P.C. to pass any other interlocutory order when it considered it just and convenient in a case in a given

situation, particularly where law had not provided any of its solutions **(2005 CLC 1330)**

55.9.3. Power of Court to compel attendance of witnesses

When the appellant had reported his inability to produce its witness and asked for indulgence of the Court, it should not have been refused as it would be a clear case of failure to exercise jurisdiction vested. **(2013 SCMR 200)** Even, in a case where a party undertook to produce its own evidence, but then reported its inability to do so and applied for process of the Court for the attendance of its witnesses, there was no sanction in law for refusing such request. **(2012 CLC 569 Pesh)** Court may decline to accede to such request only where party deliberately seeks to prolong case to grave disadvantage of other side and evidence sought to be adduced has no material bearing on decision of case. **(1972 SCMR 534)** If a witness did not appear in spite of his service or refuse to appear in Court, Trial Court had got enough power to compel his attendance through modes prescribed by Civil Procedure Code, 1908--**(2005 CLC 1330 Lah)**

i. **Issue warrants of arrest:** After refusal of witnesses to appear before the Court, the trial Court was not only empowered to issue warrants of said witnesses with or without bail (surety bond)
ii. **Attachment:** Court is also empowered to pass orders for attachment of their moveable and/or immoveable properties in order to enforce their appearance. **(2018 CLC 87, 2005 CLC 1330)**
iii. **Imposition of fine:** Trial Court could issue not only notice but could also attach salary or property of such disobedient person who refused to appear and could impose fine also **(2005 CLC 1330 Lah)**

55.10. Power of Court to require person present in Court to give evidence

The rule 7 of Order XVI CPC provides that any person present in Court may be required by the Court to give evidence or to produce documents then and there in

his possession or power. This provision does not apply, where the persons present in Court are required by a party to give evidence. (**2016 SCMR 1976)** O. XVI, r. 20-Applicable when party present in Court refuses, when required by Court, to give evidence or produce any document in his possession. (**1963 PLD 175 Dhaka High Court)**

55.11. Deposit of expenses of witnesses

i. **Mandatory:** Provision of O.XVI, R. 2(1), CPC regarding deposit of expenses of witness being mandatory must be strictly observed and complied with before grant of summons for attendance of witness---In case of non-compliance with such provision, grant of summons would be illegal and summons would become liable to be recalled. (**2009 YLR 389 Kar)**

ii. **Close right of evidence in case of non deposit of process fee:** Non deposit of process fee and diet money of witnesses required by defendant to be summoned through Court. Trial Court in such circumstances would have no option but to close evidence of defendant. (**2008 SCMR 1330)**

55.12. Summoning of Government Servant

When the witness, who was a government servant, did not attend the Court on the date fixed, it was the duty of the Court to have proceeded against the defaulting witness as provided under O.XVI, R.10, C.P.C. (**1988 SCMR 1167)**

55.13. Family matters

Even if in a family matter list of witness has not been filed, the witness could be produced **(2019 SCMR 542, 2018 CLC 1334)**

56. SUMMONS & SUMMONING OF PARTIES

56.1. Relevant Provisions

Sections 27 to 32, Order V of CPC

56.2. Definition "summons"

A writ or process commencing the plaintiff's action and requiring the defendant to appear and answer[7]. A notice requiring a person to in court as a juror or witness[8].

56.3. Summons to be signed by the Judge or by such officer he appoints

Under sub-rule (3) of rule 1 "every such summons shall be signed by the Judge or such officer as he appoints, and shall be sealed with the seal of the Court", while under rule 10 "service of the summons shall be made by delivering or tendering a copy thereof signed by the judge or such officer as he appoints in this behalf, and sealed with the seal of the Court" (**PLD 1952 Lahore 552)**

56.4. Summons, issuance of

A summons to the defendant to appear and answer the claim can only be issued after a suit has been `duly' instituted (**PLD 1958 SC 195)**

56.5. Modes of service

Three modes of service have been prescribed by Order V, personal service, service by affixation and substituted service (**1991 CLC 1326)**

56.5.1. Refusal to accept summons sent by registered post

Another summons by registered post had been sent to the Lahore Films, 3, Abbot Road, Lahore, for 11th March 1952, and was returned as refused. That too would be good service (**PLD 1956 (W. P.) Lahore 434)**

56.5.2. Service through male member of the family

The defendant shall be served in person or through his agent empowered to receive/accept the service. In case defendant is neither found on the given address

---

[7] **Black's Law Dictionary,** 11th edition, P 1737
[8] ibid

nor there is any authorized agent then service may be made through male member of the defendant's family, who is residing with him in one house (**PLD 2015 Peshawar 90)**

56.5.3. Service through affixation

If there was denial on the part of defendant to accept the summons then Process Server was bound under Rule 17 of Order V, C.P.C. to make affixation of the summons on any conspicuous place of the house/residence of the petitioner but this practice was not done by the Process Server. Provisions of above-mentioned rule were mandatory as is clear from the rule itself (**2012 MLD 1605 Lhr)**

56.5.4. Order for affixation not necessary

For the Process Server to serve the summons on the defendant through affixation pursuant to Order V, Rule 17 C.P.C., an order of Court to that effect is not necessary (**PLD 2017 Islamabad 356)**

56.5.5. Substituted service

Substituted service only where the defendant avoid the service or service through ordinary mode is not possible **(1996 SCMR 1703, PLD 1998 Lahore 118, 2013 YLR 909 Lhr)**

56.6. Service of summons on defendant in jail

The relevant provision regarding service of summons on an imprisoned defendant is Order V, Rule 24, C.P.C (**PLD 2006 Lahore 32)**

The Court in spite of the knowledge with regard to the detention of the appellant did not direct the Jail authorities to produce him in Court…when it came to the notice of the Court that the appellant had been detained on a criminal charge, it was obligatory on the Court to have issued a process to the appellant (**1991 SCMR 1964**).

56.7. Service when summons not annexed with copy of plaint

Non-supply of the copy of the plaint has no bearing on the service of summons (**PLD 1981 SC 364**)

57.SUPPLEMENTAL PROCEEDINGS

57.1. Relevant Provision

Section 94 CPC

57.2. Power of Court to pass incidental or supplementary orders

- A civil Court has all the powers made available to it under the Code of Civil Procedure and in a suitable case can pass an incidental or supplemental order following to the procedure prescribed in the Code. **(PLD 1975 SC 15)**
- The making of an interim order is a part of the working of the judicial system and no separate or specific provision is necessary to empower a court to issue an interim order. **(1996 SCMR 645, 1991 SCMR 2319, 2017 CLC 1539)**
- If the civil Court is competent to entertain and decide the dispute between the parties there is no reason why the procedure applicable to that Court should not be applied for passing incidental or supplementary orders. (**PLD 1962 Lah. 317**)

57.3. Power to pass interlocutory order to prevent ends of justice

In order to prevent the ends of justice from being defeated the Court has ample power to make such interlocutory order as may be considered just and proper. Section 94 of Code of Civil Procedure, 1908 recognizes such powers of the Court. **(2004 YLR 361)**

57.4. Elaboration of term "person" as used in section 94 CPC instead of "party"

The legislature in its wisdom has used the word 'person' and not 'party' in section 94, CPC. and Order XXXIX, Rule 2(3), C.P.C. in order to bring all those to justice who violates the order of a Court whether they are party or not, however, the person brought to Court to face such allegation can validly take a defence of ignorance of existence of such an order of the Court. However, if it

is proved on record that he had the knowledge of the order of the Court, then of course, he can be proceeded and taken to task. **(2006 YLR 2758)**

57.5. Miscellaneous powers of Court

- **To appoint receiver:** The Court can issue injunction and appoint receiver. (**2017 CLC 1539)**
- **Proceedings against violator of status quo:** The status quo order though was discharged later on by the Civil Judge but for the period during which status quo order remained operative and was breached, the violator of such an order can be proceeded against. (**1995 CLC 2020)**
- **Restoration to position where it originally stood:** It is well settled that when by contravening an injunction order the party against whom the order is passed has done something for its own advantage to disadvantage of the other party, it is open to the Court under its inherent jurisdiction to bring back the party to a position where it originally stood, as if the order had not been contravened. The exercise of this inherent power is based on the principle that no party can be allowed to take advantage of his own wrong in spite of the order to the contrary passed by the Court. (**1980 SCMR 89)**
- **Status quo in cases of easements of necessity:** Where the breach of obligation by the defendant is so patent, which floats on the surface of the record, causing immediate, pressing and irreparable injury to the plaintiff e.g. in the cases of easements of necessity or the severance of basic necessities of life by the public authority, such as illegal disconnection of electricity or water connection, the Court may while exercising its powers under section 94 read with section 151, C.P.C. grant a status quo ante. (**2002 CLD 77, 2017 CLC 1539)**
- **Power of Court against witness:** If a witness does not appear in spite of his service or refuses to appear in the Court, learned trial Court has got enough power to compel his attendance through modes prescribed by the

Code. Section 32 of the C.P.C. has empowered the Court to cause the attendance of any person in his Court to obtain his signatures for the purpose of comparison. Trial Court cannot issue notice but can also attach salary or property of such disobedient person who refuses to appear and can impose fine also. There is yet another provision of section 94 of the C.P.C. which has granted powers to the Court to pass any other interlocutory order when it considers just and convenient in a case in a given situation, particularly where law has not provided any of its solution. The Court, which is seized of the case, has to act for the smooth running and trial of a case for its conclusion. There is no prohibition to the Court, to pass such an order. **(2005 CLC 1330)**

57.6. Order of injunction against specific person

An interim relief/injunction thus can be issued, in "personam" against a person, who has been validly and properly joined and arrayed as a party to the legal proceeding, pending before the Courts in Pakistan, and under the law, the Courts otherwise have the jurisdiction over the party. It can undoubtedly be issued against a party, who is legally joined and has also submitted to the jurisdiction of Pakistani Courts, such a person/party can obviously be directed through an injunctive order to perform or restrain from performing any act, related/connected to a subject matter, which even is outside the jurisdiction of the Courts in Pakistan. **(2005 C L D 602)**

57.7. Effects of interlocutory orders

The interlocutory order exists on the file till final determination of the cause, even after the same being acted upon. Orders granting a temporary injunction, appointing a receiver, attaching of a property before judgment and other interlocutory orders are passed by the Court and acted upon during the proceedings of the case but the same do not exhaust and survive on file till the final determination of the case by the trial Court. Interlocutory order exhausts or

becomes merged in final order made in case and, then, become "functus officio". **(2017 CLC 1539)**

57.8. Curtailment of powers by specific provision in any other enactment

Courts had extensive powers to issue an injunction in a pending suit but this power certainly could be curtailed by a specific provision in any other enactment. **(PLD 1962 Lah. 317)**

57.9. Where Courts should not interfere

But in the case of breach of a contract, which agreement is not even enforceable under the law, the Court cannot and should not exercise its judicial discretion to create a situation, which has ceased to exist when the lis is commenced. **(2002 CLD 77, 2017 CLC 1539)**

58. TEMPORARY INJUNCTION

58.1. Relevant provisions

- Order XXXIX of Code of Civil Procedure, 1908
- Part-L, Chapter 1, Volume-I, Lahore High Court (Rules and Orders)
- Sec 56 of Specific Relief Act

58.2. Meaning of injunction

Injunction, by its nature, is a preventive remedy for the purpose of preserving the status quo of the matter of suit pending the determination of suit. By use of words "status quo" all that can be implied is that same status in regard to title or possession of immoveable property as existed on date of filing of suit is to be maintained. **(PLD 2016 Sindh 445)**

58.3. Injunction, an equitable relief

No doubt an injunction is a form of equitable relief and is to be issued in aid of equity and justice but not to add injustice. **(2004 SCMR 1092)**

58.4. Conditions for grant of equitable relief

For grant of such relief, it is mandatory to establish that in order to obtain an interim injunction, the applicant has not only to establish that he has a prima facie case but he has also to show that the balance of convenience is on his side and that he would suffer irreparable injury/loss unless he is protected during the pendency of suit. **(2004 SCMR 1092, 1994 CLC 1601)**

58.5. Prima facie case, meaning

The term "prima facie case" is not specifically defined in the Code of Civil Procedure, 1908. The judge made law or the consensus is that in order to satisfy about the existence of prima facie case, the pleadings must contain facts constituting the existence of right of the people and its infringement at the hands of the opposite party. **(PLD 2016 Sindh 445)** Meaning thereby that a serious

question is to be tried in the suit and that in the event of success, if the injunction is not issued, he will suffer irreparable injury. **(PLD 1970 SC 180).**

58.6. No prima facie case made out

Where no prima facie case is made out by the plaintiff, no temporary injunction can be issued in his favour and likewise, where prima facie case could not be established without recording evidence, the Court would refrain from granting such injunction. **(PLD 2016 Sindh 445)**

58.7. Prima facie case and not indefeasible case

The Court has to see only a prima facie case and not an indefeasible case in favour of a party seeking injunction. **(PLD 2004 Karachi 304)** In establishing prima facie case, plaintiff need not establish his title. It would be sufficient for him to show that he has a fair question to raise as to the existence of his right and that till the question is ripe for trial, a case is made out for preservation of the property in status quo. **(1994 CLC 1601)**

58.8. Material to be looked into by Court

For, unless the plaintiff shows existence of some of his right and its infringement, it shall not be deemed that he has any prima facie case. The existence of a prima facie case is to be judged or made out on the basis of material/evidence on record at the time of hearing of injunction application, and such evidence or material should be of the nature that by considering the same Court should or ought to be of the view that the plaintiff applying for injunction is in all probabilities likely to succeed in the suit by having a decision in his favour. While dilating upon the merits of a case on these parameters, the Courts may tentatively examine the pleadings, affidavits, counter affidavits, rejoinder, if any, and the documents annexed thereto. **(PLD 2016 Sindh 445)**

58.9. Other two ingredients to be looked into only when prima facie case established

The plaintiff succeeds in establishing a good prima facie arguable case then, other two ingredients, irreparable loss and balance of convenience would be looked into. **(PLD 2016 Sindh 445)**

58.10. "Balance of convenience"

Balance of convenience means the comparative mischief or inconvenience to the parties. The inconvenience to the plaintiff if temporary injunction is refused would be balanced and compared with that to the defendant if it is granted. If the scale of inconvenience leans to the side of the plaintiff, then alone interlocutory injunction should be granted. **(1994 CLC 1601)**

58.10.1. Comparative inconvenience

Although it is called "balance of convenience", it is in fact the "balance of inconvenience", and it is for the plaintiff to show that the inconvenience caused to him would be greater than that which may be caused to the defendant. **(PLD 2016 Sindh 445)** Injunction will issue only if the circumstances are such that the object really is to avoid the comparative inconvenience or mischief which is likely to result from refusing it. In other words the inconvenience will be greater than that which is likely to arise from refusing it. **(1976 SCMR 393)**

58.11. Irreparable injury

Irreparable injury means such injury which cannot be adequately remedied by damages. The remedy by damages would be inadequate if the compensation ultimately payable to the plaintiff in case of success in the suit would not place him in the position in which he was before injunction was refused. **(1994 CLC 1601)** Irreparable loss means simply such loss, which is incapable of being calculated on the yardstick of money. For grant of interim injunction the existence of a prima facie case is not by itself sufficient, the plaintiff should further show that irreparable loss will occur to him, if the injunction is not granted and that there is no other remedy

open to him by which he can protect himself from the consequences of the apprehended injury. **(PLD 2016 Sindh 445)**

58.12. Where temporary injunction not granted

Loss measurable in terms of money

Where loss allegedly suffered by the plaintiff was measurable in terms of money, Court declined to grant interim injunction. **(2002 SCMR 1269)**

59. ULTIMATE JURISDICTION OF CIVIL COURTS

59.1. Relevant provision

Section 9 of CPC

59.2. Civil Courts can try all suits of civil nature excepting the suit of which their jurisdiction is barred

There can be no cavil with the proposition that in terms of section 9 of CPC, the Courts have jurisdiction to try all suits of a civil nature, excepting suits of which their cognizance is either expressly or impliedly barred. Thus Civil Courts have been conferred with the general jurisdiction to try all suits of a civil nature (**PLD 2002 SC 408)**

59.3. Where no remedy is provided, relief can be sought from civil Court

A Civil Court is a Court of utlimate jurisdiction and in case where no other remedy is provided for, the Civil Court is the forum where relief can be sought for (**2008 CLC 1472, 1993 CLC 2026**).

59.4. Civil suit can be filed independently of any statute

A litigant has a general right to institute a suit of civil nature independently of any statute, unless such general right is expressly or by necessary implication barred by a statute to the contrary **(PLD 1975 SC 457)** Where ever the object of proceeding is the enforcement of civil rights, a Civil Court has jurisdiction to entertain the suit independently of statute unless its cognizance is either expressly or impliedly barred **(PLD 2013 Peshawar 9).**

59.5. Special Law taking away jurisdiction, interpretation

In order to evaluate whether such jurisdiction has been taken away, the special law under which it is so done, must not only be strictly constructed but also be accordingly applied (**PLD 2011 SC 260)**. Such provision should leave no room for doubt that the jurisdiction of the civil Courts has been ousted or if the ouster is

claimed on the basis of implication, the implication must be founded and adjudged on the touchstone that the forum or the tribunal created by the special law have been conferred with the exclusive jurisdiction to try the matter of a specific civil nature (**P LD 2007 Lahore 261)**.

59.5.1. Jurisdiction of civil Courts barred, but can see whether the acts of special forums are in accordance with law

Even where the jurisdiction of civil Court is barred and conferred upon special tribunals, civil Courts being Courts of ultimate jurisdiction will have the jurisdiction to examine the acts of such forums to see whether their acts are in accordance with law or are illegal or even mala fide **(1974 SCMR 356).** Where the authority or the tribunal acts in violation of the provisions of the statutes which conferred jurisdiction on it or the action or order is in excess or lack of jurisdiction or mala fide or passed in violation of the principles of natural justice, such an order could be challenged before the Civil Court in spite of a provision in the statute barring the jurisdiction of Civil Court **(2009 SCMR 1058, PLD 1996 SC 827, PLD 1997 SC 3)**

59.6. Suits expressly barred: Some Examples of the suits that are expressly barred

59.6.1. Bar under CPC

a. **Res-judicate:** Further action in the matter is barred by res judicata and the doctrine of past and closed transaction **(2019 SCMR 1657, 2007 SCMR 373, 2019 YLR 1290)**

b. **Bar U/S 12 (2) CPC:** The provision of section 12(2) was made the part of CPC by withdrawing the right of a suit of the aggrieved party challenging the decree on the ground of fraud (**2014 CLD 390)**.

c. **Bar U/S 47 CPC:** Section 47, C.P.C. empowers the executing Court to determine the questions relating to execution, discharge and satisfaction of a decree and it bars a separate suit (**2015 CLD 1202 DB Lhr)**

d. **Bar U/S 144 CPC:** The question of restitution comes under section 144 of CPC and the power to grant it is not confined to the section itself and the Court, where it wants to repair the injury done to the party by his action, can grant, restitution on the principle that a Court of Justice has a duty to repair the injury done to the party by his acts and that duty the Court can exercise under section 144 or under section 151 of CPC. (**PLD 1960 Dacca 452)**

59.6.2. Bar under other Statutes

a. **Art 212 of the Constitution-Service matters:** Reference can also be made with approval to a Full Bench judgment of the Sindh High Court in Khalil-ur-Rehman v. Government of Pakistan (PLD 1981 Karachi 750) where the High Court was examining the validity of order which fall within the jurisdiction of the Service Tribunals and it was held that orders, even if mala fide, ultra vires or coram non judice, fell within the ambit of Service Tribunal and jurisdiction of Civil Courts including High Court was ipso facto ousted as a result of barring provisions of Article 212 of the Constitution. **(1998 S C M R 2280)**

b. **Sec 227 Income Tax Ordinance 2001:** Assumption of jurisdiction by a civil Court including the Court of learned single Judge of High Court in the instant matters, while exercising original civil jurisdiction, is without lawful authority **(2017 PTD 2123 DB)**

c. **Sec 29 & 31 Punjab Boards of Intermediate and Secondary Education Act 1976:** In view of the clear wording of section 29 of the Act and the interpretation, which so far has been made as to such provision of law, the Civil Court has no jurisdiction to entertain a suit filed against the proceedings taken and order made by the Board in pursuance of the provisions of the Punjab Act XIII of 1976. (**2016 MLD 158**);

d. **Sec 26 (6), 54-C Electricity Act 1910**: In view of bare reading of section 26(6) of the Electricity Act, 1910, and the case-law cited above, the Civil Court lacked jurisdiction in the matter. (**PLD 2008 Lahore 175**)

e. **Sec 172 Land Revenue Act 1967:** Section 135 of the Act confers power upon a Revenue Officer to make partition of land, on application of any joint owner, whereas section 172 of the Act excludes expressly jurisdiction of civil Courts in any matter which the Government, Board of Revenue or any Revenue Officer is empowered by the Act to dispose of. (**2019 CLC 1343**)

f. **Sec 14 of Evacuee Trust Properties (Management and Disposal) Act 1975**: The property being declared to be part of Hindhu Dharam Shallah and vesting in Evacuee Trust Board, the petitioner having not challenged the declaration in the hierarchy of jurisdiction, he cannot now be permitted in law to open an avenue through the civil suit when the jurisdiction of Civil Court is expressly barred by the specific provision of sections 8 and 14 of the Act. (**2019 YLR 2737 Lhr**)

g. **Sec 7 (4) of Banking Companies (Recovery of Loans, Advances, Credits and Finances) Act, 1997:** It is observed that the ordinary civil Court had no jurisdiction to try the suit as the jurisdiction lay exclusively with the Banking Court. **(2019 CLD 1248 Lhr**)

h. **Displaced Persons (Land Settlement) Act, 1958:** There is no denial of the fact that the remedy before the Civil Court availed by the petitioners was clearly barred under section 41 of the Act, 1957 as well as under the provisions of sections 22 and 25 of the Displaced Persons (Land Settlement) Act, 1958. (**2011 SCMR 239**)

i. **Section 217(2) of the Customs Act 1969**: The adverse orders/actions by the Assessment Officer/Customs authorities cannot be said to be beyond

jurisdiction and thus fail to circumvent the bar to jurisdiction of civil Courts imposed under section 217(2) of the Customs Act (**2018 SCMR 1444**)

j. **Sections 22 and 25 of Displaced Persons (Land Settlement) Act, 1958:** There is no denial of the fact that the remedy before the Civil Court availed by the petitioners was clearly barred under section 41 of the Act, 1957 as well as under the provisions of sections 22 and 25 of the Displaced Persons (Land Settlement) Act, 1958. (**2011 SCMR 239**)

59.6.3. Suits impliedly barred

a. **Implied bar on Suit with regard to Sovereign Acts:** Where an act is done in the exercise of the powers usually called sovereign powers, by which is meant powers which cannot be lawfully exercised except by a sovereign or private individual delegated by a sovereign to exercise them. (**AIR 1970 Mysore 13**)

b. **No action against the State in respect of a tort committed by a servant of the State:** One class are acts of State properly so called, such as making a treaty, commandeering private property for war purposes or quelling civil disturbances by force. Such acts are never justiciable in Courts of law, and since the Crown itself is not answerable for such acts in its Courts, there is no principle upon which it could be made liable for the acts of its officers or subordinates. (**AIR 1956 Calcutta 66**). Any obligation assumed under or created by a treaty, whether it be in favour of the ceding Sovereign or individuals, is not one which the municipal courts are authorised to enforce. (**AIR 1955 Pepsu 3**)

c. **No suit with regard to privileged statements:** Bare perusal of above sections confirmed that the statements or any judicial proceedings are qualified privileged statements and hence, no action lies in such like cases (**PLD 2016 Peshawar 105)**

d. **No suit against public servants for actions taken in discharge of their official duties:** The suit for declaration to challenge an order passed by an official in discharge of his public duty was not maintainable under section 42 of the Specific Relief Act (**PLD 2012 Balochistan 154 DB)**

e. **No suit against Judicial Officers against acts done in exercise of their duties:** Every act in the conduct of the proceedings from the commencement of the hearing up to the pronouncement of the final judgment was an act done in discharge of judicial duty, as such, enjoyed the full immunity granted by the Judicial Officers Protection Act, 1850 against liability to be sued in any Civil Court. **(PLD 1966 SC 628)**

f. **Implied bar on suits related to acts of States:** According to Stephens "an act done by a Sovereign authority *independently of the ordinary* law of the land is not cognizable by the ordinary municipal courts. Hence the Courts have no jurisdiction to question the validity of an act of state **(PLD 1982 SC 367)**.

59.7. Matters regarding which special or general law in force

As per new amendment in Sec 9 of the Code, jurisdiction of the Civil Courts is barred with respect to matters regarding which special or general law is in force e.g:

- Matters relating to rent under Punjab Rented Premises Act, 2009 (Rent Tribunals)
- Family cases under Family Court Act, 1964 (Family Courts)
- Matters relating to environment under Punjab Environmental Protection Act, 1997 (Environmental Tribunals)

60. WITHDRAWAL OF SUIT

60.1. Relevant Provisions

- Order XXIII Code of Civil Procedure, 1908
- Volume I, Rules and Orders of the Lahore High Court, Rule 7, Chapter 13, Transfer and Withdrawal of Suits and Appeals

60.2. Discretion of Court to allow or disallow request of withdrawal with permission to file a fresh

Where the plaintiff has applied for the withdrawal of his suit or has sought the abandonment of his claim or a part thereof, with the permission of the Court to bring a fresh suit, it is within the authority of the Court obviously with the parameters of sub-rule 2(a)(b) to either decline such request or allow the permission. **(2013 SCMR 464)**

60.3. Suit should continue if permission to file fresh suit declined

In the eventuality of refusal, the suit should not be dismissed simpliciter, rather the request for permission alone be turned down and the suit should continue. Thus obviously the plaintiff shall have a right, to choose his further course of action and to decide whether he should withdraw the suit or not. **(2013 SCMR 464)**

60.4. Court should record reasons to grant permission to file fresh suit

The Court has to record its reasons justifying the permission, which in any case shall be so recorded in either of the eventuality as afore-stated. **(2013 SCMR 464)**

60.5. If request not declined in express words

The problem is faced where the request is not declined in express and clear words, yet the suit is 'dismissed as withdrawn' without recording the reasons. In the situation it should be implied, considered and deemed that the Court has found it to be a fit case for the permission and has granted the plaintiff permission to file a fresh suit, because this is the saver course, which should be followed in the interest and promotion of justice, otherwise serious prejudice shall be caused to the plaintiff

who shall have to face the bar of sub-rule (3) and shall be left in a flummox. **(2013 SCMR 464)**

60.6. Power to permit withdrawal of suit also exercisable by appellate Court

It is now well-settled that in terms of Order XXIII, Rules 1 and 2, C.P.C. permission to withdraw a civil suit for the purpose of filing a fresh one can be granted by the appellate and revisional Court at any stage of proceedings. **(2005 SCMR 1405)** The power of the trial Court under Rule 1 ibid to allow a plaintiff to withdraw a civil suit and to file a fresh one is also exercisable, in the like manner, by an Appellate Court including the Supreme Court. **(PLD 2018 Quetta 34,)**

60.7. Scope of permission to file fresh for sufficient cause

Withdrawal of a suit with permission to institute another one is not restricted only to the cases of formal defect. The scope of Order XXIII, rule 1, C.P.C. is wide enough to empower the Court to grant such permission for some other sufficient grounds. **(2005 SCMR 1405, PLD 2003 SC 979, 2000 SCMR 1730, PLD 1965 SC 634).**

60.8. Subsequent Court not to look as to properness or otherwise of the permission

After leave to withdraw a civil suit with liberty to file a fresh one has been granted by a competent Court rightly or wrongly, the Court trying a subsequent suit is not expected to enter into the question whether the earlier grant of permission was proper or not. (**PLD 2003 SC 979)**

60.9. Withdrawal with permission to file fresh, not operate as res judicata

As a consequence of withdrawal of a civil suit with the permission of an Appellate Court, the judgment and decree of the Court below is wiped out unless the Court directs otherwise. The institution of a fresh suit pursuant to such an order is not barred as res judicata. (**PLD 2003 SC 979)**

60.10. Withdrawal of suit without permission, bars institution of fresh suit

If a plaintiff withdraws from a suit or abandons part of a claim, without permission to file a fresh suit, he is precluded from instituting any fresh suit in respect of such subject matter or such part of the claim. **(2011 YLR 2863, 2017 PLC (C.S.) 717 SC)** Further, said suit was subsequently withdrawn without seeking permission to file a fresh one. Thus, both the provisions, i.e., Order II, Rule 2, C.P.C. as also Order XXIII, Rule 1(3), C.P.C. were fully attracted to the case of the petitioner as rightly held by two Courts below. **(2017 SCMR 2005)**

60.11. Applicability of Limitation Act after withdrawal of suit

Order XXIII, Rule 1, C.P.C. provided for the filing of fresh suit with the permission of the Court. However, under Order XXIII, Rule 2, C.P.C., the plaintiff is bound by the law of limitation in the same manner as if the first suit had not been instituted. (**2013 SCMR 1099, 2011 SCMR 345)**

60.12. Maintainability of second suit when instituted during the pendency of first without withdrawing the same

As far as the maintainability of the subsequent suit is concerned, there is no bar under the law to file a subsequent suit in the presence of the earlier one and when earlier suit is withdrawn after institution of the subsequent suit, then the provisions of Order XXIII of C.P.C. are also not attracted and fresh suit could not be declared to be barred by law. (**PLD 1983 SC 344**, **2018 MLD 401)** Since the plaintiff did not require permission to institute a fresh suit having already instituted that suit, the prohibition contained in Order XXIII sub-rule (3) read with section 12, C.P.C., cannot be applied to the instant suit. **(2017 CLD 959**)

61. WRITTEN STATEMENT & SET-OFF

61.1. Relevant Provision

Order VIII Code of Civil Procedure, 1908

61.2. Types of written statements

Three types of written statements can be filed by a defendant viz. as of right without any formal permission of the Court (O. VIII, R.1); when it is so required by the Court to file a written statement (O. VIII, R. l & 9 and when under some circumstances it is filed by the leave of the Court (O. VIII, R.9). (**PLD 2002 SC 630)**

61.3. Limitation for filling written statement

Order VIII, Rule 10 of C.P.C. prescribes a timeframe for filing a written statement which cannot ordinarily exceed 30 days. Where law prescribes a time for doing a certain act, the same should ordinarily be adhered to unless cogent reasons and lawful justification is presented before the Court justifying an extension of such time. **(2017 SCMR 1841)**

61.4. Penal Consequences for all three types of written statements

All the three types of written statements mentioned earlier do not entail penal consequences. Therefore, it should always be absolutely clear from the proceedings that the written statement on account of which penalty is sought to be imposed were "required", by the Court. It was neither as of right (Rule 1) nor as result of permission (Rule 9). The use of word "required" is not without significance. It does not permit a routine order without application of mind to the "requirement" and/or the need. Therefore, it is essential that whenever a written statement is to be made subject of the penal rule 10, there should be proof on record that the Court had "required" it by application of mind to the need and that too in a speaking order. Without the same, many innocent parties would be trapped in a technicality without fully realizing the implications. In this connection, it is made clear that whenever adjournments are granted for production of a written statement which can be filed

as of right under Rule 1 or which is permitted to be filed under rule 9, that would not satisfy the law regarding the "requirement" of the Court. It is only the written statement which is "required" and that too by "the Court" by a speaking order, which would entail the penal consequences of Rule 10. (**PLD 2002 SC 491, 1987 SCMR 1365)**

61.5. Discretion of Court in case of failure to submit written statement

Where the required written statement has not been filed, there are two alternatives to the Court, the pronouncement of judgment forthwith or the making of such other order (**2003 SCMR 1701).** An opportunity should be provided to the defendant before invoking the penal provision (**2004 SCMR 1528, 2002 SCMR 1954).**

61.6. Retraction of defendant and his subsequent plea

Where the defendants had disowned the written statement, no credence could be given to such statement. Real defence from the side of the defendants was required to be reflected in the proceedings. (**2001 SCMR 761)** In absence of any plea raised in the written statement, defendants could not be allowed to raise such a plea subsequently (**2004 SCMR 530)**. Party to litigation can only succeed according to what was alleged and proved. (**1998 SCMR 593, 1996 SCMR 1770, 1989 SCMR 704).**

61.7. Evidentiary value of assertions made in written statement

Averments made in pleadings would not carry weight, unless proved through evidence or admitted by opposite party (**2007 SCMR 870)**. Written statement cannot be treated as evidence against party who had submitted the same. Without leading evidence, the plea raised by defendant in written statement cannot be accepted merely on the basis of assertion (**PLD 2004 SC 465).** Pleadings are not evidence by themselves and statement of defendant in written statement cannot be used as evidence, when amounting to admission of plaintiff's pleas, without examination of the concerned party in its support (**2000 SCMR 1391)**. Written statement cannot be an exhibit in case without person filing same being examined

in Court. Written statement filed by deceased cannot be treated as evidence in case under S. 32, Evidence Act, 1872. (**PLD 1972 SC 25)**

61.8. Admitted facts in written statement

Fact admitted needed no proof, especially when such admission had been made in the written statement. (**2015 SCMR 21)**

61.9. Evasive denial

Evasive denial in written statement, expressing lack of knowledge in that regard, is no denial as per provisions of O. VIII, R. 3, 4 & 5 C.P.C. Such denial may be construed as admission on the part of defendant (**PLD 2011 SC 119).** Written statement must deal specifically with each allegation of fact in the plaint and when the defendant denied any such fact; he must not do so evasively but answer the point with substance. Where denial of fact was not specific but evasive, and the fact shall be taken to be admitted (**PLD 2017 SC 265).** Denial in written statement must be specific and not evasive. Every allegation of fact, if not denied specifically or by necessary implication would be taken to be admitted, except as, against the person under disability. Court may in its discretion require any fact so, admitted to be proved otherwise than by such admission. (**2003 SCMR 1864)**

61.10. Fact not pleaded in plaint

Defendant could not be punished for non denial of a fact not pleaded in the plaint, which plaintiff was bound to allege in order to constitute a cause of action and then prove the same for passing a decree in his favor (**PLD 2012 SC 211).**

61.11. Burden of proof

Burden of proof would lie on the party alleging claim in plaint or written statement. (**2007 SCMR 870)**

61.12. Nature of provisions

Provision of O.VIII, R.12, and C.P.C. is directory in nature since its object is to avoid unnecessary delay in disposal of suit so that for purpose of service an address should be filed in Court. (**1992 SCMR 2112)**

61.13. List of legal representatives

Defendant is under legal obligation to file list of legal representatives along with his written statement and to nominate a person to intimate Court, of fact of death of defendant and to furnish Court with necessary particulars and addresses of his legal representatives and also to make application for their substitution in view of O.VIII, R.13 C.P.C. Even if legal representatives of dead party are not impleaded in petition, the same would not be fatal to the proceedings. (**2007 SCMR 1193, 1987 SCMR 1923, PLD 1989 SC 755)**

61.14. SET-OFF

A plea of legal set-off, in its essential character is a defence and a counter-claim combined, defence to the extent of the plaintiff's claim and a claim by the defendant in the suit itself for the balance. The essential conditions of legal set-off held by august Supreme Court in case (**2009 SCMR 666)** are given in below:

i. The suit must be one for the recovery of money.

ii. As regards the amount claimed to be set off;

   a. It must be an ascertained sum of money;
   b. Such sum must be legally recoverable;
   c. It must be recoverable by defendant or by all the defendants if more than one;
   d. It must be recoverable by the defendant from the plaintiff or all the plaintiffs if more than one;
   e. It must not exceed the pecuniary limits of the jurisdiction of the court in which the suit is brought; and
   f. Both parties must fill, in the defendants claim to set-off, the same character as they fill in the plaintiffs' suit.

1. IMPORTANT RULES ABOUT ARBITRATION

1.1 Scope and requirements (Pre-requisites)

Section 2(a) of the Arbitration Act, 1940 defines an arbitration agreement as a written agreement to submit present or future differences to arbitration, whether an Arbitrator is named therein or not. An arbitration agreement is not required to be in any particular form. To constitute an arbitration agreement in writing, it is not necessary that it should be signed by the parties, and it is sufficient if the terms are reduced to writing and the agreement of the parties thereto is established. All that is necessary is that the parties should accept the terms of the arbitration agreement. The acceptance may be in writing or by conduct. The arbitration agreement need not be incorporated in a formal deed or be under seal. It may well be entered into through correspondence or by a less formal document. What is required to be ascertained is whether the parties had agreed that if disputes arose between them in respect of the subject matter of the contract, such disputes would be referred to arbitration, then such an agreement would spell out an arbitration agreement. **(2019 YLR 209)**

1.2 Prerequisites for an application under section 20

- **i.** A subsisting and valid written arbitration agreement executed before the institution of the suit.
- **ii.** Suit should not have been filed with respect to the subject-matter of agreement which is not forbidden by law or against public policy.
- **iii.** Difference must have arisen to which the agreement applies.
- **iv.** The arbitrators should not have started arbitration proceedings.
- **v.** The award should not have been made.
- **vi.** The subject-matter should be such as is not forbidden by law.
- **vii.** The Court to which an application is made has jurisdiction.

If any of the condition is absent, the filing of the application under this section and passing of orders by Court that the agreement be filed in Court and a reference to arbitration be made will be barred. **(1998 CLC 256)**

1.3 Necessary Ingredients of Arbitration

There must be a controversy, there must be presentation of the case from both sides, if necessary evidence must be brought on record and then there should be an application of mind by the arbitrator and a reasoned award must follow. To my mind, these are necessary ingredients for an arbitration (**1999 YLR 978)**.

1.4 Essentials for making award as rule of Court

Provision of S.17, Arbitration Act, 1940 deal with cases where award has been actually filed before Court either through party or by the arbitrator---Once award had been filed before Court then Court would get jurisdiction to take further proceedings in accordance with law and pass decree thereon---Scheme of S:17, Arbitration Act, 1940, is that after filing of award in Court, opportunity is given to party challenging its legality or correctness to file objection petition for setting aside the award---Such petition has to be filed within 30 days under Art.158, Limitation Act, 1908, failing which party in whose favour award was made would be entitled to decree in terms of that award---Such exercise as contemplated under S.17, Arbitration Act, 1940, would be necessary only, if award had been filed in Court=--Where, however, award and its copy, though in possession of petitioner were never filed in Court, further proceedings under provisions of S.17, Arbitration Act, 1940, were merely exercise in futility **(1996 CLC 268)**

1.5 Object of arbitration to curtail period of litigation

It is settled that arbitration is a settlement of controversies/disputes by one or more persons chosen by the parties themselves. The Judges so chosen are known as Arbitrator/Arbitrators/Umpires. The object of arbitration proceedings is to curtail period of litigation; to encourage resolution of conflict through Judges of their own choice; that Arbitrators are not strictly bound by rules of technicalities embodied in

Procedural Laws as well as Qanun-eShahadat/Evidence Act; that the Courts are given role to see that these Judges decide causes strictly in accordance with law, in exercise of their supervisory power contained in sections 14 to 17, and sections 30 and 33 of the Act **(PLD 1998 Lahore 132)**.

1.6 Res-judicata applicability

Second suit instituted by the respondent/plaintiff, during pendency of earlier Arbitration Suit, is not maintainable, being hit by O. II, Rule 2 of the Code of Civil Procedure, 1908 as well as under section 11 i.e. Res Judicata; resultantly, while placing reliance on the judgments supra, the instant appeal is allowed, consequent whereof, the plaint in second suit i.e. present suit, is rejected under Order VII, Rule 11(d) of the Code of Civil Procedure, 1908 (**2016 MLD 1077 Lhr)**.

1.7 Arbitration award - challenge u/s 12 (2) CPC

- Under the Arbitration Act there is no provision for challenging such decree on the ground that it has been obtained by misrepresentation and fraud. Therefore applicability of section 12(2), C.P.C. has not been excluded (**1993 SCMR 437)**.
- Arbitration has been defined to resolve the differences through the Judges appointed out of the choice of the parties and when arbitration clause prescribed for all the matters arising out of the contract or incidental thereto shall be referred to the Arbitrator leading to reference of arbitration (**2007 CLC 751 Lhr)**.

1.8 Duty of Arbitrator

An arbitrator, being in loco judicis has to act honestly and legally throughout the proceedings (**PLD 2004 Lahore 404)**.

1.9 Appointment of Arbitrator

1.9.1 By Court with Consent of Parties

Consent of the parties is sine qua non and essential and any dissent shown by either of the party on the arbitrator proposed by the rival party, the said

arbitrator would not be appointed, because, in the entire scheme of the Act, 1940, the jurisdiction is not conferred upon the Court, to whom application under section 20(4) of the Act ibid is moved, to unilaterally appoint a sole arbitrator proposed by one party that is not acceptable to the other party (**2020 CLC 106 Lhr)**.

1.9.2 By Parties

The mechanism for selection of the arbitrator is invariably mentioned in the arbitration clause. Either the parties agree to nominate and appoint an arbitrator, or the arbitrator is named in the agreement (**2019 CLD 609)**.

1.10 Characteristics of an arbitrator

In order to achieve the object of arbitration, an arbitrator necessarily has to be a person who is independent, impartial, neutral and non-partisan (**2019 CLD 566)**.

1.11 Validity of award, if arbitrator not appointed according to the agreement and law

As the mandate of law prescribed by Section 8, was not followed by the respondent, the award passed by the arbitrator cannot be deemed to be valid as the arbitrator, having not been appointed in terms of the arbitration agreement and the law, lacked the requisite jurisdiction (**PLD 2016 SC 121)**

1.12 Number of arbitrators in a case

There is no embargo, restraint and impediment on appointment of more than one arbitrator as the provision of law is much clear on the subject and at the cost of repetition the subsection (4) of the Section 20 of the Act supra is referred here, If the reference is to an even number of arbitrators, the arbitrators shall appoint an umpire not later than one month from the latest date of their respective appointments (**2020 CLC 106 Lhr)**.

1.13 Mediation and arbitration

There is a difference between 'arbitration' and 'mediation'. The latter merely endeavors to facilitate the settling of disputes between the parties through the tools of mediation, while the former, after holding an inquiry, decides the dispute and the parties accept the decision of their chosen person as binding upon them (**2019 CLD 609)**.

1.14 Arbitrator and Referee

There is clear distinction between an arbitrator and a referee. An arbitrator is a person who decides a dispute after an inquiry. The determination of dispute by such person is essentially by following judicial procedure keeping in view the principles of natural justice and the law of the land. Such decision is known as an award and can be made a rule of the Court after following the procedure of the Arbitration Act. The statement of a referee is not his findings. It is a statement made before the Court on the basis of knowledge or belief of the referee (**2004 YLR 295Lhr)**.

1.15 Requirements of reference for arbitration

- It is not necessary that an agreement for arbitration should be signed by the parties. It is sufficient if the agreement is in writing. Even if it is not signed, the parties will be bound by it and the matter can validly be referred to arbitration (**1987 CLC 83)**
- The dispute, on the basis of unsigned arbitration agreement, cannot be resolved through arbitration, unless it is proved that the parties intended for resolution of their dispute through arbitration (**2009 CLD 390 Lhr)**.
- Where dispute between parties was not in regard to term s and conditions of contract but was outside the same and where defendants themselves filed written statement and submitted to jurisdiction of Court, dispute between them could not be referred to arbitration. (1996 CLC 807)

1.16 Revocation of Authority of Arbitrator or Umpire

The Arbitrator appointed under the Agreement is not revocable except with the leave of the Court under sections 5 and 11 of the Arbitration Act (X of 1940) unless contrary intention expressed in the arbitration agreement (**2002 YLR 2687Lhr)**.

1.17 Removal of Arbitrator

Section 11(1) of the 1940 Act provides that the Court may, on the application of any party to reference, remove an arbitrator or umpire who fails to use all reasonable dispatch in entering upon or proceeding with the reference and making an award. Section 11(2) of the 1940 Act provides that the Court may remove an arbitrator or umpire who had misconducted himself or the proceedings (**2020 CLC 760)**.

1.18 Court should lean towards upholding the award than setting it aside

Court is supposed to lean towards upholding the award, rather than vitiating it(**2013 MLD 689)**

Grounds for setting aside award

It is settled principle of law that the award of the Arbitrator who is chosen judge of facts and of law, between the parties, cannot be set aside unless the error is apparent on the face of the award or from the award, it can be inferred that the Arbitrator has misconducted himself under sections 30 and 33 of the Act (**2014 SCMR 1268)**. The reference to arbitration has to be confined to the subject-matter of the suit, and any award on matters not covered by the suit would be void to that extent. The same remarks would apply to any consequential decree that might be passed by the Court in terms of such an award, for the simple reason that the Court would not be seized of the matters which were not put in controversy in the suit itself. **(1973 SCMR 289; AIR 1928 Sind. 81; 1925 Sind 51; ILR 53 Cal. 258)** Court cannot scrutinize the reasons for grant of an award as the parties agree to refer the matter to the arbitrator for its decision and the arbitrator cannot be presumed to

be a court having all the laws on its sleeves, therefore, conducting proceedings relating to the procedure and determination of question referred to, arbitrator cannot be adjudged on the basis of standard of adjudication before the court.

1.19 Stay of proceedings of civil suit

- Arbitration agreement between parties still subsisting and dispute raised in suit falling within scope of that agreement, order of Court to stay proceedings before filing of written statement, was unexceptionable. **(1993 MLD 1074)**
- Where counsel appearing for party to suit had sought adjournments specifically for filing of a written statement and had obtained time on more than one occasion for such a purpose, subsequent application for stay of suit has been held to be not maintainable. (**PLJ 2016 Islamabad 342, 2017 CLC 131)**
- Defendants had stated specifically in their affidavit that there were disputes between the parties which were agreed to be referred to arbitration whenever, any dispute would arise--Defendants having not taken any step en the proceedings (of suit) were entitled to stay of suit and reference of dispute to arbitration in terms of arbitration agreement. **(1994 MLD 2227)**

1.20 Second Appeal

No second appeal is competent against a judgment passed by appellate Court as one remedy of appeal is provided under Arbitration Act, 1940. **(2019 CLC 413)**

1.21 Art 79 of QSO and arbitration

Art.79 of the Qanoon-e-Shahdat is not applicable to arbitration agreements. **(PLJ 1994 Lahore 309)**

2. CANAL AND DRAINAGE ACT, 1873

2.1 Relevant Provisions

Sections 3, 20, 68, 68-A of Canal and Drainage Act, 1873

2.2 Definition

"Nakka" and "new watercourse" are not synonymous or interchangeable terms, rather having their own connotation and significance. (**PLD 2003 SC 344)**

2.3 Jurisdiction of Authorities under the Act

- Except for period of crop sown or growing, Divisional Canal Officer could re-open and modify earlier arrangements as many times as differences arose, subject to fulfillment of conditions laid down in Section 68 of Canal and Drainage Act 1873. (**2005 SCMR 1135)**
- Superintending Canal Officer before review had not issued notice to all the shareholders of the *Moga*, such order in the absence of said shareholders was also violative of principles of natural justice and thus not maintainable. (**2002 SCMR 1466)**
- Where the condition precedent, viz. application under Section 68 for invocation of jurisdiction of the Divisional Canal Officer was missing, application under S.68-A for interim relief was not sustainable. (**1992 SCMR 613)**
- Under S.20 of Canal and Drainage Act, 1873, Superintending Canal Officer had the power to confirm or modify decision of Divisional Canal Officer but said section did not confer any authority upon him to out-rightly reject decision of Divisional Canal Officer. (**2007 YLR 1317)**

2.4 Interim Relief

- Section 68-A of the Canal and Drainage Act , 1873 was added with the sole object to provide interim relief to the farms in case of unauthorized interruption or disturbance in the watercourses-Order under said provision

was final and could not be interfered with through exercise of constitutional jurisdiction under Art. 199 of the Constitution unless it was proved that the same was patently illegal or concerned land owners had not been afforded an opportunity of hearing or that requisite inquiry was not conducted by the Canal Officer before passing the order. (**2013 MLD 347)**

- Law provides that Sub-Divisional Canal Officer before passing an order for restoration of dismantled watercourse or internal *Kkaal*, was to hold an inquiry himself. In the present case Sub-Divisional Canal Officer did not hold the inquiry as required by Section 68-A of Canal and Drainage Act, 1873-Order of restoration of *khaal* having been passed on basis of some inquiry allegedly conducted by the field staff could not be considered as valid and lawful hence was set aside-All the subsequent proceedings conducted being outcome of a void order, were also void and not sustainable. (**2007 YLR 2179)**

2.5 Jurisdiction of Civil Court

- To determine irrigation rights of different people and prepare a *"Wara Bandi"* was exclusive job assigned to concerned authorities under Canal and Drainage Act, 1873, who, till final determination, could make interim arrangements-Civil Court was barred to determine such rights. (**2005 SCMR 668)**
- Civil court could not interfere unless the discretion exercised under Canal and Drainage Act, 1873 a special statute, was fanciful, arbitrary, or result of gross abuse of authority or was mala fide. (**2007 YLR 1388)**
- Normally a `*Wara-Bandi'* arrangement, ordered by Canal Authorities, has to remain in force, unless it was set aside by Civil Court. (**1993 MLD 716)**
- Suit, held, would lie only to challenge an order finally passed under Section 68 of Canal and Drainage Act --interim order passed by Canal Authority could not be assailed in civil suit. (**1987 CLC 2093)**

- No temporary injunction suspending operation of warabandi sanctioned by Divisional Canal Officer under S. 68, can be issued by Civil Court**.** (**PLD 1962 Lahore 317)**

2.6 Partial acceptance of Canal Water

The occupier of land may accept supply of canal water and this will also include supply of tube-well water or refuse to accept any supply. There can be no partial acceptance of the canal water. (**PLD 1975 Lahore 237)**

2.7 Opportunity of Hearing

- Where orders for shifting of water outlet *(Moga)* were passed in presence of affected parties, violation of the provisions of S.20 of the Canal and Drainage Act, 1873, was not relevant. (**2002 CLC 333)**
- Imposition of *Tawan* for unauthorised extra discharge from outlet without impleading shareholders as party and without affording them opportunity of being heard, held, was patently without jurisdiction and illegal. **(1988 CLC 1870)**
- Canal Officer not competent to set aside or reverse his previous order without assigning any reason and without any change in fact s and circumstances. (**PLD 1971 Lahore 371)**

2.8 Section 68 & 68-A

(1992 SCMR 613; KLR 1992 Civil Cases 417; PLD 1992 Lah 370; 1994 PSC 82)

For correct interpretation of section 68-A of Canal and Drainage Act, 1873, it must be read alongwith section 68, both being interdependent and one qualifying the other.

- Before the enactment of section 68-A, no power vested in departmental authorities to prevent the mischief and give an immediate relief to the person whose supply of water through watercourse or internal Khal for irrigation purposes, was interrupted by his opponent, by dismantling it, or

otherwise. Under section 68-A, such power has been conferred on the Divisional Canal Officer, who upon the application of aggrieved party, after holding such enquiry, as deemed fit by him, can order interim restoration of dismantled watercourse or internal Khal; and the interrupted supply of water. The order under this section does not conclude the rights of the parties, but is merely provisional in character. It remains in force until the final settlement of the dispute under section 68.

- The object of section 68-A is to stop continuation of wrongful state of things and endangering of the rights in controversy between the parties in the proceedings under section 68. Such an order terminates on the final decision of the dispute by the Sub-Divisional Canal Officer under subsection (2) of section 68; and in case the application under subsection (1) of section 68 is not accepted and appeal under subsection (3) is filed, on the decision of the appeal by the Divisional Canal Officer. An interim order made as to the construction of a link watercourse remains in force until it is constructed.
- It will thus be seen that the pendency of dispute under section 68 is sine qua non for entertaining an application under section 68-A, and commencement of further proceedings on its footing. Action under section 68 can be initiated by the Sub-Divisional Canal Officer, only on the application in writing, of the person complaining an infringement of his rights.
- Section 68-A speaks of an interim order, and interim relief is always a step in aid of grant of main relief on the conclusion of the trial by a Court or a Tribunal. This jurisprudential concept of interim relief when viewed in the context of the expression "until the dispute is finally settled under section 68", appearing in section 68-A, unequivocally leads to the conclusion, that the proceedings under section 68 must be in existence before an application under section 68-A for grant of interim relief is entertained. The award of

interim relief, before commencement of proceedings for grant of main relief, will be a sheer anomaly.

2.9 Nikal

Dispute of *'Nikal'* water cannot be treated as independent proceedings as same is a part of *'warabandi'* and every share holder in a*'Moga'* has a right to get his dispute settled by way of making application u/S. 68-If DCO after conducting inquiry comes to conclusion that some modification is required in *'Warabandi'* he can certainly pass an appropriate order allocating share in *Nikal* water also Dispute about distribution of *Nikal* water can be decided by Divisional Canal Officer(DCO) at time of preparation or modification of *'Warabandi'* as same are not independent proceeding and very much connected with *'Warabandi'* **(PLJ 1998 Lahore 1345)**

3. BAILMENT

3.1 Definition

Section 148 of the Contract Act defines bailment as the delivery of goods by one person to another for some purpose upon the contract that they shall, when the purpose is B accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. **(2007 CLD 1164)**

The bailment is the delivery of goods by one person to another for a purpose as per the contract that when the purpose is accomplished the goods shall be returned or otherwise disposed of according to the direction of the person delivering them. **(2015 CLD 802)**

3.2 Rights and duties of Pawnee towards goods pledged

The Pawnee is bound to return the pledged goods to the Pawnor on repayment of debt or performance of the purpose, but where the Pawnar failed to repay the debt, the Pawnee is within his rights to sell the pledged goods after notice to the Pawnor or retain the goods and file the suit for recovery of debt as provided under the Contract Act. However, this question arose that if the Pawnee is not in a position to return the pledge goods whether the right to sue and recover the debt remains alive or not, if the Bailee/Pawnor adopts the recourse of filing the recovery suit. **(2015 CLD 802)**

3.3 Pawnee's right where Pawnor makes default

- Section 176 is, in essence, a right which has come to vest in the pawnee. That right cannot be converted into a corresponding obligation at the whim of the pawnor. In other words, a right in the pawnee and a discretion to exercise that right at the most opportune moment cannot be asserted as an obligation from the standpoint of the pawnor. That would be tantamount to taking away that right. In effect, therefore, the entire foundational basis of section 176

would fall away. Section 176 would then be reduced to being a painting to be looked at, merely. **(2016 CLD 1586)**

- The key words in section 176 are 'makes default in payment of the debt, or performance, at the stipulated time of the promise'. Thus the right under section 176 is triggered on the default at the stipulated time. **(2016 CLD 1586)**
- If there was no default and the stipulated time had not arrived, the mandate of section 176 was not engaged. **(2016 CLD 1586)**
- When a pawner defaults to make the payment of loan the pawnee has three rights; firstly, he brings a suit against pawner upon debt or promise; secondly, he may retain pawn as collateral security till the realisation of debt; and thirdly, pawnee may sell the pawn after reasonable notice to pawner and to sue the pawner for recovery of the debt. It thus clearly follows that right to retain pawns, right to. sell the same and right to bring an action for realisation of debt, are not` alternative remedies but concurrent. **(1999 CLC 671)**

3.4 Bailee's duty to exercise due care and diligence and responsibility against any loss

In terms of Section 151 of the Contract Act, 1872, the bailee has to exercise due care and diligence in respect of goods bailed to him and under Section 161, it is the bailee, who is responsible if the bailed goods are not returned, delivered or tendered on the proper time and if this default results in any loss, then it is the liability of bailee. **(2016 CLC 1326)**

3.5 Responsibility of Bailee to take care of goods bailed and responsibility in case of loss of goods bailed

- Under section 151 of the Contract Act, the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under

similar circumstances took of his own goods of the some bulk quality and value as the goods bailed. **(2015 CLD 829)**

- The bailee is not an insurer of the goods, the bailee is not responsible for loss caused by an accident but he has to show when goods bailed are lost that there were no negligence or default on his part, it is thus the duty of the bailee to take step to recover the goods and if he can inform the owner, in time he must do so, and if he has failed to inform the owner, he must act as an agent of necessity and takes the steps which are reasonable owner would take in defence of the property of value in question. A bailee is bound to take reasonable mean to protect his bailor's property and in case of loss, the onus is on the bailee to prove that it occurred due to his negligence or want of ordinary care. **(2015 CLD 829)**
- The moment goods are delivered to the bailee, he assumes duty to take as much care of the goods bailed to him, as a man of ordinary prudence would have taken of his own goods. Unless, it is provided otherwise, by way of any special contract, a bailee cannot be held responsible for the loss, destruction or deterioration of the goods bailed. If the bailee is able to demonstrate that, he had taken as much care of the goods bailed to him as a man of ordinary prudence would have taken. Then even if the loss, destruction or deterioration has taken place, he gets statutory exoneration from any such liability by virtue of section 152 of the Contract Act. **(PLD 2004 Kar. 407)**
- To foist the responsibility and impose liability as a bailee, it is to be shown that, there was a contract of bailment either express or implied between the parties. That a loss, destruction or deterioration of the goods bailed has occasioned and lastly, the bailee had not taken as much care of the goods bailed to him as a man of ordinary prudence would have taken under a given circumstances. **(PLD 2004 Kar. 407)**

3.6 Lien

A lien is "a right in one man to retain that which is in his possession, but belongs to another, till certain demands of the person in possession are satisfied". It can arise in one of the three ways: (1) by common law ; (2) by express or implied contract ; and (3) by the general course of dealing in the trade in which the lien is claimed. Liens are of two kinds vii. general and particular. General liens are those in which A the right to retain the property is claimed for a general balance of accounts while particular lien is a right to retain property "for a charge on account of labour employed or expenses bestowed upon the identical property detained". **(PLD 1957 (W. P.) Karachi 760)**

3.7 Bank's right of lien or a right to set-off against all monies of his customers in his hands

2015 SCMR 1341:-

- According to this rule when the monies are held by the Bank in one account and the depositor owes the Bank on another account, the Banker by virtue of his lien has a charge on all monies of the depositor in his hands and is at liberty to transfer the monies to whatever account, the banker may like with a view to set-off or liquidate the debts...."
- It hardly need any emphasis to understand that a banker can exercise his right of lien or his right to set-off the liability of his customer against the securities and monies in his hand of that customer only and not of anybody else.

3.8 Creation of general lien under section 171 of the Contract Act, 1872

- The words used in section 171 of the Contract Act, 1872 "in the absence of the contract to the contrary, and unless there is an express contract to that effect" are very important and cannot be neglected from consideration. The pre-condition for the applicability of section 171 of the Contract Act, 1872 is that there must not be an explicit or implied contract indicative of the intention of

the depositors. If the customer has deposited the amount with specific instruction to adjust the amount in such and such account, in that event, when the bank accepts it as such, it cannot vary it or change and adjust it to any other account. Section 171 of the Contract Act would apply when no such specific, express or implied instructions at the time of deposit were conveyed or imparted to the Bank. **(PLD 2008 SC 442)**

- A lien is a right in one man to retain that, which is in his possession, but belongs to another, till certain demands of the person in possession are satisfied. Under the provisions of the Section 171 of the Act of 1872 a banker, amongst others named therein, in the absence of a contract to the contrary, has a right to retain as security for a general balance of account goods bailed to him. **(2017 CLC 17)**

3.9 Pledge

- Under the Contract Act, a pledge is ordinarily construed to mean delivery of an article to the pledgee by the pledgor as security for a debt or for carrying out some engagement that has been committed by the pledgor with the pledgee. An article owned by the pledgor is physically delivered to be kept by the pledgee as security until the commitment of the pledgor with the pledgee is honoured. However, in mercantile practice another form of pledge has also developed. Under this form, the actual delivery of goods is not entrusted to the pledgee as only constructive possession of the pledged goods is handed over. In this manner, the pledgor is allowed to utilize the pledged goods in his ordinary course of business. **(2016 SCMR 800)**
- A valid pledge can be created not only by actual delivery of articles but also by handing over constructive possession only. The pledgee retains a mere right to take possession of the pledged goods in case the pledgor commits default in discharge of his obligation. The character of pledge is not lost merely

because actual physical possession of the pledged goods was not delivered to the pledgee. **(2016 SCMR 800)**

- Pledge is a sub-specie of bailment and the purposes for the delivery of goods by way of bailment as envisaged by section 148 of the Contract Act is the security for payment as has been mentioned in section 172 of the Contract Act. **(2007 CLD 1164)**

4. COMMUNICATION AND ACCEPTANCE

- The general rule relating to offer and acceptance is that there can be an acceptance of an offer by communication of assent of the person to whom the offer is made or by his doing some act which he is required by the terms of the offer to do. In the case of Dr. Azeem Shad v. Municipal Committee, Multan PLD 1968 Lahore 1419 it was observed that under section 3 of the Contract Act the communication of proposals and the acceptance of proposals are to be deemed by an act or omission of the party proposing or accepting by which he intends to communicate such proposal or acceptance. A mere acceptance without communicating the same cannot be binding. **(2008 CLD 356)**
- It cannot be denied that without communication of an offer, no contract can arise. Equally, it can also be said that in absence of acceptance of proposal/offer which acceptance should be absolute and unqualified there is no contract. It is the communication of a proposal/offer and intimation of its acceptance which creates a contract. The facts of such transactions are missing in this case. **(1996 CLC 118)**

5. CONSENT

5.1 Definition

The word "Consent", which is an essential ingredient of an "agreement", has been defined in the **dictionary of English law by Earl Jowitt** to mean "an act of reason accompanied with deliberation, the mind weighing, as in a balance, the good or evil of either side Consent presupposes three things a physical power, a mental power, and a free and serious use of them. Hence it is that if consent be obtained by intimidation, force, meditated imposition, circumvention, surprise, or undue influence, it is to be treated as delusion, and not as a deliberate and free act of the mind. **(PLD 2011 SC 44)**

5.2 Free Consent

- The consent is said to be free as provided under section 14 of the Contract Act, when it is not caused by coercion, undue influence, fraud, mis-representation and mistake subject to the provisions of sections 20, and 22 of the said Act.**(PLD 2011 SC 44)**
- It is well settled by now that "consent is free, when the activity of man, by which it is effective, works without obstacles to impede its exercise. The law upon the question of free consent is given in the statute itself, and therefore, the Court has to administer the law to a case when it comes within its provisions irrespective of the consideration whether the application of the provisions would or would not disfavour the abuse of moral influence or encourage moral cowardice.
- Consent obtained under duress, whether duress is physical or moral is not free consent. **(AIR 1945 Cal. 218).**
- Consent should not only be free but informed. Consent is said to be free when it is not caused by coercion undue influence, fraud, misrepresentation or mistake. Consent can be regarded as informed,

when it is act of reason accompanied with deliberations of mind which knows right or wrong, good and evil, and also rights and obligations of the parties involved in the commission of the act. Since the oral consent was not informed, it cannot be set up as valid defence **(AIR 1985 HP 88)**

- General averment that consent was not freely obtained is not enough to set up the plea that there was one of the vitiating elements enumerated under section 14. **(AIR 1915 PC 7)**

6. CONTINGENT CONTRACT

6.1 Test, contract `contingent' or not

The test to determine as to whether a contract is `contingent' or `absolute' is that if there is mere stipulation in the agreement-to-sell that the sale-deed would be executed after obtaining permission from any public functionary then such a condition is not collateral to the contract and the contract cannot be construed as a `contingent' contract because the condition was forming the part of the consideration. However, where vendor is not in possession of the absolute title and execution of the sale-deed depends upon the grant of proprietary rights by the Government then such a contract could be declared as `conditional' or `contingent'. **(2008 CLC 1340, 2017 YLR 495)**

6.2 How and when contingent contracts can be enforced

- Section 32 of the said Act provides how contingent contracts are enforceable in law. The law allows enforcement of a contingent contract, after the event upon which it was contingent, has happened. In order to seek enforcement of a contingent contract, the party suing to enforce an obligation, which is conditioned upon the occurrence of an event, has to only establish that the event has occurred in a manner contemplated by the contract for the obligation to arise. **(2012 SCMR 345)**
- A contingent contract is not enforceable till the event on which it depends has occurred. But the uncertain event on the happening of which the contract is conditional must be collateral to the contract. This means that it must not form part of the consideration of the contract but must be independent of it. **(PLD 1963 Dacca 816)**
- Contingent contracts enforceable unless rendered impossible. **(PLD 1959 (W. P.) Karachi 750)**

7. CONTRACT

7.1 Legal meaning

Discussed in detail in **2017 YLR 1579**

In the Law Dictionary, 5th edition, page 291, Black has given the meaning of 'contract' as "an agreement between two or more persons which creates an obligation to do or not to do a particular thing. Its essentials are competent parties, subject matter of a legal consideration, mutuality of agreement and mutuality of obligations."

'Contract' has been defined in **David M. Walker Oxford Companion to Law** as "an agreement between two or more persons intended to create a legal obligation between them and to be legally enforceable". Ref: David M. Walker Oxford Companion to Law, 1980 Ed. P. 284.

Anson has defined in **Law of Contract, 23rd Edition by A.G. Guest** the word contract in the following words: "A contract consists in an actionable promise or promises. Every such promise involves two parties, a promisor and promisee, and an expression of a common intention and expectation as to the act or forbearance promised". Ref: Anson's Law of Contract, 23rd Edition, by A.G. Guest, 1971, p. 23.

According to Treitel, in **The Law of Contract by Sir Guenter Treitel** "A contract is an agreement giving rise to obligations which are enforced or recognized by law. The factor which distinguishes contractual from other legal obligations is that they are based on agreement of the contracting parties. This proposition remains generally true, in spite of the fact that it is subject to a number of important qualifications." Ref: G.H. Treitel, The Law of Contract, Tenth Edition (1999) by Sir Guenter Treitel, Sweet & Maxwell (1999), p. 1. (Source: MOITRA'S Law of Contract & Specific Relief, Fifth Edition).

7.2 Agreements are contract

- There is no cavil to the proposition that all agreements or contracts are made by the free consent of the parties. **(PLD 2011 SC 44)**
- The word 'contract' is defined in section 10 of the Contract Act, which provides, that all agreements are contracts if they are made by the free consent of parties competent to contract for a lawful consideration and with a lawful object. Under section 2(e) of the Contract Act every promise and every set of promises forming the consideration for each other, is an agreement. **(1988 MLD 1175)**

7.3 Essentials of valid contract

It is well-settled that a lawful agreement i.e. contract' consists of three essentials: (a) Proposal, (b) acceptance, and (c) consideration. **(2001 MLD 1925)** Basic ingredient for agreement/contract is free consent, which cannot be imposed upon a party. (**2017 CLD 280**

7.4 An oral contract and its enforceability at law

2017 YLR 1579:

- An oral contract is valid and enforceable but it requires strong and satisfactory evidence vis-a-vis its formation and contents. Where a party seeks to enforce an oral agreement, heavy burden lies on him to prove that a contract is concluded and the terms of oral contract were meant to be given effect to.
- The conditions of essential validity are: (i) competent parties; (ii) existence of consent of parties; (iii) consent being free; (iv) existence of consideration; (v) consideration and object being lawful and (vi) the agreement not being expressly declared to be void.
- No rigid or tenacious stipulation is imparted or divulged under Section 10 of the Contract Act which may rationally exclude the existence of oral contract from being enforced although in the case of seeking enforcement of or

specific performance of oral contract, more satisfactory evidence is required to be led.

7.5 Signatures of both the parties to a contract on contract

2017 SCMR 98:

- The primary and basic law relating to the contracts is obviously the Contract Act, 1872. The essentials of a valid contract are an offer communicated, the unconditional acceptance of such offer and consideration. There is nothing in the Contract Act, 1872 which requires that such offer and acceptance must necessarily be in writing or form a single document. The law i.e. the Contract Act, 1872 envisages a valid enforceable contract, which may even be oral. A perusal of the provisions of the said enactment also reveals that both the proposal and its acceptance may be expressed or implied, as is apparent from section 9.
- Once an offer is communicated, the performance of the conditions of the proposal or the acceptance of any consideration or part thereof offered with the proposal also constitutes an acceptance so as to bring about a valid binding contract between the parties, as is obvious from the bare reading of section 8 of the Contract Act, 1872.
- Section 54 of the Transfer of Property Act, 1882, requires that a contract of sale of immovable property of a value of more than one hundred rupees must necessarily be reduced in writing, is not applicable to the entire length and breadth of Pakistan and oral sales are recognized and enforced in various parts of Pakistan.
- There is nothing in the Transfer of Property Act, 1882 or any other law, which requires that an Agreement to Sell of immovable property must necessarily be reduced into writing or be signed by the parties thereto.
- Sections 8 and 9 of the Contract Act, 1872, have repeatedly and consistently held that the contracts in general do not require to be reduced into writing

(except where otherwise specifically provided by law) and the offer and acceptance can also be implied from the conduct of the parties in terms of sections 8 and 9 ibid and the absence of formal signatures does not effect the validity or enforceability of the Contract Act, 1872.

- For a valid contract, the same can be oral or it may be through exchange of communication between the parties. Once an offer is communicated, the acceptance thereof can be expressed or implied. Such acceptance of the offer would include accepting the consideration accompanying the offer or acting upon the said bargain. There is no requirement of a formal signature of both or either of the parties. All that is required is an offer and acceptance and consideration between the parties.
- Parties and witnesses though should execute document at the end, but parties must also sign each page if document was written out on more than one page. **(2017 CLC 70)**

7.6 Enforcability of contract, terms of which are contrary to law

Terms and conditions arrived at, with consent of the parties, which are contrary to the law of land, cannot be treated as lawful and enforceable under the law. **(PLD 2008 Karachi 189)**

7.7 Agreement against public policy

Agreements should be carefully scrutinized and when found to be unconscionable, unjust or inequitable or for improper object or against law or oppressive or leading to vexatious litigation, same would be, deemed to be against public policy. **(1995 CLC 1906)**

7.8 Difference between a promise and a contract

PLD 2008 SC 146:

- There is difference between the contract and a promise as a valid contract creates obligation and is capable of enforcement in law whereas a mere promise to render service or to hand over certain property moveable or

immoveable to a person without any consideration may not create a contractual obligation to be enforced in law.

- The promise to perform certain act without any consideration may have moral value but such promise neither creates a contractual obligation nor a legal right and thus a promise in absence of essential terms of consideration may have no binding force and legal effect.

  The acceptance of a proposal may bring into existence a promise but to have an agreement it is essential that there should be consideration for promise without which the promise may not have the legal status of an agreement. This is settled law that to constitute a binding agreement, the intention of the parties must be proved and an agreement by which the parties do not intend to create any legal obligation is not enforceable in law.

7.9 Essence of a contract

It is the essence of a contract that there should be an "aggregatio mentium" (the meeting of the minds of the contracting parties). Where the parties are in agreement as to the terms, it is not necessary that they should enter into a regular written contract. The existence of the contract can be inferred from their conduct. A contract is a consensual act, the parties being free to settle any terms they pleased. A contract creates legal obligations. **(2007 CLC 1372)**

7.10 Breach of contract

Breach of contract would give rise only to two reliefs i.e. damages or specific performance---Where, however, specific performance was barred, only relief available was to file suit for damages **(1993 CLC 330)**

7.11 Participation in a bidding process - contract

It is my view that participation in a tender bidding process does not come within the meaning of a contract, dealing or transaction. **(2020 CLD 151)**

8. CONTRACT OF AGENCY

8.1 Agent, Principle and Contract of Agency

- An agent is appointed by a principal to do any act for the principal or to represent the principal in dealings with the third persons. **(PLD 2004 SC 860, 2016 CLC 83)**
- According to Section 182 of the Contract Act an **agent** is a person employed to do any act for another or to represent another in dealings with third person.
- The person for whom such act is done or who is so represented is called the principal.
- The basic ingredient of contract of agency includes that the agent has a power on behalf of principal to deal with third person as to bind the principal the subject matter of the agency has to be dealt with as proprietor of principal and not of the agent. The agent acts as intermediary for consideration.
- In ordinary legal parlance and phraseology the agency is a relation between two parties created by agreement express or implied by which one of the parties confides to the other management of same business to be transact in his name or his account and by which the other assume to do the business and for render an account of it.

8.2 Agency - creation

No particular formality is required to constitute the agreement of agency. Principal's authority to agent to represent or act for him in bringing or to act in bringing him into contractual relationship with the third party constitute essence of agency. Such authority or agency need not to be necessarily, in writing but could be inferred from circumstances. The principal is responsible for the acts done by the agent within agency arrangement. **(PLD 2011 Lahore 284)**

8.3 Creation of contract of agency through silence

Mere silence does not create contract, however, such a silence when coupled with conduct or availing of benefits or other circumstances can create a valid contract. **(2002 CLD 1031)**

8.4 Creation of agency by estoppel

This arises when one person puts another in such a position as to lead other persons to think that they are entitled to treat the second person as authorised to act as agent for the first person in respect of a certain class of business. Here the first person is estopped from denying to those who have acted on behalf of the second person on whose belief he has by his conduct thus induced that second person was in fact his agent. **(1996 SCMR 193)**

8.5 Basic ingredients of contract of agency

Basic ingredients of contract of agency are

i. Agent has a power on behalf of the principal to deal with third persons so as to bind the principal
ii. Subject-matter of the agency has to be dealt with as the property of A the principal and not of the agent
iii. The agents acts as intermediary for consideration ; and
iv. The liability of the agent is always to account for the sale-proceeds to the principal. **(1983 CLC 1695)**

8.6 Role of agent in relation to principle and third party

An agent is the connecting link between the principal and third person---a sort of conduit pipe or an intermediary. This intermediary has the powers to create legal relationship between the principal and third party. He has competence to make the principal responsible to the third person. He is an imperative bridge by crossing which, the third person can reach the principal to enforce his legal right or vice versa. The principal is liable to the third person for all the act and deeds performed,

within the authority of agency, by his agent, as if those were personally performed by him. **(2002 CLD 77)**

8.7 Extent of authority of an agent

If a principal, confers his authority on a person as his agent, the agent can act only within the compass of the authority so conferred on him under the power of attorney. However, if such power is challenged it will be the function of the Court to see on a fair construction of the whole instrument, the authority in question either in express words or by necessary implication. **(2009 YLR 1199)** If the power of attorney is given for various purposes, governing object being power to sell, all other purposes must be read as ancillary to governing object. **(2003 CLC 138)**

8.8 Effect of acts of attorney beyond authority

If an attorney/representative/agent does anything beyond the instructions given by the principal, the same shall, in no case, be binding upon him (principal). **(PLD 2002 Lahore 290)**

8.9 Liabilities of agent and principle towards each other

The agent necessarily and the principal in certain circumstances are liable to each other for accounts. If a so-called agent is not liable to the so-called principal for the submission of accounts, such as the profit and loss, he cannot be termed as agent. **(2002 CLD 77)**

8.10 Definition of Power of Attorney

Power of attorney is a written delegation of powers on the basis of which the principal appoints a person or persons singly or jointly as his/their agent and confers upon his/them the authority to perform specified acts on his/their behalf and thus primary purpose of instrument of such nature is to delegate the authority of the principal to another person or persons as his/their agent. **(2015 CLC 1675)**

8.11 Purpose of Power of Attorney

The purpose of agency is that agent has to act in the name of principal/s and principal/s also undertake to rectify all the acts and deeds of his/their agent done by him/them under the authority conferred through the instrument. **(2015 CLC 1675)**

8.12 Interpretation of Power of Attorney

Rule of construction of such document is that special powers contained therein followed by general words are to be construed as limited to what is necessary for the proper exercise of special powers and where the authority is given to do a particular act followed by general words, the authority is deemed to be restricted to what is necessary for the purpose of doing the particular act, general words do not confer general power but are limited for the purpose for which the authority is given and are construed for enlarging the special powers necessary for that purpose and must be construed so as to include the purpose necessary for effective execution. **Noor Alam through L.Rs. and another case (2015 CLC 1675)**

8.13 Sale of property by attorney to his relative

It is a settled law by now that if an attorney intends to exercise right of sale/gift in his favour or in favour of next of his kin, he/she had to consult the principal before exercising that right. The consistent view of this Court is that if an attorney on the basis of power of attorney, even if "general" purchases the property for himself or for his own benefit, he should firstly obtain the consent and approval of principal after acquainting him with all the material circumstances. **(PLD 2008 SC 389)**

8.14 Registration of power of attorney in case of immovable property

It is an established principle of law that no person can act as attorney on behalf of a person nor can he make any statement having the effect of relinquishing any right in the immovable property worth Rs.100 situated in the urban area, unless he is holding some registered Power of Attorney. **(2005 YLR 2623)**

8.15 Principal's right to terminate authority of an agent 2009 CLD 979:

The principal admittedly have authority to terminate the authority of an agent in the following circumstances:--

i. by the principal revoking his authority;
ii. by the agent renouncing the business of the agency;
iii. by the business of the agency being completed;
iv. by neither the principal or agent dying or becoming oft unsound mind;
v. by either the principal or agent being adjudicated an insolvent under the provisions of any Act for the time being in force for the relief of insolvent debtors;
vi. by expiry of the period of agency, if any;
vii. by the destruction of a material part of the subject matter of the agency;
viii. the happening of any event which renders the agency unlawful or upon the happening of which, it is agreed between the principal and the agent that, the authority shall determine; or
ix. by dissolution of the principal, where the principal is a firm or a company or other corporation.

8.16 Termination of agency by death of principle

With the death of the principal, the agency stood automatically terminated. **(2016 CLC Note 62)**

8.17 Modes of termination of agency and rights and duties of parties in case of termination

- The termination of the authority of an agent, so far as regards the agent, takes effect when it becomes known to him, or, so far as regards third persons, when it becomes known to them. There is no provision which requires revocation of authority only through a registered deed. As per

provisions of the Contract Act ...only notice of revocation is required to be given to the agent and this notice may be oral. **(2016 YLR Note 175)**

- An agency is terminable by the principal revoking his authority, or by the agent renouncing the business of the agency, and where the agent has himself an interest in the property which forms the subject-matter of the agency, the agency cannot, in the absence of express contract, be terminated to the prejudice of such interest... ...When an agency is terminated by the principal, the agent is bound to take all reasonable steps for the protection and preservation of the interest entrusted to him. **(PLD 1986 Karachi 234)**

8.18 Death of one of principal - termination of authority of agent jointly appointed

No flexible rule that when more than one persons jointly appoint a person as their agent, the death of one would result termination of the authority of the agent not only with regard to the deceased but also on behalf of the others. This question is to be determined in each case on the basis of intention of the parties in the light of terms of the instrument and since the agency under the power of attorney is different to that of other contracts therefore, the agency of power of attorney cannot be stricto senso, adjudged on the touchstone of the principles applicable to the contracts. **(PLD 2005 SC 418)**

8.19 Right of agent to be compensated in case of pre-mature termination of time bound agency

Where there is an express or implied contract that the agency should be continued for any period of time; the principal must make a compensation to the agent, for any previous revocation or renunciation of the agency. without a sufficient cause. **(PLD 1986 Karachi 234)**

8.20 Delegation of authority by the agent

Principal had not authorized his agent to appoint any other person as attorney or further delegate the power...Mere fact that principal had been informed regarding

transaction would not give any sanctity to power of attorney executed in favour of delegatee. **(2004 SCMR 1034)** The attorney is always a delegate of the authority conferred on him. It is well-recognised principle that a delegatee cannot delegate such power unless he has been specifically authorised to delegate it... ... Under section 190 of the Contract Act the principles of delegation of the authority by an agent have been propounded. It provides that an a agent cannot lawfully employ another to perform acts which he has expressly or impliedly taken to perform personally. It is permissible only where the ordinary custom of trade or from the nature of the agency it may be delegated. **(1983 CLC 2127).**

8.21 Ratification by principle of an unauthorized act by agent

Ratification of an act as required by section 196 of the Contract Act could be done by the person on whose behalf an act has been done by the agent without having authority to perform such act and necessity requires that the person ratifying the act should be in full and complete knowledge of the case and it is the duty of the person claiming ratification of the act done by him on behalf of the principal to establish beyond any doubt that the person who was to ratify the act had been fully explained the facts and circumstances of the case, the consequences thereof as well as of ratification or refusal to ratify but there is no material on record to establish that such was done. **(2005 SCMR 1408)**

- One of the established essentials of ratification in law is that the purported agent must have been acting in the name of the purported principal, always having been representing himself as a lawful agent of the same. **(PLD 2013 SC 641)**
- Section 194 of Contract Act lays that where an act is done by a person for another who has no authority to do so and who does so without his knowledge, the aforesaid person may elect to ratify or to disown such act. **(1999 YLR 1668)**

- If any authority was not conferred upon the agent, but subsequently it was acknowledged by the principal, then it carried value in the eye of law. The expression "ratification" means the making valid of an act already done. This principle is derived from the latin maxim "ratihabitio mandato aequiparatur" meaning thereby a subsequent ratification of an act is equivalent to a prior authority to perform such act. It is for this reason, the ratification assumes an invalid act which is retrospectively validated. (**PLD 2019 Lahore 717)**

8.22 Implied ratification

In the case of an agent exceeding his authority ratification may be implied from the mere silence or acquiescence of the principal. **(2003 CLC 138)**

8.23 Unauthorized act of agent in excess of his authority

An unauthorized act of an agent in excess of his authority in all cases is not binding upon his principal **(2010 SCMR 1108)**

8.24 Termination of agency under section 202 of the Contract Act for the reason that agent himself has an interest in the subject matter

For section 202 to apply, the following three conditions must be fulfilled:

(a) there must be an agency;

(b) the subject matter of the agency must be some property; and

(c) the agent must himself have an interest in such property.

Thus, for section 202 to apply, the Court must ask itself the following sequential questions:

(a) is the contract in the nature of an agency? If so,

(b) what is the subject matter of the agency, i.e., does it involve some property? If so,

(c) does the agent himself have an interest in such property?

A negative answer to any one of these questions would negative the application of section 202. **(PLD 2011 Kar 362)**

8.25 Revocation of authority of agent – effect on transaction

An agent can no longer bind his principal by any transaction, entered into by him, with a third party, after the revocation of his authority. **(1986 MLD 2049)**

8.26 Liability of principal in case of revocation of agency by principal before time stipulated

Reading sections 203, 205 and 206 of the Contract Act together it seems evident that if the principal without sufficient cause revokes the agency before the expiration of the period mentioned in the contract be must make compensation to the agent. Furthermore, that unless reasonable notice is given of such revocation, the principal must make good, the damage r resulting to the agent. **(1973 SCMR 555)**_It is also settled principle of law that if a principal makes a premature revocation, the agent can only claim damages... ...It is also settled principle of law that contract of Agency is dependent upon the confidence and trust which the principal has in his c agent, the principal can revoke the agency at his will, once this confidence is shaken, despite the fact that the agency is for a certain period. But he may have to pay damages to the agent it there is no sufficient cause for the dismissal. **(2006 MLD 367)**

8.27 Duties of agent on behalf of principal

A plain reading of the above section shows that an agent is bound to conduct the business of his principal according, to his directions or in the absence dl any such direction according to the custom which prevails in doing business of the same kind at the place where the agent conducts such business. It further shows that if he acts otherwise which results in loss to the principal he is obliged to make good to his principal and if any profit accrues he is liable to account for. **(PLD 1992 SC 838)**

8.28 Duty of agent to provide proper account to the principal

Agent is bound to render proper accounts to his principal on demand. **(PLD 2004 SC 860**)

8.29 Responsibility of agent after revocation of agency by death of principal

According to section 209 of the Contract Act, 1872, on the termination of agency due to death of a principal it is bounden duty of the agent to take all reasonable steps for the protection and preservation of interests entrusted to him by the principal on behalf of the representatives of the principal. **(PLD 2014 Lahore 179)**

8.30 Right of principal to claim benefit from agent while such agent deals in business on his own account

If an agent without the notice of a principal, deals in the business of agency on his own account instead of on account of his principal, the principal is entitled to claim from the agent any benefit which may have accrued to him from the transaction. **(PLD 2004 SC 860**)

9. CONTRACT OF GUARANTEE

9.1 Meaning

Guarantee means that it is an undertaking by a 3rd party for one of the parties to the contract whereby the 3rd party binds itself to see that the promise or condition would be fulfilled according to covenant. A contract of a guarantee is a contract to meet the promise or discharge the liability of a 3rd person in case of his default. The person who gives the guarantee is called the surety, a person in respect of whose default the guarantee is given is called the creditor. (**2006 SCMR 619)**

9.2 Parties in a contract of Guarantee

The contract of guarantee, as is clear from the above definition, involves three parties - a principal debtor, whose liability may be actual or prospective; a creditor, and a third party called surety who promises to discharge the debtor's liability if the debtor fails to do so. The guarantee, thus envisages two contracts, one between the principal debtor and the creditor and the second between the creditor and the surety. The guarantee has its genesis in the underlying contract between the principal debtor and the creditor. **(2016 CLD 1833)**

9.3 Interpretation of contract of guarantee

The contract of surety ship/guarantee is to be construed according to the terms mentioned therein and must be construed strictly so that no liability is imposed on the surety, which is not clearly and distinctively covered by the terms of agreement...Further the contract of guarantee, is required under law to be specific identifiable, devoid of uncertainty and must refer to a particular transaction or transactions. **(2007 CLD 1205)**

9.4 Extent/nature of liability of a guarantor

- The liability of the guarantor/surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract as envisaged in section 128 of' the Contract Act, 1872, unless it B is otherwise provided by the

Contract. They are jointly and severally liable to pay the outstanding amount to the creditor. A guarantor cannot shirk from the liabilities incurred by him through the execution of documents. (**PLD 2008 SC 326, 2006 SCMR 619)**

- It is a settled principle of law that on account of failure of the principal debtor, it is the surety who becomes the principal debtor and, thus, is liable to payout and clear the liabilities of the principal debtor, as determined in accordance with law. **(2017 CLD 380)**
- The liability of the surety is always considered to be co-extensive with that of the principal debtor and guarantors are jointly and severally liable to pay the outstanding amount to the creditor unless the contents of contract provides otherwise. **(2017 CLD 380)**

9.5 Rights and liabilities of parties in a contract of guarantee - determination

A guarantee is a contract and the rights and liabilities of the parties there under have to be determined with reference to the terms and conditions of the guarantee. **(1991 CLC 450)**

9.6 Consideration for surety

- It is needless to say, that any promise made, thing done for the benefit of principal debtor, under law, is sufficient consideration as far as surety is concerned for giving the guarantee. **(2018 CLD 250)**
- It is clear that, by virtue of section 2(d), anything done or abstained from or any promise made by a promisee, in order to amount to "consideration", must have been done or abstained from or made at the desire of the promisor. If, therefore, the promisee does or abstains from doing, or promises to do or abstain from doing, something, at the desire of a surety, such act or abstinence or promise would be good consideration for the guarantee. **(1996 CLC 106)**

9.7 Liability of surety

The liability of the surety immediately arises after the failure on the part of principal debtor to payout the legally due liability against him and the creditor in this regard is legally entitled to proceed in case of default of the principal debtor against the surety/guarantor, as per the terms of the contract and while determining the liabilities of the guarantors/sureties technicalities unless insurmountable are not to be taken into consideration. **(2017 CLD 380)**

9.8 Impact of any act or omission by the creditor inconsistent with the rights of surety

Section 139 of the Contract Act lays down that if the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which is his duty to the surety requires him to do and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged. (**2006 SCMR 619)**

9.9 Requirement for creditor for an action against the guarantor

- It is also settled principle of law that a creditor in action against the guarantor is merely required to show existence of liability of the principal debtor and the occurrence of default or breach of the terms leading to the liability. Defence based on the technicalities, loss of procedure or covenants to which guarantor is not a party cannot be pressed into service by guarantee. (**2006 SCMR 619)**
- In an action by a creditor against a guarantor the former is only required to establish the liability of the principal debtor and occurrence of default or breach of the terms leading to the liability. The guarantor cannot resort to technicalities to defeat the claim .of the creditor. Even where the contract becomes unenforceable against the principal debtor, yet, the guarantor would still be liable for the surety he had executed, unless there was any covenant to the contrary. **(2002 SCMR 1419)**

9.10 Surety's right as to the benefit of security which the creditor has against the principal debtor

Section 141 of the Contract Act confers a right on the surety to the benefit of every security which the creditor has against the principal debtor at the time when the contract of surety is entered into. (**2006 SCMR 619)**

9.11 Nature of contract of Bank Guarantee

- The bank guarantee is an autonomous contract and imposes an absolute obligation on the bank to fulfill the terms and the payment on the bank guarantee becomes due on the happening of a contingency on the occurrence of which the guarantee becomes enforceable. **(PLD 2003 SC 191, PLD 2005 SC 925)**
- A contract of Bank Guarantee is a trilateral contract under which the bank has undertaken to unconditionally and irrevocably abide by the terms of the contract. It is founded on an act of trust with full faith to facilitate free growth of trade and commerce in internal or international trade or business. It, like a Letter of Credit, creates an irrevocable obligation to perform the contract in terms thereof. A Bank must honour a Bank Guarantee free from interference by the Courts otherwise trust of any commerce, internal and international, would be irreparably damaged. **(1999 SCMR 591)**
- If a Bank Guarantee is unconditional and irrevocable, the Bank concerned must pay when demand is made unless the Bank has pledged own credit involving its reputation. Generally, it has no defence except in case of fraud. **(1999 SCMR 591)**Those guarantees are independent contracts and the bank authorities must construe them, independent of the primary contracts. They should encash them notwithstanding any dispute arising out of the original contract between the parties. **(PLD 1994 SC 311)**
- Encashment of bank guarantee has no nexus with the spirit of the contract executed between the parties being an independent contract containing its

own terms and conditions to be performed by the concerned parties. The encashment of the bank guarantee has nothing to do with any dispute between the parties which must be decided independently on the basis of terms of that contract without involving the contract of bank guarantee. It must be noted that bank guarantee is an autonomous contract and imposes an absolute obligation on the bank to fulfill the terms and the payment on the bank guarantee becomes due on the happening of a contingency on the occurrence of which the guarantee becomes enforceable. **(PLD 2002 Lahore 52)**

9.12 Difference between contract of guarantee and mobilization advance guarantee

The rights and liabilities of the parties, in case of a contract of guarantee, are determined strictly with reference to terms and conditions of the guarantee without recourse to any other instrument or document executed by the parties, for any other different purpose. Mobilization advance guarantee is on different footings than guarantees of other nature. In such a case, the liability of surety would be entire amount of mobilization advance and it would not be restricted to actual amount due from principal debtor. This is for the reason that principal debtor in such cases normally in advance receives consideration from the owner/creditors, which he is liable to return in case of any revocation, termination or completion of contract. **(PLD 2003 SC 295)**

9.13 Difference between conditional and unconditional bank guarantees

A conditional Guarantee can only be invoked on fulfilment of the condition(s) stipulated therein e.g. proof of a breach or default. On the other hand, in case of an 'unconditional' guarantee, the guarantor i.e. the Bank or an Insurance Company is under an obligation to honour its commitment by making the payment on demand,

regardless of a dispute between the parties arising out of or connected with the underlying agreement/contract. **(2015 CLD 8)**

9.14 Effect of pre-consent upon subsequent changes

Where guarantor under personal guarantee pre-consented to changes without reference, recourse or notice to him, then he would be bound by guaranteed obligations, even if variations, concessions, time enlargements and indulgences were granted by creditor to principal debtor. **(2003 CLD 1468)**

9.15 Right of guarantor to be indemnified

In case of payment by the surety of the amount of the finance facilities under the contract of guarantee, in terms of section 145 of the Act, he has a right to be indemnified and to recover from the principal debtor whatever sum he has originally paid under the guarantee. **(2016 CLD 1654)** Section 145 of the Contract Act provides that in every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee. **(1996 CLC 106)**

9.16 Limitation in case of contract of guarantee

It is an established law that the period of limitation in the case of a guarantee such as the one in this case begins to run from the date of demand for payment and that in the absence of any prior demand the filing of the suit amounts to a demand for payment. **(1996 CLC 79)**

9.17 Continuing Guarantee

- It is quite true that under section 129 of the Contract Act a continuing guarantee is one which extends to a series of transactions…The mere fact that the payment of the lease amount was payable by instalments cannot change the transaction in question as relating to series of transactions. In law a guarantee in order to be continuing guarantee must refer to a series of transactions, of which when the guarantee was given, some are unknown and

not certain to come into existence.... In our view simply because this amount referred to three instalments, would not render it as a continuing guarantee. **(PLD 1966 (W.P.) Kar. 297)**

- The principle is that if the consideration for a contract of guarantee has flowed once for all and is confined to a single transaction, it cannot b extended to a series of transaction. Where the guarantee has been given for the performance of a definite engagement, which has already come into existence and is not contingent and the consideration for which is not variable as the result of future dealings between the parties the contract is not one of continuing guarantee. **(1983 CLC 356)**

9.18 Effect of death of surety before any direction or decree for the recovery of the amount from the principle debtor

Section 131 of the Contract Act, 1872 postulates that death of the surety results into revocation of a continue guarantee so far as it regards future transaction. The defendant/principal debtor was held liable to pay suit amount after the death of the surety. Therefore, legal heirs of the surety or his estate cannot be made liable for the realization of decretal amount. The liability of surety to pay, arises, only when the decree is passed. The decree will not bind the surety, whose death has taken place prior to the decree. **(2009 CLC 1289)**

9.19 Variation in contract and discharge of surety

Variation of contract, within the contemplation of section 133 of the Contract Act, 1872, means material variation or alteration in the original contract, that may prejudicially or adversely affect the surety, any composition or concession offered by the creditor, whereby, rescheduling the liability with substantial markup waived or written-off leading to reduction in liability of borrower is normal banking practice. It does not amount to variation of finance agreement. **(2016 SCMR 451)**

9.20 Determination as to whether surety stood discharged or continued to be liable under the surety bond

2015 CLC 1704:

a. If the terms of the bond indicate that the surety undertook the liability on the basis that the dispute should be decided on the merits by the Court and not amicably settled, the compromise will effect a discharge of the surety.

b. If the terms of the bond show that the parties and the surety contemplated that there might be an amicable settlement as well, and the surety executed the bond knowing that he might be liable under the compromise decree, there can be no discharge and the surety will be liable under the compromise decree.

c. Where the surety bond was executed in favour of Court and by it the surety undertook to pay certain amount of money on behalf of the defendant if decreed by the Court and compromise decree between the parties to the suit introduces complicated provisions or include matters extraneous to the judicial proceedings in which the surety bond was executed, the surety is discharged from his liability.

d. If there is fraud on collusion or any of the matter on which a contract can be set aside, the surety can claim exemption on these grounds, for consent decree is treated on the same footing as agreements.

e. Sections 133 to 141 of the Contract Act, 1872 do not in terms apply to the surety bond executed in favour of the Court but their equitable principles apply to it.

f. Where the plaintiff and defendant have entered into compromise without the consent of the surety by which he is seriously prejudiced and according to which substantial departure is made from the terms of the surety bond under which the surety engages himself to pay the decretal money then of course surety would be discharged.

9.21 Forbearance, on the part of the creditor, to sue the principal debtor

Mere forbearance, on the part of the creditor to sue the principal debtor, or to enforce any other remedy against him, would not, in the absence of any provision in the guarantee to the contrary, discharge the surety, as is provided by section 139 of the Act. **(PLD 1968 SC 83)**

9.22 Requirement for the discharge of surety due to act or omission of creditor

For application of section 139 of the Contract Act...the first thing which a party is required to show to the Court is that there is something which a creditor is required to do and which such creditor has omitted to do as a result whereof the eventual remedy of the surety against the principal debtor has been impaired. **(1999 MLD 1626)**

10 CONTRACT OF INDEMNITY

10.1 Requirement for indemnity holder to establish to be indemnified

Indemnity is to save the indemnity-holder from a (genuine) loss likely to be suffered by him from conduct of promisor or any other person, hence the indemnity holder would be required to establish the loss suffered by him in consequence to conduct of indemnifier or that of other person, so promised. **(2019 CLC 950)**

10.2 Parties in a contract of indemnity

A contract of indemnity, therefore, contemplates only a promisor and a promisee. Furthermore, in a contract of indemnity there is no privity of contract between the surety and the debtor while in the case of the contract of guarantee, surety, creditor and principal. **(PLD 1989 Karachi 371)**

10.3 Creation of contract of indemnity

Contract of guarantee or indemnity can be created either by parol or by written instrument. It need not necessarily be in writing.(**2003 CLD 363)**

10.4 Person transferring the property bound to indemnify the buyer in case of any defect in title

It is an established principle of law that a person transferring property under a valid contract also impliedly binds himself to indemnify tine transferee of the said property against any loss sustained by the transferee to contract due to some defective title and a right to indemnify exists in every contract irrespective of airy express clause to this effect. (**2007 CLC 1433)**

10.5 Person receiving consideration or deriving any benefit even under a void contract, is bound to indemnify

It is an established principle of law that any person receiving consideration or deriving any benefit even under a void contract, is liable to return the same or to indemnify the promisee in terms of sections 124 G and 125 of the Contract Act. (**2005 MLD 1533**)

11 MISCELLANEOUS

11.1 Supply Orders – An Offer Or Acceptance

The Supply Order cannot be deemed to be either an offer or acceptance. Since those orders had been issued for actual supply of the goods after the completion of the tender by the acceptance of the offer. **(1979 CLC 546)**

11.2 Novation of contract

Where there being a contract in existence, some new contract is substituted for it either between the same parties or between different parties, the consideration mutually being the discharge of the old contract. It is now well settled that when an agreement is substituted, both the agreements are supposed to be read together to form a complete subsisting agreement. Thus, to prove a novation, four elements must be shown, that is, (a) the existence of a previous valid agreement; (b), the agreement of the parties to cancel the first agreement; (c) the agreement of the parties that the second agreement replaces the first one; and, (d) the validity of the second, agreement. From a legal standpoint a novation is a form of affirmative plea and the party who canvasses a novation has the burden of proving it by clear satisfactory evidence. (**PLD 2019 Lahore 333)**

12 TIME ESSENCE OF CONTRACT

12.1 General rule

- Time ordinarily not of the essence of contract. (**PLD 1965 SC 690)**
- In relation to contracts of immovable property the rule is that time ordinarily is not the essence, however, this by no means is an absolute rule and it is always open to the party, who claims exception thereto, to establish otherwise from the contents/text, letter and spirit of the agreement and/or from the intent and conduct of the parties, as well as the attending circumstances. (**2015 SCMR 21**)
- Be that as it may, it is well settled law that in the contract relating to immovable property time is not generally the essence of the contract in the failure to perform part of the contract by the date fixed in the agreement to sell i.e. for execution of sale deed is not a ground for refusing specific performance unless the circumstances must be highlighted and proved by the owner of the land that time is essence of the contract in view of the law laid down by this Court in various pronouncements. (**2010 SCMR 286)**
- Intention of parties whether time was essence of the contract was to be ascertained from the terms of agreement itself and with reference to material brought on record in evidence. 1993 C L C 2409
- Time was essence of the agreement" as the words used in the agreement provided that the remaining part of the agreement would be performed within one and a half months- **2017 S C M R 902**
- Time was of the essence of the contract---Cumulative effect of the agreement to sell and acknowledgment was that the parties had agreed to transfer the property free from all encumbrances---Time was successively enlarged---Time fixed in the first agreement ceased to remain the essence of the contract---The case fell within the purview of the second limb of Article

113 of the Limitation Act, 1908---Limitation would be computed from the final refusal. **(2005 MLD 283)**

- This rule was settled many centuries ago when prices of real estate remained constant and stagnant for years on end... ... principle that in real estate transactions, time is not of the essence cannot indiscriminately be applied. It must be interpreted and applied specifically considering the facts and circumstances of each case to balance equities, keeping the standards of reasonability in mind and ensuring that injustice is not done to either side. (**2017 SCMR 1696)**

12.2 Performance of contract when time not essence of contract?

Even where time is not of the essence of the contract, the plaintiff must perform his part of the contract within a reasonable time and reasonable time should be determined by looking at all the surrounding circumstances including the express terms of the contract and the nature of the property. (**PLD 2019 SC 704)**

12.3 Effect of extension in time

In law, if time is extended for performance of a contract pertaining to immovable property, then time can never be enforced as essence of the contract. (**PLD 2011 SC 540**)

13 VOID AGREEMENT

13.1 Void agreements

- Section 25 of the Contract Act 1872, provides inter alla that an agreement made without consideration is void, unless it is in writing and registered.
- Under section 29 of the said Act, agreements, the meaning whereof is not certain or capable of being made certain, are void. The Suit is, therefore, barred under sections 25 and 29 ibid.

13.2 Agreement without consideration

- The agreement without consideration is nullity in the eye of law on account of section 25 of the Contract Act, 1872. **(2004 SCMR 1102)**
- Section 25 of the Contract Act postulates that an agreement without consideration is void unless it is expressed in writing and registered under the law for the time being in force for the registration of the documents and is made on account of natural love and affection between the parties standing in near relation to each other. **(2010 YLR 297)**
- A contract without consideration is Void unless it. comes under any of the exceptions set out in subsections (1) to (3) of section 25 of the Contract Act, 1872. **(2005 CLD 255)**

13.3 Inadequacy of consideration

According to law mere inadequacy of consideration is no ground to hold that an agreement was void unless the same was set up as a ground and proof with supporting evidence that apart from inadequacy there were other grounds to avoid the contract. (**1993 CLC 2348)**

13.4 Transfer of state land without consideration

State land which under the Government Grants Act could be transferred without consideration keeping the purpose for which the same was to be utilized, therefore, general principles of ordinary contract could not be invoked in the present case

apart from the fact that in the offer itself, it was made clear that the price shall be paid by the respondent the determination of which was postponed, therefore, it could not be maintained that it was a transaction which was without consideration. **(PLD 2004 SC 108)**

13.5 Contract to pay time barred debt

- In order to invoke Section 25(3) of the Contract Act, 1872, ordinarily three ingredients are required to be established: (a) there must be a promise; (b) signed by a person to be charged therewith or by an agent generally or specially authorized in that behalf; and (c) there is a debt which is barred by time. (**2013 MLD 1891)**
- Section 25(3) of the Contract Act, 1872 that whenever the suit is barred by the Limitation Act, 1908, the acknowledgement is not acceptable in any other mode unless it is offered by one party and accepted by the other and reduced into writing and duly signed by both the parties, then it forms a valid contract, because it contains a promise to pay wholly or in part on the stipulated date or period mentioned therein as it expresses an intention to pay which can be construed to be a promise within the meaning of the above section. **(2012 CLD 245)**
- To bring the case within the purview of section 25(3) of Contract Act, it must be shown that writing singed by a .debtor or his agent to pay liability whole or in part of thereof which creditor could have enforced but for the law of limitation in suit. On reading subsection (3) to section 25 of the Contract Act it is abundantly clear that the commitment to make payment; if extended after the expiry of limitation, it becomes independently enforceable. **(2007 CLD 1459)**

13.6 Acknowledgment for payment of time barred debt

- An acknowledgment under section 19 of Limitation Act and promise under section 25(3) of the Contract Act have the effect of fresh starting point of limitation. **(PLD 1990 SC 681)**
- A promise to make payment of time-barred rent on moral consideration may not be acceptable in law but if a person with full consciousness of mind promises to pay a debt which is due against him and which is barred by the statute of limitation the efficacy of such promises is now referred to the principle that a person may renounce the benefit of a law made for his own protection. **(PLD 1990 SC 681)**

13.7 Difference between void and voidable

- The expression "void" in the strict or accurate sense means "absolutely null" that is to say incapable of ratification or confirmation and of no effect whatever. The word "voidable" on the other hand is something which could be avoided or confirmed and which is not absolutely, void. In other words what is voidable has some force or effect, but which may be set aside or annulled for some error or inherent vice or defect. **(2011 SCMR 837, PLD 1976 SC 258)**
- A common place instance of a void act or transaction in the sense of an absolute nullity is an agreement by a person under a legal disability e.g. a minor or a person of unsound mind. Such act is void ab initio and is incapable of ratification or confirmation. Law forbids the enforcement of such a transaction even if the minor were to ratify it after attaining, majority. **(2011 SCMR 837, PLD 1976 SC 258)**
- While an act is "relatively void" which the law condemns as wrong to the individual concerned who can avoid it by appropriate proceedings. A common-place instance of such transaction is that which is brought about

by undue influence, fraud etc. which remains of full effect unless avoided by appropriate proceedings. **(2011 SCMR 837, PLD 1976 SC 258)**

13.8 Agreement to pay a time barred debt

There is no bar in law for the parties to agree for the settlement of their disputes by Arbitration even though the claim involved may be barred by time. An agreement in writing to pay a time-barred debt is not illegal or void. The Limitation Act only bars the remedy and does not extinguish the right. **(2002 SCMR 1903)**

13.9 Agreement to satisfy the negative feelings/desires of one party and to defeat the legitimate right of other

There can be no lawful agreement for the purpose of satisfying the negative feelings/desires of one party and thus, to defeat the legitimate right of any other person, in this case, the rival pre-emptors. Where main purpose is not to enforce the right of pre-emption of one but only to deprive the rival pre-emptors of their rights available under the law, the element of collusiveness comes into the picture and this being so the alleged agreement falls within the mischief of section 23 of the Contract Act. **(2001 MLD 1925)**

13.10 Agreement in restraint of marriage

According to sections 26, 28 and 29 respectively, agreement in restraint of marriage, legal proceedings or meaning whereof is not certain, are void. **(2004 YLR 482)**

13.11 Agreement in restraint of trade

PLD 2008 Kar. 583:

a. a restraint of trade clause is void if unreasonable, however, if the same is reasonable the said clause is valid;

b. a reasonable restraint of trade clause whereby an employee is prevented from entering into competition with his former employer or entering into an employment in same/similar business with a competitor of former

employer, can be enforced by Court. The said enforcement can include a declaration or injunction or both, as the case may be;

c. reasonableness of the clause will vary from case to case and inter alia, depends upon the following:-

(i) the extent of duration;

(ii) the extent of the geographical territory;

d. the employer will only be able to obtain an injunction for information, know-how and details of customers/orders acquired by employee through some classified or secret information. However, no injunction would be obtained if the know-how is not acquired by employee through access of classified or secret information but rather during the normal course of employment;

e. the restraint of trade clause should only be aimed at protecting interest of the employer and not aimed at penalizing the employee or causing him inconvenience;

f. the restraint of trade clause should not be vague and generalized but should be rather specific. In case the general a vague part of the restrictive covenant is separable from substantive part, the Court while exercising doctrine of severance and by supplying construction will be empowered to uphold the substantive part of restrictive covenant. However, where the restraint of trade is not separable in the manner stated above, the Court will reject the entire clause without applying the doctrine of severance;

g. the restraint of trade clause shall only be applicable to particular type of business in which the employer is actually engaged in and not to any business activity in which the employer would possibly engage in the future.

13.12 Sole Distribution Agreements under section 28 of the Contract Act

There is no cavil with the proposition that a sole distribution/agent is appointed to deal with the goods of principal and in such agreement a condition is imposed on principal not to sell the goods through other agents and at the same time, on the agent not to deal with competing goods. When such condition is not wholly one sided and when it operates during the currency of the period of contract, it cannot be regarded as one in restraint of trade. **(2006 CLD 210)**

13.13 Agreements in restraint of judicial proceedings

- The intention behind the said provision of law (Section 28 of the contract Act) is that all those agreements which restrain a person to enforce his rights under a contract by usual legal proceedings in the ordinary tribunals are void. **(1992 SCMR 1174)**
- Section 28 of the Contract Act lays down that every agreement by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals or which limits the time within which he may thus enforce his rights, is void to that extent. **(2016 CLC 1197)**

13.14 Jurisdiction clause

- Where two or more courts have jurisdiction over the matter, an exclusive jurisdiction clause in an agreement that any dispute arising between them shall be tried only by one of such courts is not void: There is nothing in section 28 of Contract Act to restrain the parties from entering into an agreement to get their disputes decided by a particular Court of competent jurisdiction for their convenience and avoidance of unnecessary objections to the territorial jurisdiction of Courts. **(1992 SCMR 1174)**
- So far as the Section 28 of the Contract Act is concerned, two or more courts having jurisdiction to try a suit and agreement between the parties

that any dispute arising between them shall be tried only by one of such courts is not contrary to public policy as it would neither contravene provisions laid down in Section 28 of Contract Act, 1872 nor violates in any manner provisions of Section 9 or Section 20 of Civil Procedure Code. **(PLD 2016 Sindh 169)**

13.15 Agreements, terms of which uncertain

- Section 29 of the Contract Act provides that agreements, the meaning of which is not certain; or capable of being made certain, are void **(PLD 1989 Lahore 152)**
- The contracting parties must be shown to be at ad idem with reference to the' essential terms of the contract and, therefore,' if there is any vagueness or uncertainty incapable of being made certain the contract fails for vagueness. **(2003 YLR 1109)**

13.16 Agreements by way of wager

- All contracts by way of gaming or wagering are void and no action can he brought by the winner on a wager, either against the loser or the stake holder to recover what is alleged to be won. **(PLD 1975 KAR. 661)**
- Wager is defined by Sir William Anson as a promise to give money or money's worth upon the determination or ascertaining of an uncertain event. It is almost settled that a contract if highly speculative is insufficient in itself to render it void as a wagering contract. **(1980 CLC 2092)**

13.17 "Wagering Contract"

- Whether a particular contract or scheme is wagering in nature or not one has to examine its terms and conditions. Where there is element of uncertainty and the price or the benefit which accrues is dependent on happening of such uncertain event upon which one is the winner and the other a loser it will be called a wagering contract. **(1991 MLD 201)**

- A wagering contract has been described in Halsbury's Laws of England, 3rd Edition, Volume 18 on page 169, as one by which two persons mutually agreed that on determination of a future uncertain event one shall win from the other and the other shall pay a sum of money, there being no other real consideration for the making of such contract. **(PLD 1975 KAR. 661)**

13.18 Agreement due to mistake of fact

- Under section 20 of the Contract Act an agreement based on a mutual mistake is void and the same principle will apply to an abandonment of a right under a contract. **(PLD 19964 SC 337)**
- Section 20 of the Contract Act...provides that where both the parties to an agreement, are under a mistake as to a matter of fact essential to the agreement, the agreement is void. (**2002 CLD 1280)**

13.19 Contract - one party under mistake of law

Mistake as to a matter of fact entertained by one of the parties would not make the contract voidable. Section 22 of the Contract Act so provides. **(1990 CLC 1514)**

13.20 Effect of clerical mistake in a contract

If there was some clerical mistake, whole contract, held, could not be avoided on basis of such mistake which needed rectification. **(1988 CLC 1272)**

14 APPOINTMENT AND DECLARATION OF GUARDIANS

14.1 Power of Court to appoint guardian

"If the minor/Qasir has no father or grand father alive or if they have not appointed any "wasi", then right for appointing of guardian shifts to judges, for the reason that they have general authority over them. A judge has therefore, the authority to take action in his property for his welfare but since this would be difficult for him to perform and supervise each and every act himself, he may appoint guardians to supervise the property of minors in his capacity as Wasi of Qadi. (Al fiqh al Islami wa Adellatuh vol. 7 page 759.)"

In the light of Verses of the Holy Qur'an, Sunnah of the Holy Prophet (SAWS), we may conclude that courts are empowered to appoint or remove guardians, keeping in view the Islamic principles of Justice and, accordingly, a person in authority is empowered to enact laws in conformity with the Injunctions of Islam. (**2013 MLD 1885)**

14.2 Welfare of minor

Needless to observe that second marriage of mother or father is not the sole fact to decide the fate of the custody petition rather it is the welfare of the minor which will prevail upon all other consideration. (**PLD 2017 Lahore 153)** The question of custody has to be determined only on consideration of the welfare and interest of the minors. This is the predominant considera?tion according to the authorities cited by both the parties as well as according to the principles of section 17 of the Guardians and Wards Act. **(PLD 1975 Lahore 793)**

14.3 Right of father

- According to clause (b) of section 19 of the Act, no guardian can be appointed or declared in the case of a minor whose father is living and is not, in the opinion of the Court, unfit to be guardian of the person of the minor. This section clearly assumes that the father is in every case the natural guardian of

his children and, therefore, in his lifetime no person can be appointed or declared to be a guardian, unless, of course, the father is unfit. (**PLD 1963 (W. P.) Lahore 534)**

- According to Islamic Law, the guardian of the property of a minor is the father and after him, the paternal grand-father or the executors nominated by them in the same order. (See Mulla's Muhammadan Law, Fifteenth Edition, para. 359, p. 296). It was held in Alimullah Khan v. Abadi Begum (ILR 29 All.10), that brother of the deceased father of a minor has no better right to be appointed as a guardian as against the, mother. **(PLD 1968 Lahore 1045)**
- "The natural guardian for a minor under (Hindu, Mohammadan) or Christian Law is normally the father and failing the father, the mother." **(PLD 1975 Lahore 793)**

14.3.1 Constructive custody of minor

In order to invoke the provisions of section 25 of the Guardians and Wards Act, it is not necessary for a Muslim father to show that he had the actual custody of the minor, which the latter has left or from which it has been removed. As the minor is deemed to be in the constructive custody of the father, there would) be removal within the meaning of section 25 of the Act, when a person who has the actual custody of the minor refuses to hand over the said minor to the father. (**PLD 1963 (W. P.) Lahore 534)**

14.4 Right of mother

- A mother who always has a better understanding with her children, with whom the children enjoy the intimacy, has a superior right for the custody of the minors. The intelligence preference made by the minors who, in my opinion, are old enough to make a right preference deserve a consideration and respect. A child needs a proper control as well as a room for free thoughts and actions. The mother's lap is a proper place for these optimum

restrictions and liberties. In my view, the welfare of the minors in the instant case lies in giving their custody to the mother. **(2012 MLD 1755**)

- By now it is universally accepted that the lap of the mother is the best protection for a minor on this earth as her incomparable love is the direct manifestation of the greatest attributes of Almighty Allah. Psychologically, the development of child's personality is directly proportion to the level of care and attention given by her mother. Any admiration of the minor in his academic or extra-curricular activities is quickly received by his mother, and likewise, any reprimand or condemnation will take no time to reach her mother. If the minors are appreciable in their conduct before this Court, the mother should be given credit rather than discredit and should not be deprived from the custody of the minors for their further grooming. Even the best intention or acts of the father cannot possibly substitute the company of the mother. (**2016 YLR 1433 Lahore)**
- Keeping in view the right of the mother to have custody of the said minor child and his welfare, he cannot be allowed to be kept away from his real mother, as the mother's lap is the cradle of God. Unfortunately, his father has already passed away, however, since his real mother is alive and his two (2) sisters are also living with the said mother, therefore, the scale of welfare of Basit Ali, clearly tilts in their favour and they need to be together. **(2004 SCMR 1839, 2019 MLD 2036 2016 CLC 1460, 2016 MLD 1767, 2010 M LD 477)**
- Poverty on the part of a lady was no ground to disentitle her from the custody of minor. Jirga had no legal authority to decide the custody of children and in doing so it violated the law and Islamic Injunctions--- Mother could not be compelled to part with her child by a jirga; she could not be called upon to barter the right to her child's custody to secure a divorce nor could a child be used to settle personal scores-- (**2019 SCMR**

520) Mere fact that the mother had no source of income is not sufficient to deprive her from custody. (**PLJ 1996 Lahore 571)**

14.5 Second marriage of mother

Thus, it is apparent from reading of the two paras of the Muhammadan Law that though the mother is entitled to the custody (Hizanat) of her minor child but such right discontinues when she takes second husband, who is not related to the child within the prohibited degree and is a stranger in which case the custody of minor child belongs to the father. It has been construed by the Court in Pakistan that this may not be an absolute rule but it may be departed from, if there are exceptional circumstances to justify such departure and in making of such departure the only fact, which the Court has to see where the welfare of minor lies and there may be a situation where despite second marriage of the mother, the welfare of minor may still lie in her custody. **(2014 SCMR 343)**

-Remarriage of the mother, ipso facto, would not disentitle her from retaining the custody of minor 2016 CLC 1460, 2018 CLC 273

14.5.1. Islamic Perception

There are numerous traditions which enjoin the children to serve their parents and in particular the mother, which shows that Prophet Muhammad considered the mother better person to have the custody of the child than the father. All these traditions only show that Prophet Muhammad decided the questions as the facts of each case required and his decisions therefore could not be accepted as of general application. Lastly, did Prophet Muhammad (peace he upon him) himself not marry Umma Salmah who had children from her previous husband who were not related to the prophet within the prohibited degree. Were the children taken away from Umma Salmah after she married the prophet for this reason? History shows that they were not. Then why the children should be taken away from other mothers.....Re-marriage by itself of a mother of male children is no disqualification for retention of their custody. Delivery of custody of female minors

to the father, on re-marriage of the mother with a stranger to the minor's has some reasons, behind. To my mind, it is not applicable to the male child. A step-father not related to the minor may not pose any danger to him. Islam has always guarded jealously, chastity of a woman. The minor daughters either on attaining or near to attain the age of puberty may not be allowed to live in the custody of the mother, while a step-father is in the house. Women are prohibited to stay with "Ghair Mehram". The philosophy in Islam is to keep stranger away from the females. On this analogy re-marriage of a woman with stranger may be considered ground for the delivery of custody of female minors to the father. However, it is not universal applicability. For instance, if the father of minor is proved to be a person of ill character, still the custody be granted to him. In that case will mother be not the right person to guard the minor. Woman is no longer a weaker person in the society. Each case, therefore, requires determination on its own peculiar facts. **(PLD 2004 Lahore 801)**

14.6 Agreement between parents regarding custody of minors

It is also an undeniable fact that according to the law of the land, any agreement reached between the two parents, inter alia, regarding the custody of the minor children is neither valid in law nor even enforceable. Therefore, even if it be presumed that the petitioner lady had, through some alleged compromise which she is however, denying, waived her right of HIZANAT, the said compromise or agreement had no binding force in the eyes of law. (**PLD 2006 SC 533)**

14.7 Personal law

No doubt under the personal law, the petitioner being real father is pre-eminently placed to claim custody of her daughter; however, his entitlement is subordinate to the paramount consideration of welfare of the minor. Personal law prevails in case the claimants are otherwise identically placed. **(2019 MLD 662)**

14.8 Visitation right of father

Welfare of minor was prime consideration before the Court, admittedly, respondent was father of the minor and being the natural guardian he had right of his supervision under the Islamic Law, therefore, on separation of the parents the minor could not be permanently deprived from the love and affection of either of the parents---Minor, in the present case, had crossed the age of six years, therefore, he should have maximum interaction with the father even if the custody was with the mother, otherwise, it may cause an estrangement in the mind of the child which may ultimately leave a vacuum in the accomplishment of his personality for deprivation of love, affection and company of his father---Court, in order to achieve such goal, was to make every possible effort to chalk out reasonable visitation schedule in friendly atmosphere---Meeting of the minor in the Court premises with the father was neither conducive nor effective and did not serve the purpose of meeting, therefore, welfare of the minor was in meeting with the father at his residence- **(2018 MLD 1592)**

14.9 Visiting Plan

2018 SCMR1991:

(i) Both the minors shall remain with the mother.

(ii) On every alternate weekend minors may reside with the father, who shall pickup the minors from the house of the mother on Friday at about 8:00 p.m. late evening and shall drop the minors at the house of the mother on Sunday by 01:00 p.m. in the afternoon.

(iii) During summer vacations the custody of the minors shall be handed over to the father on the 1st Sunday of the summer vacations so declared by the School/Government and shall be returned to the mother at evening on the 4th Sunday during the vacations so that minors may have four weeks to spent with their father

(iv) Winter vacations were generally due from 21st December to 30th December. First week of the winter vacation shall be spent by the minors with their father and second week with the mother.

(v) During Eid-ul-Fitr the minors shall celebrate Eid with their father from chand raatat 8:00 p.m. till second day of Eid upto 08:00 p.m.

(vi) On Eid-ul-Adha the mother shall allow the minors to celebrate Eid with their father who shall pick the minors from the residence of mother on the second day of Eid-ul-Adha at 11:00 a.m. in the morning till 3rd day of Eid at 10:00 p.m. or earlier.

(vii) Minors may spent alternate unscheduled holidays with their father from 10:00 a.m. to 08:00 p.m. in the evening.

(viii) The father shall bear all expenses of the minors i.e. school fees, uniforms, van fees as well as other miscellaneous expenses as may be needed for the minors.

(ix) In addition to such expenses the father shall also provide a sum of Rs.5,000/- per month for each minor for their other personal needs and requirements.

(x) In case there was any family occasion for which the father desired and wished that his sons may also attend, he shall inform the mother who shall not unreasonably stop the minors from attending such family events and/or functions.

(xi) Both the mother and father shall not do any act that may prejudice the minors' mind towards the other parent.

14.10 Visiting rights of grandparents

- We are also mindful of the fact that the children have spent sufficient amount of time with their maternal grandmother..... and have developed emotional attachment to her. We, therefore, direct that (children) shall be allowed to spend weekends with their maternal grandmother. (**2018 SCMR 590)** in

the presence of father, custody of the minor could not be ordered to be given to Mst. Sahib Khatoon, who is maternal grandmother of the minor. **(1999 YLR 666 Lahor*e)***

- Paternal grandfather of the minor obtained guardianship certificate through ex parte proceedings without disclosing to the court that mother of minor was still alive---Mother of minor, who was unaware of the guardianship certificate, filed a habeas corpus petition before the High Court claiming custody of the minor---Habeas corpus petition was allowed by the High Court despite the existence of guardianship certificate in favour of paternal grandfather on the ground that said certificate had not been obtained in a bona fide manner and, thus, by ignoring the guardianship certificate the High Court ordered transfer of the custody of the minor from the paternal grandfather to the mother.... Supreme Court by invoking its jurisdiction under Art. 187(1) of the Constitution in the present case set aside the order passed by the Guardian Judge, and cancelled the Guardianship certificate and directed the Guardian Judge to consider the application for guardianship certificate submitted by the paternal grandfather as a pending application, and to hear all the parties concerned, including the mother of the minor, and then decide the matter of custody afresh after attending to all the jurisdictional, legal and factual issues relevant to the controversy raised by the parties---Supreme Court further directed that during the interregnum the custody of the minor shall remain with the mother and the Guardian Judge shall attend to the request, if any, made regarding visitation rights- **(2015 SCMR 731)**

14.11 Intelligent Preference

It can safely be said that the learned Courts below while evaluating evidence of the parties especially "intelligence preference" of the minor have rightly reached to the conclusion that the petitioner is not entitled to the custody of the minor

and the respondent is entitled to retain her custody because he enjoys sound financial status and his family is also well educated, they are providing education to the minor and up-bringing her in a better way. The respondent is looking after the minor properly and minor ..... is enjoying natural sense of safety and protection with her father/ respondent.....There is no denial that the petitioner is mother of the minor, so the learned appellate Court while considering this fact has rightly held her entitled to have visitation rights, despite the fact that the minor has shown her aversion towards the petitioner but the petitioner cannot be denied to have company of her minor daughter, because the same cannot be denied to a mother/father vice versa. **(2020 YLR 401)**

14.12 Source of income not considering factor

It is duty of the father to maintain his minor children, wherever they may be living. **(2012 CLC 784 Lahore)**

14.13 Foreign Order

The Court will consider a foreign order as to custody, but only subject to the paramount consideration of the welfare of the child. (**PLD 1981 Pesh. 110)**

14.13.1 Custody of minor handed over to the mother on the basis of foreign Judgment in her favour

Petitioner was married to respondent No.1 on 28-4-2006 in Canada and the couple was blessed with a son namely Muhammad Abdullah on 27-1-2007 in USA. With the passage of time due to cruel attitude of respondent No.1 the spouse could not keep their matrimonial fold intact and differences arose between the parties which construed the petitioner to settle herself in Canada on 19-4-2007 with her two month's son. Respondent No.1 filed a suit for custody of the minor in the superior Court of New Jersey, USA and the petitioner filed a separate suit in Ontario Court of Justice at Canada. Both the suits were decided in favour of the petitioner and a meeting scheduled was prepared according to which the father had to meet his son in Buffalo New York for twenty-four hours. On third meeting respondent No.1 had

kidnapped the child and removed him to Pakistan..... matter of custody has already been decided from the foreign courts where the parties were residing and admittedly the petitioner as well as the respondent are citizens of USA. Even otherwise keeping in view the age of minor namely Muhammad Abdul it is proper that the custody should remain with the petitioner because she is the most suitable person being mother who can properly look after him. In view of above custody of the minor is handed over to the petitioner (**2008 YLR 2647)**

14.14 Welfare of minor in appeals barred by time

Even an application for condonation of delay in filing appeal in guardianship matters is to be decided keeping in view welfare of the minor even if the said ground has been raised by a party or not. **(2019 YLR 2692)** Although the appeal has been dismissed as barred by time but the aspect of welfare of minor does not appear to have been considered by the appellate court before dismissing the same, therefore, the jurisdiction does not appear to have been properly exercised and, consequently, without commenting upon the merits of the case, it would be appropriate to remand the matter to the appellate court for decision afresh. **(2019 CLC Note 66 Lahore)**

14.15 Prime consideration for restoration of interim custody

The Guardian Court is the final Arbiter for adjudicating the question of custody of children. However, where a parent holding custody of a minor lawfully has been deprived of such custody, such parent cannot be deprived of a remedy to regain the custody while the matter is sub-judice before a Guardian Court. While the tender age of the minor is always a material consideration but it is not the only consideration to be kept in mind. Other factors like best interest and welfare of the minor, the procedural hurdles and lethargy of the system, delays in finalization of such matters, the handicaps that the mother suffers owing to her gender and financial position, and above all the urgency to take appropriate measures to minimize the trauma, emotional stress and educational loss of the minor are equally

important and also need to be kept in mind while granting or refusing an order to restore interim custody (**2018 SCMR 427)**

14.16 Adopted Child - maintenance

Adopted children are also entitled for maintenance due to relationship of trust and constructive guardianship. **(PLD 2015 Lahore 336)**

15 CUSTODY OF MINOR

15.1 Visitation Rights

- Comprehensive plan for custody, visitation rights and maintenance of minors, and obligations of both parents issued by the Supreme Court listed **(2018 SCMR 1991)**
- It is well-settled that decision on application for the custody of the minor is not final and conclusive in nature and matter can always be reviewed/re-determined keeping in view the welfare of the minors and change in circumstances. **(PLD 1967 SC 402, PLD 1967 Lah. 977, PLD 1986 SC 14, PLD 1983 Lah. 442 and 1994 MLD 1370 Lahore)**
- Mere relationship of minor with applicant is not sufficient to hand over custody of minor. **(2019 MLD 1502)**

15.2 Principle of *Riazzat* and *Hizanat*

1995 CLC 800:

Following are the principles regarding custody of minor during period of *Riazzat* and right of *Hizanat* of mother and father:-

(i) A willing mother would have the right to keep the child with her during period of *Riazat* i.e. for two years. This right will be forfeited if she refuses to feed or suckle the child.

(ii) After the period of *Riazaat*, the mother who otherwise is not disqualified, can keep the minor (both male and female) in her custody till they attain the age at which they are capable or ready to receive formal education according to customary practice of the area in which the parents reside. Waiting for a child to become 7 or 9 years old is not the requirement or policy of *Shariah*.

(iii) Right of mother to keep the minor with her would stand forfeited in case of her marriage to a stranger.

(iv) The mother is required to keep the minor at a place where the father is in a position to see that his child is being brought up properly. The minor is also to be brought up in a more enlightened atmosphere where he can be schooled or trained more adequately. Where a father lives in a backward area, or is incapable of supporting or educating the minor, the mother can keep the custody but shall not charge the father for such services.

(v) The character of the father or the mother who desires to keep the minor with him or her, is also a very important factor to determine the right of custody.

(vi) The incapacity (physical or mental) of a person would disentitle him/her to keep the minor.

(vii) If a minor is in the custody of any person other than mother, the minor shall be restored to the father as soon as he/she is capable of looking after her/him.

(viii) The minor of tender age would not be given the right to choose between either of the parents.

16 JURISDICTION

16.1 Jurisdiction of Family Court

a. Under section 5 of the Act 1964, the Family Court has the exclusive jurisdiction to entertain, hear and adjudicate (emphasis supplied) all the matters which fall within the first schedule to the Act; this admittedly includes the custody and guardianship matter.

b. For the purposes of determining the 'territorial .jurisdiction" of the Family Court, it is Act 1964, and the rules framed there under which shall be taken into account and not the provision of the Guardian and Wards Act 1980, even as per force of section 25 of the Act 1964.

c. According to Rule 6 (a) of the Family Court Rules 1965, there are three factual eventualities which are relevant for the purposes of the determination of the 'territorial jurisdiction' of the Family Court; firstly, where the cause of action wholly or in part has arisen, meaning thereby, in the custody or guardianship disputes if the minors were with the mother and they have been illegally and improperly removed and taken away that from the place where they were living with her (or vice versa for father as well), the cause of action shall be said to have arisen at such place, otherwise the cause of action shall be deemed to have arisen where the minors are residing; secondly, under Rule 6(b) where the parties reside or last resided; thirdly as per proviso to Rule 6, in a suit for dissolution of marriage or dower where the wife ordinarily resided. And in view of the addition of proviso to section 7(2) of the Act 1964, which was introduced on 1-10-2002 if in a suit for the dissolution of marriage join other causes of action mentioned in the said proviso, such suit shall also fall in the last category, otherwise not. **(PLD 2012 SC 66)**

d. Jurisdiction to hear guardianship cases---Provision of S.5, West Pakistan Family Courts Act, 1964, gives exclusive jurisdiction to Family Courts to entertain, hear and adjudicate upon matters specified in the Schedule, wherein guardianship is listed as Item No.6- (PLD 1995 Lahore 91)

16.2 "Ordinary residence" determination

- The question as to whether the parties had last resided together at Lahore and further that the ordinary place of residence of the minor was at Lahore could not have been decided in such a slipshod manner and the Courts below should have given an opportunity to the parties to establish their respective case. **(1999 CLC 1623 [Lahore])**
- It may be so, however, the question, as already observed, is that -the minors are deemed in law to be holding the citizenship of their father. The fact that the minors were residing m Lahore is evident from the suit filed by respondent No.1 herself in the Civil Court in which it was so stated. Furthermore, learned counsel for the petitioner is also correct in contending that a minor is deemed to be ordinary resident of the place where his guardian resides and is for the person challenging the jurisdiction to prove to the contrary. **(1994 MLD 1370***)*
- For the purposes of section 9 of the Guardians and Wards Act, the words "ordinarily resides" are not synonymous to the occasional or temporary residence. The provisions of section 9(1) have to be given ordinary and usual meaning connoting some habitat in contradistinction with the occasional or temporary residence. It may also be appreciated that the words "ordinarily residence" also do not equate with the words "ordinarily resides" as used in section 9(1) ibid. The ordinary residence is the one, which generally has a permanent character and makes the residents available in normal course of life. As against it, ordinarily resides, despite being a usual residence, may have a little bit different level of permanency. The question as to what place,

the minors ordinarily reside, is a question of fact to be decided on the basis of evidence placed on record. (**2009 MLD 1274 Lahore)**

16.3 Minor taken out of territorial jurisdiction of Court

Minor was forcibly taken away from the lawful custody of his mother within the territorial limits of Islamabad. The minor was thereafter moved to Lahore and later to Karachi in order to evade the process of law. This minor is about one year old and obviously needs his mother to survive. No reason whatsoever has been alleged or pleaded that may furnish any justification to deny custody to the real mother and hand him over to Respondent No.l. Prima facie Petitioner has a right to have custody of the suckling baby. Such right is recognized by the law. We are also convinced that there are material and overwhelming factors pointing towards welfare of the minor being best served and protected, if the custody of minor is handed over to the Petitioner. We are of the opinion that Islamabad High Court erred in law in refusing to exercise jurisdiction despite the fact that the custody of the child was forcibly taken away from the Petitioner while both were residing within the territorial jurisdiction of the Islamabad High Court. **(2019 SCMR 116)**

17 ACQUISITION OF LAND FOR COMPANY

17.1 Relevant provisions

Section 38 to 44 of Land Acquisition Act, 1894

17.2 Purpose

It is settled principle of law that Land Acquisition Act, is founded on doctrine of *"Salus pouli Suprema lex"* that interest of public is supreme and that private interest is subordinate to interest of state, therefore, it is well established canon of interpretation that benefit has to be given to subject **(PLJ 2016 Lahore 686)**

17.3 Purposes for acquiring land for company

Acquisition of land for a Company made may be:

a. for the purpose of erection of dwelling houses for workmen employed by the Company or for the provision of amenities directly connected therewith, or
b. for the construction of some work, and that such work is likely to prove useful to the public, or
c. for the construction of some building or work for a Company which is engaged or is taking steps for engaging itself in any industry or work which is for a public purpose. **(2002 SCMR 1652)**

17.4 Acquisition of land for company for other than 'public purpose'

Sub-Article (2) of Article 24 of the Constitution no doubt provides that no property shall be compulsorily acquired or taken possession of save for a public purpose and it does not, cover acquisition for any purpose as mentioned in section 40 other than public purposes but sub-clause (e) of sub-Article (3) of this Article provides that nothing in the said Article shall affect the validity of any law providing for the acquisition of any class of property for the purpose of providing housing and public facilities and services such as roads, water supply sewerage, gas and electric power to all or any specified class of citizens, therefore, the provisions of the Land

Acquisition Act so far as they relate to acquisition of land for the purpose of Company even for purposes other than "public purpose" as contemplated by sub-Article (2) is valid in law and cannot be held to be void on account of inconsistency with the provisions of the said Article. **(2002 SCMR 1652)**

17.5 Intent of enactment for acquiring land on the request of company for other than 'Public Purpose'

The intention of the law makers appears to be to encourage private sectors to make investments in such work or other projects which may be beneficial i.e., useful to the public. There can be no denial of the fact that to provide developed plots for housing purpose to public in well-nit Scheme is a purpose useful to the public to avoid construction of buildings in haphazard manner being not basic facility of sewerage and roads, etc., inclusive of the provisions for public parks for inhabitants of the locality. **(2002 SCMR 1652)**

17.6 Public Purpose - definition

"By public purpose is meant an obvert or aim in which the general interest of the community as compared with the interest of an individual is involved"**(1993 S C M R 1673)** This would certainly mean and include a purpose in which the general interest of the community as opposed to the particular interest of individuals is directly involved. To put it in another way, anything which is useful to the public in the sense of conferring some public benefit or conducive to some public advantage is a public purpose. **(P L D 2004 Lahore 47)**

17.7 Acquisition of land for by housing societies

- The acquisition of land for a housing society is recognized as a public purpose**. (2002 SCMR 1652), (2018 SCMR 705)** Acquisition of land for a housing scheme for a limited and specified segment of the society is a public purpose though where the benefit would ensure to the entire community the same would be a higher public purpose. In short the individual interest must give way to interest of the community or a part

thereof and a part of the community must give way to the interest of the entire community or public-at-large **(PLD 2009 SC 217)**

- The provision of residences is not by itself a matter falling outside the concept of a "public purpose" provided that it is part of a scheme for making general provision of that character, Secondly, the provision of residences for a particular class of persons, even though it may operate so as to provide a particular residence for a particular member of that class is also not excluded from the meaning of the expression "public purpose", nor does it make any difference whether the residences are for completely unprivileged persons like coolies or for those enjoying the patronage of Government in the capacity of officers. And the further conclusion which emerges from these decisions is that the provision of such residences may be included within the meaning of the expression "public purpose." **(PLD 1960 SC 60)**
- Acquisition of land for a housing scheme for a limited and specified segment of society is a public purpose where the benefit would ensue to the entire community. Individual interest must give way to interest of the community or general public or a part thereof. Judicial notice of acute shortage of accommodation and rehabilitation facilities of general public can be taken by this Court; as earlier observed suitability of the land or determination of question of "Public Purpose" is to be decided by the acquiring agency/Government. Order passed by the public functionaries has to be given weight. In view of above, this Court has no hesitation in holding that establishment of a housing colony for the H benefit of a specified segment of citizens does not offend against the fundamental rights enshrined in the Constitution.**(2010 YLR 1161)**

17.8 Company without enlarging benefits to public at large cannot establish housing scheme by using machinery of law

The Housing Foundation without extending the benefit of the scheme to the public and private sectors on the basis of a reasonable classification and ratio by including people from every walk of life in official or semi-official position cannot justifiably acquire land for the benefit of only for the employees of Federal Government in Sector G-13 as such employees are not definable as a Community for the purpose of public purpose. Therefore, the Housing Foundation notwithstanding its Memorandum and Articles of Association without enlarging the purpose of acquisition of land to the general use for benefit of public-at-large can neither establish such scheme out of Zone-5 nor use the machinery of law and Government for such purpose. (**2002 PLC (C.S.) 1655)**

17.9 Land acquired for a company for public purpose - 15% otherwise 25% compulsory charges are to be paid

It is clear and obvious from a bare reading of section 23(2) of the Act of 1894, which reveals that the purpose for which the land is acquired, is the determining factor for ascertaining compulsory acquisition charges. If the purpose, is a public in nature, then such compulsory acquisition charges will be payable at the rate of 15%, even if, such acquisition is for a Company. However, when the land is acquired simpliciter for a Company for its private use only then the compulsory acquisition charges will be payable at the rate of 25%. Such an interpretation of section 23(2) of the Act of 1894 is consistent with the precedent law **(2015 SCMR 28)**

18 COMPENSATION UNDER LAND ACQUISITION ACT AND DETERMINING FACTORS

18.1 Relevant provisions

Section 23 to 28-A & 31 & 34 of Land Acquisition Act, 1894

18.2 Factors to be considered for determining compensation against the land acquired

It is settled law that in assessing compensation of acquired land, the following factors are to be taken into consideration:

a. its market value at the prevalent time and its potential;
b. one year average of sale taken place before publication of notification under section 4 of the Act of the similar land;
c. its likelihood of development and improvement;
d. a willing purchaser would pay to a willing buyer in an open market arms length transaction entered into without any compulsion;
e. loss or injury occurred by severing of acquired land from other property of the land owner;
f. loss or injury by change of residence or place of business and loss of profit;
g. delay in the consummation of acquisition proceedings and;
h. peculiar facts and circumstances of each case. **(2018 SCMR 779)**

18.3 "Market value" - definition

Market value is not defined in the Act and the standard for evaluation thereof is also not provided therein. It has, however, come to represent as the amount that would have been paid for the land if it had been sold at the date of acquisition by a willing but not anxious seller to a willing but not anxious buyer. **(2018 CLC 1445)** Phrase "market value of land" as used in Section 23(1), of Act means "value to owner" and,

therefore, such value must be basis for determination of compensation. **PLJ 2016 Lahore 686)**

18.4 Alternate Plot

Authorities were bound to give alternative plot in lieu of exempt plot to petitioner and other legal heirs of petitioner's father against the land acquired---In case there was no alternative vacant plot available, then they were entitled to cash compensation as per current market value of the plot. (**2017 Y L R 1087**)

18.5 Acquisition without distinguishing culturabe and non culturable

Land Acquisition Act, 1894 permitted the acquisition of land without distinguishing culturable and non-culturable land, whether the land was situated in the vicinity of a town or not. PLD 2011 Lah. 276.

18.6 Determining factors for measuring compensation

The measure of fair compensation is the value of the property in open market which a seller voluntarily entering into a transaction of sale can reasonably demand from a purchaser this means that we, have to determine the value of the land in the open market at the relevant time on the assumption that the notification of acquisition did not exist. **(PLD 1983 Lah. 578).** While determining the value of the land acquired by the Government and the price which a willing purchaser would give to the willing seller, only the past sales' should not be taken into account but the value of the land with all its potentialities may also be determined by examining (if necessary as Court witness) local property dealers or other persons who are likely to know the price that the property in question is likely to fetch in the open market. **(2014 SCMR 75)**

18.7 The criteria of one year average produce should be replaced with potential utility of land

Being a compulsory acquisition of land for public purposes, the owners of the land are deprived of its utility while at the same time the Collectors Acquisition simply impose their own opinion ordinarily based on one year average which is not a

correct approach to the matter, as has been laid down by this court. **(2016 SCMR 1141)**

18.8 Acquired for a company for public purpose – compulsory charges 15% otherwise 25%

It is clear and obvious from a bare reading of section 23(2) of the Act of 1894, which reveals that the purpose for which the land is acquired, is the determining factor for ascertaining compulsory acquisition charges. If the purpose, is a public in nature, then such compulsory acquisition charges will be payable at the rate of 15%, even if, such acquisition is for a Company. However, when the land is acquired simpliciter for a Company for its private use only then the compulsory acquisition charges will be payable at the rate of 25%. Such an interpretation of section 23(2) of the Act of 1894 is consistent with the precedent law **(2015 SCMR 28)**

18.9 Time duration between initial notification and final declaration must be considered

Time taken during the completion of acquisition proceedings may have escalated the prices of the property and therefore this escalation has to be kept in view while assessing the potential value of the land. **(2014 SCMR 75, PLD 2004 SC 512, 1999 SCMR 1245, 1993 SCMR 1700)**

18.10 The person who did not challenge award cannot claim benefit of decree awarded to other landowner

- All those land owners who had not raised any objection or filed reference under section 18 of the Land Acquisition Act, 1894 cannot be benefited by the judgment impugned for the simple reason that they were satisfied. Had they not been satisfied they must have invoked the provisions as enumerated in section 18 of the Land Acquisition Act, 1894 which was never done. **(PLD 2007 SC 620)**
- The persons, who had not filed objection before the Collector against the award and had accepted the award passed by the Collector, cannot take

benefit of the decree passed in favour of the other landowners of the award, as it reached finality in respect of such landowner. **(PLD 2010 SC 878)**

- It is established on the record that the respondents/plaintiffs had received compensation as deter-mined by the Land Acquisition Collector through the Award with-out any protest. The respondents/ plaintiffs had no lawful right even to file reference under section 18 of the Land Acquisition Act, 1894 read with sections 30 and 31(2) of the Land Acquisition Act. **(2010 SCMR 1408)**
- It is an established principle of law that if compensation is received without any protest on the part of the person interested whose land has been acquired, then the reference under section 18 of the Land Acquisition Act, 1894 read with second proviso to subsection (2) of Section 31 of the Land Acquisition Act, 1894, is not maintainable **(2019 YLR 2770, 2016 YLR 462)**

18.11 Deposit of compensation in Court - obligatory on Collector

It is clear from reading of the provisions of section 31 that on making of Award under section 11 of the Act, the Collector is bound to tender the payment of compensation awarded by him to the person entitled thereto according to the Award. In case the Collector is prevented from tendering compensation awarded by him, the Collector is required to deposit the compensation in the Court to which Reference under section 18 of the Act is made. The compliance of the provision of section 31 of the Act by the Collector is mandatory for the simple reason that its non-compliance gives rise to penal consequences and such penal consequences are those as are provided in section 34 of the Act i.e. interest prescribed therein will become payable. **(2015 SCMR 1440)**

18.12 Payment of interest on the amount of compensation u/s 34

Section 34 applied when the amount of compensation `is not paid or deposited on or before taking possession of the land'. In that case the Collector `shall pay the

amount awarded with interest thereon at the rate of six per centum per annum from the time of so taking possession until it shall have been so paid or deposited'. Section 28 enacts that "if the sum which, in the opinion of the Court, the Collector ought to have awarded as compensation is in excess of the sum which the Collector did award as compensation, the award of the Court may direct that the Collector shall pay interest on such excess at the rate of six per centunt per annum from the date on which he took possession of the land to the date of payment of such excess into Court." **(1996 SCMR 1361)**

18.13 Object of compound interest u/s 34

The scheme of compound interest has been introduced so that unnecessary delay should not occur in the payment of compensation to the land-owners after taking possession of the land. **(2006 MLD 308)**

19 GENERAL PRINCIPLES REGARDING PROCEDURE OF LAND ACQUISITION

19.1 Notification u/s 4 operates, an impediment in creation of any encumbrance on the land

It is settled principle of law that purpose of issuance of Notification under Section 4 of the Act of 1894 is to give a notice to the public at large that land subject matter of the notification is required for a public purpose, and it further means that there will be "an impediment to any one to encumber the land acquired thereunder", this mean any encumbrance created after the gazette notification, all encumbrances will be void against the State. For example, if any person purchased land after the issuance of notification under Section 4 of Act of 1894 the said purchase of land will not create any right in favour of purchaser, hence he will not be entitled to challenge the acquisition proceedings for the reason, that his/her title is void and he/she can at best claim compensation on the basis of vendor's title. **(PLD 2013 Lahore 565, PLD 2013 LAH 565)**

19.2 Sale after notification u/s 4 but prior to further notifications

Property had not vested in Authority at the time of publication of preliminary notification for acquisition; it vested only after the award had been given and possession was taken over. Sale made by its owner between the period of publication of notification and final acquisition was thus valid. **(1995 MLD 794)**

19.3 Notice u/s 9(3) mandatory

Notice under section 9(3) of the Act is a mandatory requirement for validity of the acquisition proceedings; otherwise such proceedings are void. The object of the notice is to enable the affected party to raise objection under section 5 of the Act to the acquisition of his land **(PLD 2013 Lahore 273)**

19.4 In cases of urgency, provisions of Section 5 and 5-A inapplicable

- Under the Act, the Government has the power to acquire the land for public purpose. Upon issuance of notice under section 17(4) of the Act, the provisions of sections 5 and 5-A of the Act are done away with, upon a direction of the Commissioner. Furthermore, when the land is acquired for public purpose, the owner is expected to surrender his land in public interest though he may object to the amount of compensation being awarded to him under the award and may also file reference for enhancement of the compensation**.(2014 CLC 230)**
- Section 17(4) of the Act was based on the subjective satisfaction of the Competent Authority to apply the provisions or not according to the given circumstances which was not available for scrutiny by the Court. **(PLD 2008 SC 335)**
- Under subsection (4) of Section 17 of the Act of 1894, where in the opinion of the Provincial Government, the provision of sub-sections (1) and (2) of Section 17 of the Act ibid are applicable, the provisions of Section 5-A of the Act ibid may be exempted and if the Provincial Government has not directed as above, then declaration of Section 6 of the Act ibid may be issued at any time after the publication of the notice of Section 17(1) of the Act of 1894. **(PLD 2013 Lahore 565)**

19.5 In cases of urgency taking possession of land without issuing award by the Collector

Under section 17(1) of the Act of 1894, in case of urgency, the Provincial Government can direct Collector, even if the award has not been issued even on expiry of 15 days of Notification from the publication, the Collector in the absence of any objection on the part of interested person can take possession of any waste or arable land for "public purpose" or for company and the said land after taking

possession shall vest absolutely in the Government free from all encumbrances. **(PLD 2013 Lahore 565)**

19.6 Land vested in the state, cannot be divested

In case the owner or interested person fails to raise objections or to challenge the acquisition proceedings after issuance of gazette Notification under Section 4 read with section 17(1) and Section 6 of the Act ibid, the acquisition proceedings qua such person is generally neither quashed nor does it vitiate qua the owner of land by any error of law. It is thus clear that once the land is vested in the State, free from all encumbrances, it cannot be divested and proceedings under the Act would not lapse, even if an award is not made within the statutory stipulated period. **(PLD 2013 Lahore 565)**

19.7 Abandonment of acquired land confer vested right of restoration to the land-owner

On non-requirement of the acquired land for the purpose of its acquisition or on frustration or change or abandonment of such purpose, the decision will be that of the acquiring authority or the Government to use it for another public purpose or to return it to the original owners, who otherwise have no vested right to compel restoration of such land to them. **(2010 SCMR 480)**

19.8 Major portion of the land subsequently exempted from acquisition

The legal implication of the respondents stand is that the acquired land was subsequently exempted from acquisition except to the extent of 1-kanal 7-marlas land belonging to the petitioner. In essence that act singles out the petitioner for differential treatment and consequently suffers from arbitrariness and discrimination. Accordingly the petitioner's land measuring 1-kanal 7-marlas is liable to be returned to him by the acquiring department. **(PLD 2013 Lahore 273)**

19.9 Limitation on the power of government to withdraw notification for acquisition of land u/s 48

Section 48 of the Act empowers the Government to withdraw from the acquisition of any land. This power is, however, not absolute, but subject to the condition that possession of the land has not been taken.**(PLD 2004 SC 441)** Statutory intendment enacted in the above reproduced section is only a logical extension of the principles incorporated in sections 16 and 17 of Land Acquisition Act that upon taking over possession of the land, the same shall stand acquired forever to vest in the Government absolutely. Under section 48 Government's liberty and discretion to withdraw from the acquisition of land terminates upon taking over its possession. **(2002 CLC 790)**

20 REFERENCE TO THE COURT AND POWERS OF THE COURT

20.1 Relevant Provisions

Section 18 to 22 Land Acquisition Act, 1894

20.2 Kinds of reference

Act has provided for two references, under section 18 and the other under section 30 of the Act but the scope and the object of these two references are quite distinct and separate. Under section 18 the reference is of a dispute with regard to the area or the quantum of the compensation or as to the apportionment of the same amongst the person interested. This reference is strictly limited to the above matters, whereas under section 30 the reference may be made if a dispute arises as to the method of apportionment of the compensation or as to the persons to whom the same or any part thereof is payable. The subject-matter of these later references is limited to disputes purely of title in which the government is not directly interested but where there is a dispute as to who are the persons interested or as to the extent of their interest or as to the nature of their respective interest that would not be for the Collector to decide under section 18 but should be left to the Courts to decide upon under section 30. **(PLD 1993 SC 336)**

20.3 Reference of Collector - foundation of Jurisdiction of Civil Court/Referee Court

The combine effect of the provisions of the Act is that award of Collector is an administrative award. For judicial determination of compensation etc., a reference within the meaning of section 18 of the Act is essential, without such reference the Court has no jurisdiction to determine the compensation etc. **(PLD 2010 SC 878)** The matter goes to the Court only upon a reference made by the Collector. It is only after such a reference is made that the Court is empowered to determine the objections made by a claimant to the award. In fact it is the order of reference which provides the foundation of the jurisdiction of the Court to decide the objections

referred to it. The Court is bound by the reference and cannot widen the scope of its jurisdiction or decide matters which are not referred to it. **(2019 MLD 968)** It is only when a reference is made under Section 18 that the designated Court is empowered to act and not otherwise. **(PLD 1981 SC 516)**

20.4 Receiving compensation without protest - filing of reference before Court

- The landowner, who has accepted the award by receiving the whole or part of the amount of compensation without protest, he is barred from filing reference under section 18 of the Act. A specific bar has been created against a landowner who has accepted the award by receiving the full or any part of the amount without protest disentitling him from moving any application under section 18 of the Act. **(PLD 2010 SC 878)**
- It is established on the record that the respondents/plaintiffs had received compensation as deter-mined by the Land Acquisition Collector through the Award with-out any protest. The respondents/ plaintiffs had no lawful right even to file reference under section 18 of the Land Acquisition Act, 1894 read with sections 30 and 31(2) of the Land Acquisition Act. **(2010 SCMR 1408)**
- It is an established principle of law that if compensation is received without any protest on the part of the person interested whose land has been acquired, then the reference under section 18 of the Land Acquisition Act, 1894 read with second proviso to subsection (2) of Section 31 of the Land Acquisition Act, 1894, is not maintainable (**2019 Y L R 2770, 2016 YLR 462)**

20.5 Limitation to file application to Collector for sending reference to Court

If the person making the application was present or represented before the Collector at the time of making of the Award then the application has to be filed within six (6)

weeks from the date of the Award. However, if the person making the application was neither present nor represented at the time of making of the Award then the application can be made within six (6) weeks of the receipt of the notice from the Collector under section 12(2) of the Act or within six (6) months from the date of the Award whichever period expires first. **(2014 CLC 465)**

Once a matter was referred to the Civil Court by the Collector, then Referee Court was bereft of jurisdiction to determine the question of limitation. (2008 CLC 1000)

Once Collector had made reference, the court would be incompetent to go beyond the reference to see whether petition under S.18 of Land Acquisition Act, 1894, was filed within time prescribed in proviso to S.18 of Land Acquisition Act, 1894. (2017 CLC 66)

20.6 Collector cannot condone delay in filing of such application for reference

The limitation provided under section 18 of the Act for filing an application before the Collector for referring the matter to the Referee Court is not directory but mandatory in nature. When the Collector comes to the conclusion that the Reference filed by any party is barred by law, he can straight-away refuse to forward the same to the Referee Court and cannot condone the delay of his own or on the application of the aggrieved party. **(2019 MLD 39)**

20.7 Referee Court to make its own independent decision about objections regardless of Collector's award

The material taken into account by the Collector for making his determination about the compensation, however, cannot be considered by the referee court till such time it is duly proved before it. In this respect, the referee court does not act as an appellate court charged with the function of affirming or reversing the findings of the Collector which form the basis of the award rather it has to apply its independent mind in arriving at the amount of compensation to be awarded to the complaining party. **(2018 CLC 1445)**

20.8 Referee Court cannot go beyond reference and cannot determine its legality

It is only when a reference is made under section 18 that the designated Court is empowered to act and not otherwise; and while exercising its jurisdiction, it cannot go behind the reference and hold that it was illegally made for the reason that the Collector had no power to do so as the application for making the reference was made beyond time. Such exercise of judicial power must be eminent from the jurisdiction otherwise it cannot be exercised." **(2014 CLC 465)**

20.9 Beneficiary of acquisition has no right to file reference against compensation awarded by Collector

A beneficiary of acquired land has no right and locus standi to either file reference against the award of compensation or appeal against a judgment arising out of the reference under section 18 of the Land Acquisition Act, 1894. **(PLD 1987 SC 485, 1989 SCMR 812, 1991 SCMR 2193, 1992 SCMR 1245, PLD 1995 SC 418, 1996 SCMR 1389, 2006 SCMR 402, PLD 2008 SC 400, 2009 S C M R 1051)**

20.10 Directly moving Court

Section 18(1) of the Act does not authorize or permit or provide for a person aggrieved, to make an application directly to the Civil Court and the Trial Court had no jurisdiction whatsoever to decide the points arising in the application, therefore, the proceedings of the Senior Civil Judge were void ab initio. **(2019 M L D 968)**

20.11 Collector not filing reference

If the person interested feeling aggrieved on account of the Collector either refusing or omitting to make a reference under Section 18, it would appear that he has no remedy under the provisions of the Act, as there is no Section in the Act which, for example, provides that on an application made to the Collector under Section 18 of the Act, and on the Collector failing or refusing to make a reference, it would be open to the party aggrieved to approach the Court by an application directing the

Collector to make reference. Notwithstanding the said omission in the Act, the proper remedy would be to seek a mandamus by invoking the extra-ordinary constitutional jurisdiction of a High Court for the enforcement of that statutory obligation. The Civil Court, as already stated, is a Court with a special jurisdiction and cannot direct a reference to itself, nor proceed on the footing that a reference has been made when it ought to have been made but was not. **(2019 MLD 968)**

20.12 No locus standi of beneficiary

Beneficiary of the acquired land did not have any right to challenge the compensation given to the deprived owners of the land by the competent court---Authority or a company on whose behalf the land was acquired by the Collector had no right to file an appeal against a judgment arising out of the reference under S.18 of the Land Acquisition Act, 1984---Acquiring authority had been made party to the lis, which had contested the references by adducing evidence and the Referee Court, after considering the evidence led by the parties, had rightly enhanced the rate of the land acquired by the authority. (2010 YLR 1017)

20.13 Deposit without formal procedure

Deposit of amount by Municipal Corporation with Commissioner before issuance of notification under S. 4, Land Acquisition Act, 1894, could not be considered to be compensation' for payment to owner of land which was to be determined by Collector through award---Such deposit also did not detract from the ownership rights of plaintiffs regarding land in question---Ownership of land could vest in Municipal Corporation only after possession of same had been formally taken over after the announcement of award by Collector or if possession of same had been formally taken over under S. 17, Land Acquisition Act, 1894---No award having been delivered by the Collector nor land in question, having been -formally taken over either under S. 16 or 17, Land Acquisition Act, 1894, notification under S. 4 of the Act did not have the effect of extinguishment of the ownership rights of plaintiff nor did it have the effect of creating rights in favour of Municipal Corporation nor a

right to possess the same---Plaintiffs thus, had a right to maintain a suit for recovery of possession of land and also to claim compensation for occupation and use of same till possession thereof, was taken over formally by Municipal Corporation---Issuance of fresh Notification under S. 4, Land Acquisition Act, 1894, was itself an admission that previous notification had lapsed because no further steps were taken under the Act for acquisition of land- (1994 CLC 1471)

21 GENERAL RULES ABOUT LIMITATION

21.1 Object

The object of law of limitation is to help the vigilant and not the indolent and that the law of limitation is required to be construed strictly, coupled with the maxim that each day of delay to be explained by the party concerned (**2010 MLD 68)**

21.2 Provision of Sec 3 can be invoked at all the stages of litigation i.e. Appeal, Revision, Writ

The above duty enjoined upon the Courts is not restricted to those exercising the original, rather section 3 of the Act, shall be attracted and applied at all the stages and the forums before which, the lis comes for the consideration; may it be in appeal, revision or even the writ jurisdiction (**PLD 2005 Lahore 129)**.It is a settled principle of law that question of law even if not taken or raised by the party, could be considered by the Courts even at appellate and revisional stage. (**2020 YLR 666)**

21.3 Limitation to be decided first

Question of limitation is to be decided first **(2018 Law Notes 1256; 2018 (M) 1376; 2019 CLC 497)**

21.4 Limitation cannot be undone by ignorance, negligence, mistake, hardship, poverty

The hurdles of limitation cannot be crossed under the guise of any hardships or imagined inherent discretionary jurisdiction of the Court. Ignorance, negligence, mistake or hardship does not save limitation, nor does poverty of the parties (**PLD 2016 SC 872)**

21.5 Limitation not mere technicality

It may be elucidated and reiterated that the limitation is not a question of mere technicality and if a revision petition, as initially filed, is beyond time, the law will

take its own course (**PLD 2015 SC 212, PLD 2013 SC 392, 2011 SCMR 8, 2011 SCMR 23, 2017 YLR Note 158 Lhr)**

21.6 Salient features of limitation

- "The law of limitation is a statute of repose, designed to quieten title and to bar stale and water-logged disputes and is to be strictly complied with. Statutes of limitation by their very nature are strict and inflexible. The Act does not confer a right; it only regulated the rights of the parties. Such a regulatory enactment cannot be allowed to extinguish vested rights or curtail remedies, unless all the conditions for extinguishment of rights and curtailment of remedies are fully complied with in letter and spirit. There is no scope in limitation law for any equitable or ethical construction to get over them. Justice, equity and good conscience do not override the law of limitation. Their object is to prevent stale demands and so they ought to be construed strictly. (**PLD 2016 SC 872)**
- The intention of the Law of Limitation is not to give a right where there is not one, but to interpose a bar after a certain period to a suit to enforce an existing right" **(PLJ 2018 SC 532)**

21.7 Limitation Act to be construed strictly

It is 'the law" which should be strictly construed and applied in its letter and spirit; and by no stretch of legal interpretation it can be held that such law (i.e. limitation law) is merely a technicality and that too of procedural in nature **(PLD 2016 SC 872, PLD 2015 SC 212, 2011 SCMR 8, 2011 PTD 2358 DB, 2010 MLD 68, PLD 2019 Lahore 717, PLD 2005 Lahore 129, PLD 1968 Kar. 742. 1996 CLC 1184)** There is no second opinion that law of limitation, which is statute of repose, is intended to quit title and to bar, stale and water logged disputes must be stringently followed and the courts cannot desist from applying the said law. After the expiry of prescribed period, the door of justice is closed and no plea of scarcity, anguish, ignorance or mistake can be availed. **(PLD 2019 Lahore 717)**

21.8 Equitable considerations not be applied to nullify the law of limitation

There is no scope in limitation law for any equitable or ethical construction to get over them. Justice, equity and good conscience do not override the law of limitation. Their object is to prevent stale demands and so they ought to be construed strictly (**PLD 2016 SC 872)** Secondly, where the period of limitation for an action is provided by law, equitable considerations cannot be attracted applied and adhered to, against the express provisions of the limitation, so as to override, defeat and nullify the law **(PLD 2005 Lahore 129)**

21.9 Exceptions and exemptions of Limitation Act to be construed liberally

It is salutary to construe exceptions or exemptions to a provision in a statute of limitation rather liberally while a strict construction is enjoined as regards the main provision. (**PLD 2016 SC 872)**

21.10 No evidence required if suit appears beyond limitation

Where on the plain reading of the plaint, it can be clearly seen that the suit is patently barred by limitation, no evidence is required. In fact to plead that a plaint cannot be rejected, for the suit being barred by limitation/law, without recording evidence, is to plead against the mandate of law as contained in Order VII, Rule 11 of the Code of Civil Procedure, which essentially requires the Court to reject the plaint which appears from its contents to be barred by limitation (**2016 SCMR 910**, **2014 SCMR 513)**

21.11 Courts to take notice of limitation even if objection not raised in defence by contesting party

Under section 3 of the Limitation Act, 1908, it is the bounden duty of every court of law to take notice of the question of limitation even if not raised in defence by the other contesting party. And this shows the imperative adherence to and the

mandatory application of such law by the courts **(2015 SCMR 380, PLD 2015 SC 212, PLD 2005 Lahore 129)**

21.12 Limitation in matters of inheritance

The law of limitation is not entirely to be ignored or brushed aside whenever property is claimed on the basis of inheritance (**PLD 2014 SC 167)**. Even in the matter of inheritance a suit must be filed within the prescribed period of limitation and only on the basis that the matter relates to the inheritance the limitation be ignored is not a valid stance or ground. (**2017 YLR Note 158 Lhr)**.

21.13 Waiver cannot relieve the Court of its duty to dismiss the lis filed beyond limitation

Where the question of limitation is not a mixed question of law and fact or where limitation is apparent on the face of the record, a waiver by the parties would not relieve the Court itself of its duty under section 3 of the Limitation Act and a waiver by the Court of the question of limitation is not contemplated **(PLD 1985 SC 153)**. A waiver of the question of limitation is not permissible, even where the period of limitation is prescribed by a special or a local law (**PLD 1969 SC 167)**.

21.14 Limitation bars the remedy, not the right

The Limitation Act only bars the remedy and does not extinguish the right (**2002 SCMR 1903)**. The intention of the Law of Limitation is not to give a right where there is not one, but to interpose a bar after a certain period to a suit to enforce an existing right (**PLD 2016 SC 872)**.

21.15 Limitation a statue of repose, made to quieten title

The law of limitation is a statute of repose, designed to quieten title and to bar stale and water-logged disputes and is to be strictly complied with **(PLD 1962 Dacca 381, 2003 YLR 1837, PLD 2016 SC 872)**

21.16 Limitation in matters of fraud

Fraud vitiates most solemn proceedings and thus period of limitation would not embargo a justiceable claim directed against fraud **(PLD 2015 SC 212, 2019 SCMR 1930)**

21.17 Provisions of Limitation Act will not apply where period of limitation is provided by special or local law

Where a period of limitation is prescribed under a specific provisions of special or local law then the general principles of law of Limitation Act are not applicable **(2018 CLD 1027 Lhr, 2020 CLD 249 Lhr, 2017 CLD 179 LHR).** The ability of a court to condone the delay has been excluded under special or local laws and is authorized specifically where the law of limitation has been made applicable in the said statute. In cases where the law of limitation has not been made applicable under the special law, then the court cannot condone the delay and the court has to ensure that the application is made within the specified period given in the statute. (**PLD 2020 Lahore 354)**

21.18 Limitation is equally applicable on governmental institutions.

There can be no distinction between an ordinary litigant and the government institutions in the matter of limitation (**2019 CLC 1972 Lhr)**.

21.19 When limitation period begins to run, no subsequent disability or inability to sue stops it

Once the time has begun to run, no subsequent disability or inability to sue stops it. Provisions of section 9 of the Limitation Act clearly provide that limitation once commences, it would continue to run, unless the case falls within any exceptions provided for limitation (**Section 9 of Limitation Act, 2007 SCMR 1792, 2009 CLD 1671 Lhr)**.

21.20 Removal of office objection-limitation

Time required for removal of objection should be adhered to and failure to re-file appeal, revision, application, as directed by office would become time-barred for

time required for removal of objection would not be excluded while computing period of limitation under Limitation Act, 1908, but the same is to be granted under RA, Chap.1, High Court Rules and Orders, Vol.V and OXLI, R3, C.P.C **(PLD 1996 Lahore 158, PLD 2018 Lah 697)** that once appeal was originally filed within the prescribed limitation period but was returned within given time and when the office objections were finally removed the prescribed period of limitation for filing appeal elapsed, would not render the appeal barred by time **(PLD 2014 Lhr. 1)**

22 IF COURT CLOSED WHEN LIMITATION EXPIRES

22.1 Relevant Provision

Section 4 of Limitation Act, 1908

22.2 Limitation expires on a day/date when Court closed

- A litigant whose period of limitation for a matter shall expire during the summer vacation when the courts are closed has a statutory (a vested) right to file his appeal etc. on the re-opening of the court (**PLD 2014 SC 783)**.
- Where the period prescribed for a suit, an appeal or an application expired on a day/date which fell during the period or the day when the court was closed for summer vacations, the said case/matter may be instituted/preferred by the concerned litigant on the day when the court re-opened. (PLD 2014 SC 783)

23 LIMITATION AND CONDONATION OF DELAY

23.1 Relevant Provision

Section 5 of Limitation Act, 1908

23.2 Delay condonation

In case appeal is barred by time the provision of section 5 of the Act can only be invoked, that too, by showing the sufficient cause (**2012 SCMR 377)**.

23.3 Ground of Inadvertence, negligence or mistake

Inadvertence, negligence, mistake simpliciter etc. of the counsel does not constitute a sufficient cause (**PLD 2016 SC 872, PLD 1991 SC 102)**.

23.4 Wrong forum-limitation

If a litigant shows that he had been in good faith prosecuting another civil proceeding within meaning of Section 14, such circumstance may be treated as a sufficient cause for condonation of delay under Section 5 of Act (**PLJ 1992 SC AJK 3**) Exclusion of time consumed in proceedings before wrong forum would be subject to existence of certain conditions that the proceedings were founded upon the same cause of action and prosecuted in good faith in Court, which for want of jurisdiction or other cause of like nature did not entertain those proceedings---Court should not refuse benefit of S.14, Limitation Act, 1908, merely because plaintiff did not show any ground for exemption from limitation in plaint. **(1996 CLC 206)**

23.5 Illness-limitation

Application for condonation of delay on ground of illness--Where applicant failed to produce on record any medical certificate or any other proof to show that he was actually ill during the period, delay was not condoned. **(PLD 1990 LAH 174)**

23.6 Co-owner in possession-limitation

- Plaintiffs as co-owners in possession had been peacefully enjoying their respective shares of inheritance while disputed mutation of inheritance in which they were totally ignored was got sanctioned by defendant more than

10 years prior to filing of suit in their absence--Contention of plaintiffs that they came to know about that mutation only 4 months prior to filing of suit when consolidation proceedings in Mauza concerned were initiated, suit filed by plaintiffs, held, was within time **(1989 MLD 1034)**

- Adverse entry and non-participation in the profits of property would not amount to an ouster of co-sharer, there was no force in contention in so far as question of limitation was concerned **(1991 SCMR 515, PLD 1990 SC 1)**
- Article 142 of Limitation Act, 1908 applies where the plaintiff was originally in possession of the disputed immovable property and was dispossessed or discontinued to be in possession. **(PLD 1977 Quetta 75)**

23.7 Declaratory suit-limitation

Article 120 of the Limitation Act applies to declaratory suits not falling under any of the Articles 90, 92, 118, 119, 12-t and 129 of the Act, which make special provisions for certain classes of declaratory suits. Therefore, where the declaration of title is sought in respect of immovable property without any further relief, it will be governed by Article 120 which provides a period of six years from the date of the accrual of cause of action or right to sue. **(PLD 1969 Lahore 418)**

23.8 Void order-limitation

No period of limitation ran against a void order. **(2019 SCMR 648)**

23.9 Section 5 - Revision

Said section has not been made applicable on revision u/s 115 CPC **(2007 CLC 213, 2011 CLC 629)**

23.10 Pre-requisites of s 5

Each day of the delay has to be explained. (**2016 SCMR 1821)**.

24 LIMITATION AND LEGAL DISABILITY

24.1 Relevant Provision

Sections 6 to 8 of Limitation Act

24.2 Minor, insane and idiot under legal disability

Section 6 lays down a general rule that time for filing a suit shall not run against a disabled person who may be minor, insane or idiot (**1991 CLC 1866 DB)**.

It is evident from the plain language of section 6 that an extended period of limitation has been made available to persons suffering from a legal disability (**2009 SCMR 1005)**

Plaintiff was of 11 years when alleged deed was executed and same would be void ab initio having no legal effect as minor could not enter into any transaction---Any agreement by minor would be void ab initio and no right or liability would arise in favour of vendee from void transaction---Suit property which was un-partitioned remained in the possession of plaintiff---Plaintiff had failed to question the transaction on attaining the age of majority but initial question that whether he was in knowledge with the same prior to filing of suit and had waived his such right had not been proved by the defendant who was bound to prove the same---Void transaction could be questioned when same came into the knowledge and limitation would start from such knowledge. **(2014 MLD 1820)**

24.3 Limitation on disability ceasing of

There is no cavil to the proposition that "if sections 6, 7 and 8 of the Limitation Act are to be read together and if it is done then it would appear clearly that section 8 controls section 6 which means that after attaining majority plaintiff can file suit within three years and if limitation had started running against him and remainder of the limitation is less than three years, then also suit could be filed within three years without any further extension of time (**2007 SCMR 1792)**

25 PERIODS TO BE EXCLUDED WHILE COMPUTATING LIMITATION

25.1 Time spent in obtaining certified copies

- Any time consumed for obtaining certified copies of pleadings, documents and order required in support of such petition would thus be excluded (**PLD 2012 SC 400)**
- Time requisite for obtaining copy of order within the contemplation of S.12 of the Limitation Act, 1908 means only the interval between the date of application for supply of copy and the date when it is ready for delivery **(PLD 2008 SC 577)**
- Petitioner failed to disclose as to the date which was indicated to the petitioner on the chit issued by the copying agency to obtain certified copy because that would have been the determining factor---Originally in routine date was indicated by the copying agency on the chit on which date the petitioner was required to inquire from the agency about the readiness of the copy---If the copy was not ready on the date mentioned on the chit, then the question would have arisen whether further notice should be given to the petitioner or not---No such date having been mentioned by the petitioner, Supreme Court declined to interfere with the judgment passed by High Court**- (2003 SCMR 1560)**

25.2 The day on which the impugned judgment was announced

According to section 12(1) of The Limitation Act, 1908, while computing period of limitation prescribed for a suit, the day on which the judgment complained of was pronounced and time requisite for obtaining a copy of order/judgment/decree shall be excluded (**2016 CLC Note 66 Lhr)**.

25.3 The day from which period of limitation is to be reckoned

The period for filing a suit for pre-emption has been prescribed in section 30 of the Punjab Pre-emption Act itself and while computing the said period of limitation the word 'from' has been used which has been defined in section 8 of the West Pakistan General Clauses Act to mean that the first day is to be excluded, which is further fortified by section 12(1) of the Limitation Act (**2001 YLR 2343 Lhr)**

25.4 Period between date of judgment and date of signing the decree

Period between date of judgment and the date of signing decree can not be excluded in computing period of limitation for appeal. **(2011 SLJ 1711)**

25.5 Time spent in proceedings before wrong forum

The power to condone the delay and grant an extension of time under section 5 of the Act is discretionary, whereas under section 14 of the Act, exclusion of time is mandatory on the satisfaction of the condition prescribed in it (**2012 SCMR 377)**.

25.6 Time during which proceedings were suspended

According to the provisions of section 15 of the Limitation Act, only such period is to be excluded from the period provided for the execution application, during which the operation of the decree, had been suspended by any higher forum (**2002 YLR 2684 Lhr)**.

25.7 Time during which defendant absent from Pakistan is not applicable to permanent resident of foreign country

Where defendants were citizens and permanent residents of foreign country; S 13 of Limitation Act is not attracted. **(2011 CLC 702)**

25.8 Rules regarding exclusion of time spent in wrong forum

The power to condone the delay and grant an extension of time under section 5 of the Act is discretionary, whereas under section 14 of the Act, exclusion of time is mandatory on the satisfaction of the condition prescribed in it (**2012 SCMR 377)**.

25.8.1 Plaintiff must prove his due diligence and good faith to get relief provided by Sec 14

Applicability of the provisions of Section 14, where its principles are taken into account to set the standard for sufficient cause, proceeds on the conditions precedent of due diligence and good faith which must be present before the court grants condonation of delay on the basis of time spent before wrong forum **(PLD 2016 SC 872)**.

25.8.2 Applicability of Sec 14 to suits and appeals

There is no ambiguity that Section 14 is exclusively and solely restricted to suits and suits alone. If it is taken to apply to appeals also, this would be tantamount to reading into the section the word "appeal" which does not appear in the said section and such a reading would be contrary to the definition of the word "suit" in the statute **(2012 SCMR 377, PLD 2016 SC 872)**

26 PUNJAB ENVIRONMENTAL PROTECTION ACT, 1997

26.1 Basic Environmental Principles

Idea of sustainability or sustainable development was hinged on four legal elements; first, the need to preserve natural resources for the benefit of future generations (the principle of intergenerational equity); second, the aim of exploiting natural resources in a manner which was sustainable, or 'prudent', or 'rational', or 'wise', or 'appropriate' (the principle of sustainable use); third, the 'equitable' use of natural resources, which implied that use by one state must take account of the needs of other states (the principle of equitable use, or intergenerational equity); and fourth, the need to ensure that environmental considerations were integrated into economic and other development plans, programs and projects, and that development needs were taken into account in applying the environmental objectives (the principle of integration). (**PLD 2018 Lahore 255)**

26.2 Environmental Impact Assessment

- Through the tool of an Environmental Impact Assessment, the Environmental Protection Agency regulated and protected the environment and as a result the life, health, dignity and well-being of the people who inhabited the environment. Environmental Assessment was, therefore, a substantive exercise as every step in such process cautiously guarded the fundamental rights of the people. (**2015 CLD 983)**
- Environmental Impact Assessment described a process, which produced a statement to be used in guiding decision-making, with several related functions; first, it should provide decision-makers with information on the environmental consequences of proposed activities and, in some cases, programmes and policies, and their alternatives; second, it required decisions to be influenced by such information, and third, it provided a

mechanism for ensuring the participation of potentially affected persons in the decision-making process. (**2015 CLD 983)**

- Environmental Impact Assessment was not complete and could not be accepted for review by the Environmental Protection Agency unless it clearly provided for the following essential constituents:
    i. collection of data,
    ii. Prediction of qualitative and quantitative impacts. iii. C
    iii. Comparison of alternatives. iv. evaluation of preventive, mitigatory and compensatory measures. v. formulation of environmental management and training plans and monitoring arrangements. (**2015 CLD 983)**

26.3 Pendency of Environmental Appeal or Complaint

Pendency of (Environmental) appeal or complaint against the petitioner could not prevent the Inspector from taking notice of the serious threat to the public health and safety. (**2016 CLD 1267)**

26.4 Environmental Approval

- The distance of the petitioner's poultry farm was 100 meters from a human settlement which was in contravention to the requirement of S.12 of the Punjab Poultry Production Act, 2016, which clearly stipulated that the poultry farm must be 500 meters from human settlements. This ground in itself was sufficient to restrain the construction of the poultry farm of the petitioner as it was in contravention to the law. Environmental Tribunal had rightly restrained the Environmental Protection Agency from granting any approval to the petitioner with respect to the poultry farm until the matters in issue raised in the complaint were decided. (**PLD 2018 Lahore 356)**
- Without awaiting the survey report, the issue of future mining concessions in the area remained in doubt and uncertain, it was therefore, prudent and wise to adopt a precautionary approach and maintain status quo with respect to

the petitioner till the survey report was shared with the Agency by the Provincial Mines and Mineral Department and till such time that the Agency after reviewing the survey report passed a speaking order regarding the status of the deemed approval of the EIA under S.12(4) of the Act. (**PLD 2018 Lahore 255)**

- In case there was any defect in the environmental approval granted by Environmental Provincial Agency, the petitioners had statutory remedies of two appeals, first before Tribunal under S.22 of the Punjab Environmental Protection Act, 1997 and second appeal before Division Bench of the High Court under S.23 of the said Act. (**PLD 2016 Lahore 699)**

26.5 Environmental Justice and Fundamental Rights

- Environmental justice was an amalgam of the constitutional principles of democracy, equality, social, economic and political justice guaranteed under the Objectives Resolution, the fundamental right to life, liberty and human dignity (Art.14 of the Constitution) which included the international environmental principles of sustainable development, precautionary principle, environmental impact assessment, inter and intra-generational equity and public trust doctrine. (**PLD 2015 Lahore 522)**
- The international principle, "Indubio pro natura", meaning, when in doubt, matters shall be resolved in favour of protection of the environment. This Principle has recently been incorporated into our law in the judgment cited as "Maple Leaf Cement Factory LTD V. Environmental Protection Agency and others" **(PLD 2018 Lahore 255, PLD 2019 Lahore 664)**

26.6 Effect of (Eighteenth Amendment) Act, 2010

After the Constitution (Eighteenth Amendment) Act, 2010, the "Punjab Environmental Protection Act, 1997" and "Pakistan Environmental Protection Agency Review of Initial Environmental Examination and Environmental Impact Assessment Regulations, 2000" were provincial laws and shall remain in force

under Art.270-AA (6) of the Constitution unless altered, repealed or amended. (**PLD 2016 Lahore 699)**

26.7 Overriding effect of Environmental Law

Provisions of Punjab Environmental Protection Act, 1997 override provisions of any other law, if the former are inconsistent with the latter. (**2016 CLD 1186)**

27 PUNJAB PARTITION ACT, 2012

27.1 Scope and nature of partition suit

What is a partition suit and what relief is granted by a Court in a partition suit ? Partition is the division made between several persons of a joint property which belongs to them as co-proprietors so that each may become the sole owner of the part which is allotted to him. The true character of partition is that it converts joint enjoyment into enjoyment severally. By partition a co-sharer or a co-proprietor gets a separate allotment by virtue of his antecedent title as co-sharer. There is thus no acquisition of property in another independent right: It is not a conveyance; it is not an exchange. The separate allotment is not obtained by another independent title. So in a suit for partition each co-proprietor is allocated share in the property by dividing it as per entitlement and in case property is indivisble sale proceeds are divided amongst co-proprietors according to their respective shares. It is well-settled that necessary conditions for a suit for partition are: first that there must be unity of title; and, secondly, there must be unity of possession.Unity of title and unity of possession must exist between the parties impleaded in the suit for partition qua the property sought to be partitioned if any one impleaded in the suit claims a paramount title in the property, obviously he is negating unity of title and as such the plea falls outside the scope of a partition suit. **(1993 CLC 31)**

27.2 Dispute concerning title to be decided first

The law governing partition of immovable property is the Punjab Partition of Immovable Property Act, 2012. Section 8 of the Act is relevant for the present purposes. In view of this explicit provision of law, in presence of a dispute as to the title, the learned trial Court was duty bound to first decide the said dispute by framing of issues and recording of evidence, before proceeding further in the matter **(2020 LHC 687).**

27.3 Fresh suit not barred

Withdrawal of (partition) suit would not be a bar for a fresh suit of the kind. (**1993 M L D 962**)

27.4 Limitation to file written statement

Perusal of section 6 of law makes it crystal clear that a defendant in a partition suit is required to file written statement within 30 days commencing from the date of his first appearance in the Court which, as per Section 5 of the Act, is subject to receipt of notice/summon. (**2018 YLR 487)**

27.5 Mode and manner of partition proceedings

Punjab Partition of Immovable Property Act, 2012 which has laid down sufficient and exhaustive procedure for partition proceedings. The mode and manner of these partition proceedings is also provided in the said Act which has made it very much convenient for the public/aggrieved persons to seek partition and get their shares separated in accordance with law. People suffer for considerable long time to get their shares of the property and then take physical possession due to lack of detailed set of procedure. Order 20 Rule 18 of the Code of Civil Procedure provides for separate possession of share in the partition proceedings but no proper detailed procedure for the convenience of parties is provided therein (**2018 PHC 1412)**

27.6 Set off and partition

Suit for partition included all liabilities/claims attached to the property which would be apportioned and divided as an equitable set off in the suit for partition. (2010 CLC 267)

27.7 Stranger and Partition of house

Property of which partition is sought should be a dwelling house owned by undivided family, share of a co-sharer should have been transferred to person who was not member of undivided family, suit for partition should have been filed by stranger transferee and; members of family being shareholders in property should undertake to buy share of stranger transferee-Purpose of S.4, Partition Act, 1893,

was that on account of transfer of a share in property from one of co-sharers, a stranger should not enter the house as co-owner and disturb their privacy and family affinity --- Right to purchase share of a stranger has been given in respect of dwelling house only, while such right had not been granted in respect of other properties i.e., shops, plots etc.---Provisions of S.4, Partition Act, 1893, could not be invoked in respect of properties which were not predominantly residential in character --- Property in question, comprised of shops and dwelling unit, therefore, being composite in nature, would not fail within purview of S.4, Partition Act, 1893 --- Provisions of S.4, Partition Act 1893, should be interpreted in such a way that no violence is caused to guarantees given to citizens under Art. 23- of the Constitution --- Right to acquire, hold and dispose of property was subject to the condition of any reasonable restrictions issued by law in public interest --- Public interest, in respect of residential dwelling house owned by undivided family was limited to ensure that family privacy was not violated by intrusion of a stranger in family **(PLD 1996 Lahore 154)**

27.8 Forum for partition of agricultural property:

The suit property being agricultural land comes under the exclusive jurisdiction of Revenue Court and the jurisdiction of Civil Court is barred in this regard. **(2019 CLC 1343)**

28 APPLICATION OF THE CIVIL PROCEDURE CODE AND QANUN-E-SHAHADAT ORDER

28.1 Relevant Provision

Section 33 of Punjab Pre-emption Act, 1991

28.2 Application of C.P.C & QSO

The provisions of the Code of Civil Procedure, 1908 and the Qanun-e-Shahadat Order, 1984 are in the nature of procedural law. By virtue of section 33 of the Act, the provisions of Civil Procedure Code and the Oanun-e-Shahadat are meant to regulate the proceedings only **(PLD 1991 FSC 80)**

28.3 Repugnancy to Islam

Provision of S.33 as enacted by the Provincial Assembly being based on *Ijtihad,* taking into account the realities of time and place is not repugnant to Injunctions of Islam (**PLD 1991 FSC 80)**

29 TALABS OF PRE-EMPTION

29.1 Relevant Provision

Section 13-14 of Punjab Pre-emption Act, 1991

29.2 Requirement of Talbs

Specified features of the Talbs envisaged by the Punjab Pre-emption Act, 1991, were mandatory because of their statutory intent and as requirements of Islamic Law. Various steps prescribed in S. 13 of the Punjab Pre-emption Act, 1991, for the performance of Talbs implemented the public policy of the law to exclude delay and vexatious claims for the benefit of vendees as a class in pre-emption suits. Statutorily prescribed mode of service of 'Talb-i-Ishhad', thus, could not be waived by a party (**2017 SCMR 309).**

29.3 Talb-i-Muwathibat

Talb-i-Mawathibat is demand which is known as jumping demand and is to be performed immediately on the fact coming into knowledge of sale of land (**PLD 2007 SC 302**)

29.3.1 Requirement - Talb-e-Muwathibat

Immediacy of making of Talbs could not be tested with reference to the time by the watch, as doing so would require every witness to the Talb to mention the time by the minute or fraction of a minute of receiving the information and making Talb (**2014 SCMR 941)**

29.3.2 Proof of Talb-i-Muwathibat

i. Foundation of claim

Foundation of claim of pre-emption rested on making an immediate declaration of intention to assert one's right (Talb-i-Muwathibat) and if the same was not done, the entire structure collapsed. **(PLD 2015 SC 69)**

ii. Source of information to be disclosed in plaint

Source of information of the sale pre-empted must necessarily be pleaded in the plaint, however, the same was not done by the pre-emptor in the present case, suit for pre-emption was rightly dismissed (**2017 SCMR 404)**

iii. Time, date and place of 'Talb-i-Muwathibat'

Talb-i-Mawathibat is the foundation to exercise the right of pre-emption, and it cannot be proved, unless pre-emptor through positive evidence proves specific date of knowledge of sale in Majlis in which declaration was made by him to exercise the right of pre-emption (**PLD 2006 SC 309)** Talb-i-Muwathibat was a sine qua non for maintaining a suit for possession through pre-emption. Time, date and place of 'Talb-i-Muwathibat' must necessarily be pleaded in the plaint along with the source of information of the sale pre-empted (**2017 SCMR 404)** Date, time and place of the performance of Talb-i-Muwathibat were "conspicuous" by their "absence" in the plaint; as a consequence the plaint did not fulfill the requirements of law **PLD 2010 Lahore 649.**

iv. Failure to mention particulars of performance of Talb-e-Muwathibat

Omission to mention date, time and place of performance of Talb-e-Muwathibat was fatal for a suit for pre-emption (**2013 SCMR 721)** Plaint wherein date, place and time of making of Talb-e-Muwathibat and date of issuing notice of Talb-e-Ishhad in terms of S.13 of Punjab Pre-emption Act, 1991, is not provided, that would be fatal for the suit (**2012 SCMR 911)** Non-mentioning of place, date and time of Talb-e-Muwathibat and date of issuance of notice of Talb-e-Ishhad, in terms of S. 13 of Punjab Pre-emption Act, 1991, is fatal for maintainability of suit for pre-emption (**2011 SCMR 1545)**

29.4 Bar on second Talb if first Talb not made properly

Where the first talb is not completed in accordance with law the second Talb cannot follow and in case of missing of any one talb from three provided by law the right is pre-emption is extinguished (**2000 CLC 409)**

29.5 Talb-i-Ishhad

This is only Talb which postulate putting vendee on notice about pre-emptor's desires to purchase the land. Law mandates that Talb-i-Ishhad has to be sent through registered post acknowledgment due (**2007 SCMR 1105)**

29.5.1 Notice of Talb-i-Ishhad

Section 13(3) of the Punjab Pre-emption Act, 1991 specified unequivocally that 'Talb-i-Ishhad' shall be made by written notice, attested by two truthful witnesses, and made under registered cover acknowledgment due. (**2017 SCMR 309**)

29.5.2 Proof of notice through two witnesses

Non-production of one of the witnesses of the notice of Talb-i-Ishhad by the party asserting right of pre-emption would lead to the conclusion that it had failed to prove Talb-i-Ishhad (**2020 SCMR 445, 2015 SCMR 808, PLD 2013 SC 193))**

29.5.3 Witnesses to name in pleadings

Mere bald assertion by respondents in their pleadings coupled with sketchy evidence adduced by them is of no help to their case--Unless the names of the two witnesses of *talb-i-ishhad* and informer of pre-empted sale were disclosed by the pre-emptors in their pleadings, how the vendee of the pre-empted sale could be in a position to assess the veracity of their claim or credibility of such witnesses, if they were for the first time introduced to him in the witness box. **(PLJ 2015 SC 1034)**

29.5.4 Scribe cannot replace witness

Section 13(3) of the Punjab Pre-emption Act, 1991, specifically required that to prove a valid Talb-i-Ishhad, two truthful attesting witnesses were required to be examined, which excluded the scribe of such notice. Where scribe was examined with one attesting witness to prove Talb-i-Ishhad, the scribe could not be construed to be an "attesting witness" in terms of S.13(3) of Punjab Pre-emption Act, 1991. Even otherwise, Art. 79 of the Qanun-e-Shahadat Order, 1984, provided that the execution of a document could only be proved by producing two attesting witnesses of the document (**2015 SCMR 394)**

29.5.5 Exception of notice

- **Where postal facility not available** Only situation in which the Punjab Pre-emption Act, 1991, did not require the sending of notice by registered cover acknowledgment due was when the post office facility was not available to a pre-emptor [Proviso to section 13(3)]. (**2017 SCMR 309**)
- **Admission of notice by vendee** Secondly, the prescribed condition of service of notice by registered cover acknowledgement due may be relaxed where the defendant/vendee admitted that he had received notice of 'Talb-i-Ishhad. (**2017 SCMR 309**)

29.5.6 Effects of not proving service of notice

In all other cases, service of notice of 'Talb-i-Ishhad' upon a vendee must be established by the proof of each of the prescribed elements of the notice of such Talb. Where any of the elements of the prescribed mode of service of 'Talb-i-Ishhad' was not proven by a pre-emptor, he dishonored his mandatory obligation and consequently, his pre-emption suit must fail (**2017 SCMR 309**)

29.5.7 Commencement of period of two weeks

For the purpose of notice of Talab-i-Ishhad, he period of two weeks is to commence from the alleged date of knowledge of the transaction of sale and not from the date of attestation of mutation or the execution of sale deed. **(2015 CLR 1377)**

29.5.8 Postman not produced

Postman, who delivered postal notice of talb-i-ishhad had not been produced by the appellant...Held: production of postman was mandatory requirement in order to prove factum of service of notice Talb-i-Ishhad, failing which suit could not be decreed. **(KLR 2019 Revenue Cases 35, 2011 SCMR 762 2011 PLR 161)**

29.6 Talb-i-Khusumat

The demand of right of pre-emption by filing a suit is talb-i-khusumat in a competent court of law for enforcing his right (**1992 MLD 2536)**

29.7 Making of Talbs through guardian

Word "guardian" would mean a person having under law or through a legal appointment custody of person of a minor/child or mentally disabled person or his property or both his person and property. Person not having ability to exercise right of pre-emption could exercise same through his/her guardian, but not through his son for not falling within purview of guardian (**2012 YLR 1744)**

29.8 Making of Talbs through attorney/agent

Under S.14 of Punjab Pre-emption Act, 1991 power of making Talbs could be delegated to an agent, but such power must be conferred specifically and in express terms and that too before making of Talbs. Where there was no express authority, such lapse could not be made up by the principal subsequently on the principle of ratification under the law of agency (**PLD 2013 SC 190)** Pre-emptor could appoint an attorney to pursue suit, but Talb-i-Muwathibat being a personal act of pre-emptor would be required to be proved by him through his own statement and an attorney would not be substitute of pre-emptor under law. Statement of attorney being based on hearsay evidence would not prove performance of Talb-i-Muwathibat to have been made stricto senso as per requirement of law to succeed in suit for pre-emption (**2007 SCMR 957)**

29.9 Limitation

Limitation for filing suit for such sale would be reckoned from the date of attestation of mutation (**PLD 2014 SC 488)**

30 DEPOSIT AND REFUND OF SALE PRICE

30.1 Relevant Provision

Section 24-26 of Punjab Pre-emption Act, 1991

30.2 Time period to deposit zar-e-soim

First proviso to S. 24 of the Punjab Pre-emption Act, 1991, placed a specific embargo/ restriction on the powers of the Court from extending the time for deposit of zar-e-soim beyond the period of 30 days which was to be reckoned from the date of filing the suit. Section 24(2) of the Punjab Pre-emption Act, 1991 provided penal consequences for not depositing the zar-e-soim within a period of 30 days by dismissal of the pre-emption suit (**PLD 2017 SC 674)**. Trial Court under no circumstances had the jurisdiction and authority to extend the statutory fixed time of 30 days (**PLD 2012 SC 764, PLD 2013 SC 489)** Extension of time for performance of a act. The time fixed in a statute cannot be extended under section 148 CPC, as time fixed for the deposit of remaining consideration at the time of passing the decree, cannot be later on extended. **(PLD 2009 SC 419)**

30.3 Purpose & object of statutory period

Law had imposed a condition on the pre-emptor to deposit Zar-e-Soim to prevent mischievous pre-emption suits; to check the bona fides of the pre-emptor and to save the vendee from mala fide pre-emption action (**PLD 2013 SC 489)** Object of such a deposit was to guarantee the vendee against frivolous proceedings by the possible pre-emptor and was a token of good faith on the part of the pre-emptor (**PLD 2012 SC 764)**

30.4 Commencement of time for depositing zar-e-soim

Period of 30 days for depositing zar-e-soim would commence from the date the presentation of plaint was accepted by the Court or the officer so appointed by the Court (**PLD 2017 SC 674)**

30.5 Computing time for deposit of Zar-e-Soim

30.5.1 Day of order to be excluded

Day on which court directs the pre-emptor to make the deposit of zar-e-some had to be excluded from the time period of thirty (30) days; however by exclusion of such day the period of 30 days, as mandated by S.24 of Punjab Pre-emption Act, 1991 should not exceed (**PLD 2014 SC 466)**

30.5.2 Public holiday or Sunday to be excluded

Word `of' used in first proviso to S.24, Punjab Pre-emption Act, 1991 was to be construed in its proper context and meaning in that thirty days' time had to be reckoned after the day of institution of the suit. If the limitation period for depositing the Zare-e-Soem expired on a day when the court was closed on account of public holiday or Sunday, the deposit could validly be made on the next day (**2008 SCMR 1685)**

30.6 When Court failed to specify time

Even where the Court on account of omission or some lapse failed to specify the time in such behalf, it shall be deemed that full 30 days period had been allowed by the court to the pre-emptor to make the deposit, and not withstanding such omission/lapse, it would be the duty of the pre-emptor to make the deposit within a period of 30 days from the institution of the suit (**PLD 2013 SC 489)**

30.7 Repugnant to Islam

Provisions of S.24, 25, 26 & 27 as enacted by the Provincial Assembly being based on *Ijtihad*, taking into account the realities of time and place is not repugnant to Injunctions of Islam (**PLD 1991 FSC 80)**

30.8 Deposit of excess amount

Direction was given to pre-emptor to pay excess price by competent Court of jurisdiction. Provisions of S. 25 of Punjab Pre-emption Act, 1991 were directory in nature and did not entail any penalty (**2014 SCMR 852).** Pre-emption being a right of substitution, pre-emptor should bear all the expenses which were incurred

by the vendee. Additional expenses were awarded to the vendee along with the sale price (**2004 YLR 1212)**

30.9 Deduction of profit from deposited amount

Plaintiff had enjoyed possession of suit land, thus, he would not be entitled to withdraw amount of such profit from Trial Court, and rather same would be given to defendant. Plaintiff would not be entitled to withdraw decretal amount till return of possession of suit land to defendant (**2013 MLD 1263)**

31 DETERMINATION OF PRICE/ MARKET VALUE

31.1 Relevant Provisions

Section 27-28 of Punjab Pre-emption Act, 1991

31.2 Power of Court to determine market value

Provisions of S.27, Punjab Pre-emption Act, 1991, had empowered Court to determine market value of the property and criteria for determining market value was laid down in S.28 of the said Act (**PLD 2000 Lahore 190)**

31.3 Adjustment of probable value towards final price by Court

Market value of suit property subsequently determined by court under Ss.27 and 28 of Punjab Pre-emption Act, 1991 different than the probable value determined earlier. Amount of Zar-e-Soim deposited by the pre-emptor could be adjusted towards the final price settled by the Court in terms of Ss.27 and 28 of Punjab Pre-emption Act, 1991, and pre-emptor was entitled to get a refund of any excess paid by him (**PLD 2013 SC 489**)

31.4 Price mentioned in agreement to sell

Marginal witness though supporting transaction of sale and execution of agreement, but his statement as against sale price mentioned in agreement to sell would not be accepted (**2006 CLC 537)**

31.5 Instances where Court to determine probable value of property

The probable value of the property can be determined by the Court when No sale price is mentioned in the sale-deed or No sale price is mentioned in the mutation or the price mentioned in the sale-deed or the mutation appears to be inflated. In each of the above three cases, the Court in the Province of Punjab is mandatorily required by the use of word 'shall' to determine the probable value of the property, to direct deposit of 1/3rd of such probable value within 30 days of the suit as per the first Proviso of Section 24. (**PLD 2006 Lahore 410)**

31.6 Valuation of a suit for pre-emption

Valuation of a suit for pre-emption pertaining to agricultural land was to be fixed at thirty time the Land Revenue assessed to the land in dispute. Under S.18, West Pakistan Civil Courts Ordinance, 1962 pecuniary jurisdiction of the District Judge was always derived from the valuation in the plaint (**2005 SCMR 1388)**

32 INHERITENCE OF RIGHT OF PRE-EMPTION

32.1 Relevant Provisions

Section 16-17 of Punjab Pre-emption Act, 1991

32.2 Condition precedent to inherit right of pre-emption

- Heirs of pre-emptor would be pursuing the right of pre-emption of pre-emptor on his demise. Preemptor alone should have a better right than the vendee and previous rights of heirs of pre-emptor would be inconsequential **(1999 SCMR 1808).**
- It is true that by virtue of the provisions of section 16 of the Punjab Pre-emption Act, 1991 the right of pre-emption stands transferred to the legal heirs of the pre-emptor upon the pre-emptor's death but such transfer of the right of pre-emption is conditional upon the fact that the original pre-emptor had died after making any of the demands contemplated by the provisions of section 13 of the Punjab Pre-emption Act, 1991 (**2011 SCMR 1926**)
- Legal heirs of deceased pre-emptor had no right on date of sale and could not improve their right to pre-empt suit land by inheritance as cause of action had already come into existence. (**PLD 2012 Lahore 12)**

32.3 Repugnancy to Injunctions of Islam

Provision of S. 16 of Punjab Pre-emption Act, 1991 is not repugnant to the Injunctions of Islam (**PLD 1991 FSC 80)**

32.4 Other land apart from one inherited

Such right would not survive to legal heirs in absence of a plea that they had other land apart from one inherited by them from deceased pre-emptor (**2008 YLR 2289)**

33 RIGHT OF PRE-EMPTION

33.1 Relevant Provisions

Section 5 to 12 of Punjab Pre-emption Act, 1991

33.2 Pre-requisite of Right of pre-emption

Underlying principle of law of pre-emption was that the preemptor had to own property before he could exercise such right (**PLD 2015 SC 27)**

33.3 Kinds of Preemptor

33.3.1 Shafi-e-Shareek

Shafi-e-Shareek gets the right of pre-emption because of an already existing and shared ownership right in the corpus of the sold property (**PLD 2006 Lahore 4).** Ownership in passage equips a person to claim superior right as Shafi-e-Shareek (**2005 YLR 2570).** Purported pre-emptor could not refer to any document to show that the respondent was a co-owner or co-sharer in the corpus of the undivided immovable property wherefrom the said property had been sold. Purported pre-emptor could not be said to be 'shafi sharik' in such circumstances (**PLD 2016 SC 73).**

33.3.2 Shafi-e-Khalit

Plea raised by pre-emptor as Shafi-e-Khalit and being co-owner that he had common passage and source of water of disputed property, thus he has superior right (**2009 YLR 140).**Mere having a right of irrigation from khal (water-course) cannot confer upon pre-emptor the right of Shafi-e-Khalit unless pre-emptor succeeds to show that those rights were attached to the immoveable property and he had right of participation in those rights (**2005 CLC 835).**

33.3.3 Shafi-e-Jar

Where the revenue record shows that the land owned by the pre-emptor and land purchased by the vendee are adjacent to each other, pre-emptor had superior right as Shafi-e-Jar. (**2007 CLC 1563**) Register Haqdaran e Zamin and Aks shajra

clearly showing that land owned by pre-emptor and the one sold lay adjacent to each other. Coiurt correctly held that pre-emptor had superior right of pre-emption being Shafi-e-Jar (**PLD 2006 SC 309, 2006 SCMR 1410).**

33.4 When right of preemption accrue

Right of preemption arises only in case of sale of immovable property vide S.5 of Punjab Pre-emption Act, 1991, as the same can take place either by registration of sale-deed or otherwise as provided under S.30 of Punjab Pre-emption Act, 1991, when the title of the said property as required by law is passed on to the vendee i.e. where the deed of conveyance is registered or otherwise (**PLD 2001 SC 499)**

33.5 Three stages of right of pre emption

Pre-emptor was obliged to have a right of pre-emption on the date of sale; the right of pre-emption on the date of institution of the suit; hold the said right during the pendency of the suit and must possess it till the passing of the decree i.e. date of the decree (**PLD 2014 SC 680)** and at the time of execution of decree (**1999 YLR 2556)**

33.6 Preferential right of Pre-emption

Pre-emptor in order to succeed the right of pre-emption is to prove his preferential right in each khata at three stages; on the date of sale, on date of institution of suit and on the date of passing of decree (**PLD 2004 Lahore 300)** Pre-emption was allowed when the pre-emptor owned property either adjacent to the pre-empted one or the parties shared a water channel or common thoroughfare adjacent to their respective properties **PLD 2015 SC 27.**

33.7 Equal distribution of suit-land amongst vendees having equal right of pre-emption

Word "vendee" as used in S.20 of Punjab Pre-emption Act, 1991 would not mean one set of parties in spite of the fact that each of them had equal right to that of pre-emptor. Each vendee had independent right of sharing suit-land as per S.20 of Punjab Pre-emption Act, 1991. Both vendees could not be equated with pre-emptor

as one group by giving them half of suit-land. All vendees with equal superior pre-emptive right qua pre-emptor would independently share suit-land was, to be divided into three parts for vendees being two and pre-emptor being alone. **(2006 MLD 625)**

33.8 Joint or separate right of pre-emption

Where suits were separate and rival pre-emptors had equal right of pre-emption, then it would be necessary under principles of justice that both the suits be taken together and decided as such right could be exercised jointly or separately by any class or group of persons **(2003 YLR 79)**

33.9 Pre-emption under joint tenancy

Vendee who proved to be one of the tenants of pre-empted land had the first right of purchase of suit land in his possession as tenant. Tenant/vendee not being exclusive tenant of land, but being joint tenant along with two others, his share would be proportionately reduced. Vendee/tenant would be entitled to retain only one-third of the land and remaining two-third could successfully be pre-empted by pre-emptor who claimed to be collateral of vendor **(1997 MLD 2602).**

33.10 Pre-emptable rights

33.10.1 Cultivation rights

Cultivation rights could be sold therefore, pre-emptible **(PLD 2017 SC 158)**

33.10.2 Urban property

Sale alleged not pre-emptible for suit-land falling within limits of Town Committee. Nothing had been brought on record to show that suit-land was not urban in nature or same did not fall with such limits. Sale was, held, not pre-emptable **(2006 SCMR 915)**

33.11 Non- Preemptable rights

33.11.1 Property exchanged or gifted

Right of pre-emption is not applicable where property exchanged or gifted. Right of pre-emption could be defeated by legitimate devices like exchange and gift.

However such device must possess all essentials of exchange or gift as defined under the Transfer of Property Act, 1882 (**2014 CLC 1819**) Defendant as beneficiary of gift was not bound to prove gift, rather plaintiff had to stand on his own legs by proving that suit gift was a sale and consideration had been paid by defendant (**2013 YLR 2555)**

33.11.2 Whether disputed transaction sale or exchange

Essential character of a transaction of exchange, was a mutual transfer of ownership of property by two persons. Where there was a transfer of ownership by one of the parties only and not by the other, the transaction was not an exchange as there was no mutual transfer of ownership. (2004 YLR 432)

33.11.3 Previous sale

Right of pre-emption was not available to the plaintiff against the previous sale (**PLD 2014 Lahore 14**)

33.12 Non observance of formalities

Right of pre-emption is a feeble right. Therefore, the formalities required must be observed strictly, unexplained delay in making the requisite demands shall defeat the pre-emption (**1992 SCMR 1844)**

33.13 Waiver of right of preemption by pre-emptor

Statement of pre-emptor before the Trial Court that he could not purchase the property at the time of its sale as he had no money at that time, neither amounted to waiver of the pre-emption right nor such statement of pre-emptor was indicative of a conduct which would be construed as waiver of their right of pre-emption. Such assertion of pre-emptor that as soon as he was able to collect necessary funds, he exercised his right of pre-emption in respect of the suit land indicated that at no stage he had given up the right of pre-emption in respect of the land (**1999 SCMR 201)**

33.14 Withdrawal of Claim

If suit to the extent of one of the plaintiff was permitted to be withdrawn then same would become a partial pre-emption and it could not be presumed that other pre-emptor had claimed whole of the suit land (**2016 CLC Note 96**) One out of three pre-emptors withdrew the suit---Pre-emptors had jointly claimed the suit property, after withdrawal by one pre-emptor, suit was for 2/3 of the suit property which was partial pre-emption which was not permissible under the law. **(2015 YLR 1194)**

33.15 Evidence of Informer of Sale

Non-production of informer, the star witness about the alleged performance of Talb-i-Muwathibat, would give rise to an adverse inference against plaintiff (**PLD 2006 Lahore 39)**

33.16 Certified copy of Aks Shajra

Patwari had issued a certified copy of the 'Aks Shajra' and if the vendees were of the view that the same was an incorrect copy they should have either summoned the Patwari concerned for the purpose of rebutting the document on the production of the correct copy of the Aks Shajra or after procuring the correct certified copy they should have tendered it in evidence so as to rebut the document. **(2016 SCMR 2055)**

34 CONSTRUCTION OF RENTED PREMISES BY TENANT

No written agreement between the parties existed with regard to construction over the rented premises. Construction over demised premises without written agreement or consent of landlord would be upon the risk and cost of tenant. Any structural change in rented premises without written consent of landlord was itself sufficient ground for eviction. (**2018 YLR 1818)**

35 EXECUTION OF ORDERS

35.1 Relevant provision

Section 31 of Punjab Rented Premises Act, 2009

35.2 Rent Tribunal, power of Civil Court

Provisions of the Act of 2009 are examined; under section 26, the Rent Tribunal exercises powers of a Civil Court for the purpose enumerated therein; under section 31, while executing the order of Rent Tribunal or Appellate Court, the final order passed under section 27 is required to be treated as decree of Civil Court; and the Rent Tribunal being executing court is given all the powers of a Civil Court. Necessary corollary is that an order passed by Rent Tribunal under the Act of 2009, has force of decree therefore, ad valorem court fee was leviable under Article 1 of Schedule I to the Court Fee Act, 1870 on memorandum of appeal (**2015 MLD 751)** Rent controller remains persona designata and does not become a civil Court merely because he has to execute order like the decree of civilCcourt (**2007 SCMR 818)**

35.3 Levy of Court fees on appeals of Rent Tribunals

Rent Tribunal could execute an order passed by it or by the Appellate Court under Punjab Rented Premises Act, 2009 as a decree of a civil Court and for such purpose he might exercise any or all the powers of a civil Court "Final order" passed by the Rent Tribunal had the force of a "decree of civil court". Tenant was required to affix ad valorem court fee i. e. 7.5% of the annual rental value of demised premises on appeal filed by him (**2015 CLC 776)**

35.4 CPC - execution proceedings

Perusal of S.31 of the Punjab Rented Premises Act, 2009, revealed that all the provisions applicable to execution of a decree of a civil court would be applicable including those under which the objections were filed and under the law the same had to be decided by the Executing Court (**2011 CLC 396)**

35.5 Duty of Execution Court

Decree is executable in the light of the terms and conditions mentioned in the decree and the executing Court has to confine its deliberations within the purview of the decree and not beyond that. It is the duty and obligation of the executing Court to dispose of the objections filed by the objectors in the light of terms and conditions of a decree and the learned Rent Controller has no authority to deviate from a real controversy between the parties keeping in view the decree secured by the petitioner in the case in hand. The learned Rent Controller has only authority to determine the questions relating to execution, discharge and satisfaction of the decree...executing Court has to decide the objections keeping in view the pleading of the parties in the rent matter and the decree passed by the Rent Controller **(2007 SCMR 818)**

36 GENERAL PROVISIONS RELATING TO TENANCY

36.1 Relevant Provision

Sections 5 to 10 of Punjab Rented Premises Act, 2009

36.2 Proof qua rented premises for registration of rent agreement

It was mandatory for a person is claiming to be the landlord to provide any prima facie proof of ownership or any authorization from the owner in recognition of his being ostensible landlord qua the rented premises to the Rent Registrar for registration of the rent agreement. Even a person who filed an application under S.5 of the Punjab Rented Premises Act, 2009 for registration of rent agreement on behalf of the landlord was under an obligation to provide reasonable proof of ownership of the landlord which was not tantamount to decision of the title rather it was only for satisfaction of the Rent Registrar for the purpose of the registration of the rent agreement (**PLD 2018 Lahore 390)**

36.3 Nature of "pagri" in rent cases:

The pagri is neither a security deposit nor it could be adjusted against rent, hence landlord could not be debarred from institution of eviction proceedings merely because pagri was paid. Further before Act of 2009 as there was no legal recognition of "Pagri", it could not be enforced through process of Court in eviction petition. However, in Act of 2009 for the first time, the term "Pagri" has been provided statutory protection and section 2(e) define the term "Pagri" includes any amount received by a landlord at the time of grant or renewal of a tenancy except advance rent or security. (**2020 MLD 226)**

36.4 Jurisdiction of Rent Tribunal

Rent Tribunal established under S. 35(d) of the Act had no jurisdiction to entertain an application and pass an order under S.5 of the Act for registration of rent agreement after issuance of the notification No.SO (JUDL-III)4-24/2004 dated 26-01-2012, (**PLD 2018 Lahore 390).** Rent Tribunal was to determine the question

of tenancy in absence of registered tenancy agreement for which relationship of landlord and tenant was sine-qua-non (**2019 MLD 2095)**

36.5 Death of tenant

Widow after the death of her husband had become tenant. **(2017 CLC 450)**

36.6 Oral tenancy - not a bar to file ejectment petition

The object of the law was to compel the parties to enter into a tenancy agreement within the view and scope of the provisions of Ss.5, 6 & 7 of the Act. Penalty had been provided by the law for the breach of the obligations, envisaged thereby, in that, where the tenancy agreement was not so entered and a landlord or the tenant approached the Rent Tribunal for the enforcement of his right(s) under the Act, he had to pay a fine, the non-registration of the rent agreement (**2018 MLD 1231)**

36.7 Fine to bring action

Where the tenancy agreement was not entered into within the provisions of Punjab Rented Premises Act, 2009 and was not registered, and a landlord or the tenant approached the Tribunal for the enforcement of his right(s) under the said Act, he had to pay fine. Rent Tribunal was left with no discretion to waive off, exonerate or absolve a party coming before it, from such a fine. No proceeding to determine the case on merit shall be conducted and continued by the court, until and unless the fine was deposited by the applicant. The mandate of S.9 of Punjab Rented Premises Act, 2009, is mandatory. **(PLD 2013 SC 775)** Tenancy not in conformity with provisions of section 9. In case requirements of said provision were not fulfilled, the Rent Tribunal shall halt further proceedings and first require the party to comply with said mandatory provision. **(PLD 2016 Lahore 652)**

36.7.1Existing tenancy

Tenancy agreement not brought in conformity by landlord with provision of S.8 of Punjab Rented Premises Act, 2009: Landlord would be liable to pay 10% of annual rent as fine irrespective of fact whether grace period provided under S.8 of Punjab Rented Premises Act, 2009 had expired or not (**2013 CLC 258)**

36.7.2 Otherwise

Where the applicant (landlord/tenant) wanted to avail the remedy of law under Punjab Rented Premises Act, 2009, and exercise his right to enforce the duties of the opposite side, he shall be obliged to pay the fine as mentioned in S.9 of the said Act, notwithstanding it was an existing tenancy or otherwise. No exemption or moratorium etc. on the basis of two years period mentioned in S.8 of said Act shall be available to him (**2013 PLD 775)**

36.7.3 Fine at stage of appeal etc

Where applications/petitions (of the landlord or the tenant) had been entertained and were pending before the Rent Tribunal or had been finally adjudicated by the Tribunal and were pending in further hierarchy of appeal or in constitutional jurisdiction of High Court or even before the Supreme Court; and the original applicant/petitioner had not paid the fine which he was required to pay, such proceedings should be halted, and the original applicant/petitioner should first be directed to pay/deposit the amount of fine as per S. 9 of Punjab Rented Premises Act, 2009, (**2013 SCMR 1520)**

37 GROUNDS FOR EVICTION

37.1 Relevant Provision

Section 15 of Punjab Rented Premises Act, 2009

37.2 Default in Payment of rent

Under S.7(1) of the Punjab Rented Premises Act, 2009 the tenant was obliged to make payment of rent to the landlord in the mode and by the date mentioned in the rent agreement **2018 CLC 161.**

Subsequent payment or deposit of arrears of rent does not wipe off default once committed (**2015 CLC 1187).**Tenant should make a tender or deposit rent in the Court on refusal of landlord or his agent to collect the same after seeking permission from the court (**2014 MLD 1084)** Tenant should make a tender or deposit rent in the Court on refusal of landlord or his agent to collect the same after seeking permission from the court. Payment of accumulated rent could not be considered a proper payment. Tenant should have made a tender or deposited rent on refusal of landlord or his agent to collect the same after seeking permission from the court but no such steps were taken in the present case (**2014 MLD 1084).**

37.3 Willful default

Payment, made a year after it was due, cannot be termed anything but willful default in payment of rent (**2012 CLC 1158)** Tenant's plea that landlord had not served notice upon him asking for payment of increased rent, in absence of which tenant could not be said to have committed default in its payment. Tenant was bound to increase rent for same being envisaged by statute, failure whereof would entail consequences of willful default. Ejectment petition was accepted in circumstances **2012 SCMR 91.**

37.4 Eviction on basis of oral tenancy

Where period of tenancy had expired, the tenant who relied upon its extension had to establish through cogent evidence the time period for which it had been extended

otherwise oral extension would tantamount to extension of one month only and such tenancy had to be extended on each and every successive month and terminable at one month's notice. Filing of ejectment petition was itself a notice for termination of tenancy (**PLD 2019 Lahore 363)**

37.5 Expiry of lease agreement - eviction

Under S.7 of the Punjab Rented Premises Act, 2009 expiry of lease was one of the grounds of eviction (**2016 MLD 103)**

37.6 Default not a ground for eviction – order for payment of rent

Where, however, grounds envisaged by S. 15 of the Punjab Rented Premises Act, 2009 other than default in payment of rent were raised in an eviction application, the Rent Tribunal after deciding the issue of relationship of tenancy and finding in favour of the landlord may frame further issues on merits and at that point of time pass an order for payment of rent and other dues pending proceedings under S. 24 of the Act (**2016 SCMR 2186)**

37.7 Remedy against Pagri

Right and remedy if any available to the tenant for the recovery of the said amount of pagri from the person who was liable to return it, if permissible under the law, shall not foreclose, for which the tenant might bring an independent action before the appropriate forum (**2013 SCMR 1520)**

37.8 Adjustment of monthly rent into security amount

Landlord was to refund the security amount at the time of vacation of premises by the tenant, therefore, availability of security amount with the landlord could not absolve the tenant to pay rent within time (**2018 CLC 161)**

37.9 Presumption of ownership of landlord

Landlord may not be essentially an owner of the property and ownership may not always be a determining factor to establish the relationship of landlord and tenant between the parties; however, in normal circumstances in absence of any evidence to the contrary, the owner of the property by virtue of his title is presumed to be the

landlord and the person in possession of premises is considered tenant (**2018 MLD 1231)**

37.10 Estoppel

Principle of "once a tenant was always a tenant" will apply. Tenant, during the subsistence of tenancy, had no right to challenge the title of landlord (**2018 MLD 1231)**

38 POWERS AND JURISDICTION OF RENT TRIBUNAL

38.1 Relevant Provisions

Sections 16-28 of Punjab Rented Premises Act, 2009

38.2 Order of Rent Tribunal - decree

Final order passed by the Rent Tribunal under S. 27 of Punjab Rented Premises Act, 2009 was required to be treated as decree of civil Court and ad valorem court fee was leviable. Rent Tribunal being executing court would exercise powers of civil court while executing such order (**2015 MLD 751)**

38.3 Application of CPC on Rent proceedings

It is a settled law that provisions of C.P.C. are not applicable in the rent proceedings in stricto senso, however, learned Rent Controller in exercise of the discretion is entitled to follow the equitable principles of C.P.C. (**PLD 1976 SC 422 , PLD 1983 SC 155)** Rent Tribunal, after treating affidavits as evidence, of its own motion was required to order the attendance of deponent for cross-examination upon such referred affidavits or at the request of a party direct the production of the deponent for the purpose (**2018 CLCN 133)**

38.4 Question of jurisdiction

Question of jurisdiction of the Rent Tribunal could be raised at any stage of the proceedings before the Rent Tribunal (**PLD 2019 Lahore 268)**

38.5 Question of title of rented property - jurisdiction

Any dispute with regard to the title or ownership of a property subject matter of eviction proceedings had to be determined by a Court of competent jurisdiction. Rent Tribunal/Rent Controller lacked jurisdiction to determine questions of title. Any person could not simply file an application for impleadment in the eviction proceedings for determination of his title to the suit property by the Rent Controller (**2019 SCMR 842)**

38.6 Rent Tribunal – determination of arrears of rent

Provision of S. 24 of Punjab Rented Premises Act, 2009 had given ample powers to Trial Court to direct tenant to deposit rent admitted between parties in addition to payment of utility bills. If Trial Court had been given powers to determine tentative rent, it would also finally determine outstanding amount against tenant. Trial Court under Ss. 24 & 25 read with S. 2(b) & (h) of Punjab Rented Premises Act, 2009 was fully empowered to determine arrears of rent (**2017 YLRN 231)**

38.7 Mode of recording of evidence

Section 25 of the Punjab Rented Premises Act, 2009 dealt with the aspect of recording and evidence and did not relate to the affidavits previously filed by the landlord at the time of filing the ejectment petition (**2012 MLD 1988)**

38.8 Closing of right to produce evidence

Once leave to contest had been granted to a tenant, despite non-filing of affidavit of the witnesses by him, his right to prove the case through oral evidence must remain unimpaired (**2013 CLC 620)** In proceedings conducted by the Rent Tribunal, there was no concept of closure of evidence of any party for the reasons that evidence in the shape of affidavits was already available before such Tribunal either with the application filed by a landlord under S. 19 or with a petition for leave to contest filed under S. 22 of the Punjab Rented Premises Act, 2009. Section 34 of Punjab Rented Premises Act, 2009 barred the applicability of the provisions of Civil Procedure Code, 1908 to the proceedings under the Punjab Rented Premises Act, 2009 before a Rent Tribunal. Rent Tribunal, after treating affidavits as evidence, of its own motion was required to order the attendance of deponent for cross-examination upon such referred affidavits or at the request of a party direct the production of the deponent for the purpose (**2018 CLCN 133)**

38.9 Order for payment of rent in case of denial of relationship of tenancy

Relationship of landlord and tenant was an essential question which had a direct effect upon the assumption and exercise of the jurisdiction of the Rent Tribunal, which (question) must necessarily be positively ascertained before passing an order for payment of rent due under S. 24 of the Act. (2009 MLD 955) declared to be bad law] (**2016 SCMR 2186)**

38.10 Notice by new owner

Petitioner claiming to be new owner of property without first complying with mandatory provision of S.30 of Punjab Rented Premises Act, 2009 could not allege such default on part of respondent who was impleaded as tenant (**2013 CLC 414)**

39 PUNJAB TENANCY ACT 1887

39.1 Jurisdiction

Under the Punjab Land Revenue Act, 1967, Tehsildar acted as a Revenue officer which fell within the administrative province of the revenue authorities, however, the same Tehsildar was (also) graded as 1st Class or 2nd Class Magistrate/Revenue Court under the provisions of Punjab Tenancy Act, 1887. (**2016 SCMR 834)**

39.2 Tenancy creation

- Tenancy is not only created by express contract but also by implication or by the conduct of parties. (**1991 SCMR 228)**
- Most important condition of the tenancy and the liability of the tenant was to pay rent of that land meaning thereby, the share of the crops or lease money to the landlord. Where there was no payment of rent or lease money to the landlord, relationship of landlord and tenant would not exist between the parties. (**2001 MLD 392)**
- Mere non-payment of rent or Batai by tenant to landlord, would not alter nature of tenancy-Tenant denying title of landlord in respect of tenanted land, must show that he had done something more to deny landlord's title, because law assumed that a tenancy of land once entered upon, would continue until determined in one of ways provided for by statute. (**2000 YLR 401)**

39.3 Sub-lease of tenancy

Occupancy tenant was incompetent to create a sub-lease of his occupancy tenancy for a term beyond seven years. Lease deed executed by occupancy tenant for a period of 99 years was in contravention of S. 58(1), Punjab Tenancy Act, 1887 and thus, void. (**1993 CLC 1520)**

39.4 Onus to prove

Onus-to-prove sufficiency of cause leading to abandonment of occupancy rights shifts to tenant after tenant fails for more than one year to cultivate tenancy and fails to arrange for payment of rent as it fell due. (**1980 CLC 1929)**

39.5 Joint tenancy

Several co-sharers, joint tenants under one Landlord-Tenancy constitutes one joint tenancy-Such tenancy cannot be extinguished in part. (**PLD 1958 Lahore 918)**

39.6 Ejectment of tenant

- Tenant can either be ejected in execution of a decree for ejectment or when a decree for an arrear of rent in respect of his tenancy passed against him remains unsatisfied. (**1984 CLC 1316)**
- Tenant, even after the land reforms cannot file a suit for possession under S. 9, Specific Relief Act, 1877 because of a clear bar in S.35, N.-W.F.P. Tenancy Act, 1951 or S.51, Punjab Tenancy Act, 1887. **(PLD 1991 SC 1041)**
- Suit for recovery of arrears of rent and ejectment of tenant. Both such relief could be joined in one suit. (**2009 MLD 501)**

39.7 Application of customary law

- Occupancy tenancy on death of tenant governed by custom in matters of alienation mutated in name of his widow as a limited owner. Gift of such land made by widow would be invalid both under Punjab Tenancy Act, 1887 as well as under Custom. (**PLD 1982 S C 1)**
- Widow of a sonless occupancy tenant succeeding to her husband under S. 59 (as amended) cannot become an absolute owner of the entire holding of her husband on acquisition by her of the proprietary rights under S. 114, so as to become a fresh stock of descent in her own right in respect of entire holding of the deceased occupancy tenant, excluding Muslim Law heirs of the last male-holder. (**1987 SCMR 1232)**

- Life interest having been terminated by law under Shariat Act, 1962, widow of last male owner holding occupancy tenancy would not acquire absolute ownership on acquisition of proprietary rights in holding of her deceased husband under 5.114 of Tenancy Act. Subsequent sale made by widow in respect of holding left by her deceased husband would be valid to the extent of her share without affecting shares legally inherited by residuaries of her deceased husband. (**1988 CLC 1259)**

40 ARTICLE 124

By presuming a person dead in terms of Art.124 of Qanun -e-Shahadat, 1984, it did not mean that said Article was of any help in determining when the person actually died in those seven years' period; he was just presumed dead for all intent and purposes after a period of seven years had expired---Article 124 by itself was of no help in visualizing the probable time of death of a missing person within those seven years---Court which was seized of the matter for making a declaration in terms of Art.124 was not prevented from visualizing the probable time of death on the basis of the circumstances in which the person had disappeared. (**PLD 2019 SC 710)**

41 ARTICLE 164

41.1 Admissibility of evidence through modern devices

Evidence collected through modern devices (CD etc.) was admissible in evidence under Art.164 of Qanun -E-Shahadat, 1984. **(2016 P.Cr.LJ 1390 Lah)**

41.2 Evidence generated by modern devices

Court invested with wide powers under Art. 164 , Qanun-e-Shahadat, 1984, to make use of evidence generated by modern devices and techniques. Procedure to receive such evidence has been smoothened by the provisions of Arts.46A & 78A of Qanun -e-Shahadat, 1984, as well as provisions of Electronic Transactions Ordinance, 2002, subject to restrictions/ limitations provided therein. **(2019 SCMR 1982)**

41.3 Evidence recorded through modern devices

Wife filed application for recording her statement through video link which was accepted by the Family Court... Evidence received through modern devices was admissible under Art. 164 of qanun -e-Shahadat, 1984, however Qanun -e-Shahadat was not strictly applicable to Family Court but Family Court was not barred from receiving such evidence under any provision of law. **(PLD 2017 Lah 698)**

41.4 Evidentiary value through different devices

41.4.1 SMS

Information conveyed over modern devices such as SMS. Such information was means of communication validly accepted all over the world, however the witness in whose presence such information was conveyed or received was always important to prove a fact through its verification. Although under Art 73 of the Qanun -E-Shahadat, 1984 modern devices were legally acceptable yet in order to prove a fact, the required procedure had to be followed. **(PLD 2015 Lah 231)**

41.4.2 Record of Mobile Company

Record of Mobile Company and evidence of it's representative was admissible in terms of Art.164 of qanun-e-Shahadat, 1984 which had provided that court could

allow the production of any evidence that could have become available because of devices and techniques. **(2013 PCrLJ 1082)**

41.4.3 CCTV footage

Evidence procured through modern device like CCTV was made admissible under Art. 164 of qanun -e-Shahadat, 1984, but at bail stage tentative assessment of entire evidence was to be made by court. Evidence of CCTV would be taken into consideration by Trial Court in accordance with law **(2015 MLD 1661)**. Mere producing of CCTV video as piece of evidence and its watching in open court was not sufficient to be relied upon unless and until corroborated and proved to be genuine---As a proof of genuineness of such CCTV video, it was incumbent upon prosecution to examine the person who recorded the video to testify the same. **(2013 P.Cr.LJ 783)**,

42 CHILD WITNESS

42.1 Testimony of child witness

Child witness was the most natural and innocent witness having no grudge or motive to implicate an innocent person. (**1998 P.Cr.LJ 1429)**

42.2 Nature of evidence of child witness

Evidence of a child witness was a delicate matter and normally it was not safe to rely upon it unless corroborated---Great care was to be taken in regard to the evidence of a child. Element of coaching might not involve as children were most untrustworthy class of witnesses being of tender age. (**2020 YLR 360)**

42.3 Test for a child to be as a witness

A child, irrespective of his age, is competent to be a witness, subject to his fulfilling the conditions precedent provided under Articles 3 and 17 of the Qanun-e-Shahadat Order, 1984. **(PLD 2020 SC 146)** Under Art.3 of the Qanun-e-Shahadat Order, 1984 was that the child or the person must have the capacity and intelligence of understanding the questions put to him, and also be able to rationally respond thereto. (**PLD 2020 SC 146)** Art. 3 child witness Competence Testimony of child witness was related to his capacity and competency to understand the questions and then to address them rationally---Tender age solely was no ground to discredit the testimony of witness if otherwise it was proved that he was mature enough to understand the consequences of his statement. (**2018 P.Cr.LJ 537)**

42.4 Preliminary inquiry - legal requirement

Holding of a preliminary inquiry by the Trial Court to determine the competence of a child witness to testify is a rule of prudence and not a legal obligation upon the Court. Omission to conduct such preliminary inquiry, therefore, does not render the evidence of minor child inadmissible in evidence. (**2003 YLR 806 SC AJK)** Testing intelligence of witness of tender years-Not a condition precedent to reception of his evidence-No provision of law requires Court to test intelligence

of child witness at initial stage-Such step, however, desirable to save time of Court. (**1968 P.Cr.LJ 569)**

42.5 Rule of care - sole testimony of child witness

Though in principle, conviction could be based upon testimony of an intelligent and understanding child witness but Courts had generally preferred to adopt settled principle of prudence and rule of care attached to sole testimony of child witness despite child's intelligent deposition. (**2010 SCMR 247)**

42.6 Corroboration of evidence of child witness

Conviction could be handed down placing reliance on the sole testimony of a child witness but as a rule of prudence it was generally preferred that it should be corroborated by some other evidence so as to ensure the safe administration of justice. (**2019 YLR 2171)** Evidence of child witness has to be assessed with care and caution and it is not safe to rely upon evidence of child witness unless corroborated. (**2001 MLD 477)**

42.7 Facilitation of child witness

In cases where a child witness was also the victim of the crime and was unable to depose in the court room, and his evidence was "necessary" to find the truth, and the same had a ring of "circumstantial trustworthiness" attached therewith, the Courts may consider the out-of-court evidence thereof, as an exception to the "hearsay rule"... Supreme Court observed that great care was to be taken to ensure that child witnesses were able to depose their testimony at ease, by taking measures in the court room to lessen their stress and anxiety of court-room appearances in such a tender age; that such measures included child witness aid in testifying, screens in court rooms, closed courtrooms and counselor aid before and after recording of evidence; that it was expected that respective governments would appropriate legislative and administrative measures for ensuring the much needed protection and facilitation of child witnesses. (**PLD 2020 SC 146)**

42.8 Adjournment to record remaining evidence of child

Supreme Court observed that the "rationality test", which was applied by the presiding Judge at the commencement of the examination-in-chief of a child witness , should be made applicable throughout the testimony of the child witness; that if at any stage, the presiding Judge observed any hindrance or reluctance in the narration of events, the evidence should be stopped, and remedial measures should be taken to ease the stress and anxiety the child witness might be under, and if required, the case be adjourned to another date; and, that in case the child witness was still unable to narrate his testimony with ease, then the presiding Judge ought to record his findings on the demeanor of the child witness , conclude his evidence, and relieve him as a witness. (**PLD 2020 SC 146)**

42.9 Child not of tender age

Child witness Boy of 12 (much less of 15) cannot be said to be of tender age. (**1968 PCRLJ 1525 SC)** Children of age of 10 years, held, could not be stated to be of tender age. (**1985 P.Cr.LJ 2503)**

42.10 Effect of non-production

Witness a boy 5/6 years' old-Neither an intelligent person nor could render any assistance to Court on aspect of cases-Failure to produce such witness, held, cannot give rise to presumption that such witness, if produced, would have deposed against prosecution-Evidence Act (1 of 1872), S. 114, illus. (g). (**1970 P.Cr.LJ 585 SC)**

42.11 Tutoring

Witness of six years old was an easy prey to tutoring. (**2017 P.Cr.LJ 789)..** No particular age was given by the legislature which determined the question of competency of a witness which would depend upon the capacity of the child to understand **(2015 YLR 17)**

42.12 Conviction on statement of child victim

Kidnapping of minor girl of 6/7 years of age proved by testimony of minor girl herself. Evidence of said kidnapped child, held, alone was sufficient to prove charge of kidnapping against accused. (**1985 P.Cr.LJ 2500 Lahore)**

42.13 Minority, not ground to declare statement unbelievable.

Child witness , a girl of 6 years, found to be capable of understanding questions put to her and giving intelligent answers-Such witness found consistent and not making ally improvement on original story told by her to police-Minority of such witness cannot, in circumstances of case, make her statement unreliable. (**1969 P.Cr.LJ 93 SC AJK)**

42.14 Child unable to give intelligible answer

Child of about 9 years found unable to give intelligible and intelligent answers to questions-Deposition of such child held, without any value. (**1969 PCRLJ 343)**

43 CONFESSION OF CO-ACCUSED

43.1 Confessional statement as circumstantial evidence against co-accused

Where, in a joint trial, confession of one accused was proved, under Art.43 of Qanun-e-shahadat , 1984, the same might be taken into consideration as circumstantial evidence against co-accused. (**2009 SCMR 1133**, **2003 SCMR 1419, 2016 P.Cr.LJN 113)**

43.2 Corroboration

Confession of accused is circumstantial evidence against co-accused under Art. 43 of Qanun-e-shahadat , 1984 which needs strong corroboration. (**2019 YLR 2213)**

44 DEAF AND DUMB WITNESS

44.1 Evidence of deaf and dumb witness

Evidence of deaf and dumb witness could be recorded through necessary implication of Arts. 3 & 59 of Qanun-e-Shahadat, 1984 read with S. 543, Cr.P.C.---Article 3 of Qanun-e-Shahadat, 1984 postulated that all the witnesses were competent to testify, unless the court considered that they were prevented from understanding the questions put to them or giving their rational answers---Person could be held incompetent to testify only if the court arrived at a definite conclusion that he could neither understand a question nor was in position to give its rational answer. (**2019 P.Cr.LJ 1086 Lahore)**

44.2 Measures to be observed to record evidence of deaf and dumb witness

- A deaf and dumb person is the solitary eye-witness in this case, however, the trial Court did not determine the level of his comprehension. There is also nothing on record to show how the Court concluded that witness was "well versed with his language of signals." It is also not clear in what capacity witness interpreted the sign language of the deaf and dumb witness, whether he did so as a translator or as an expert in terms of Article 59 of the Qanun-e-Shahadat. The trial Court should also have administered an oath to witness, but did not do so. Section 543 of the Code of Criminal Procedure ("the Code") requires that an interpreter "shall be bound to state the true interpretation of such evidence or statement". (**2019 SCMR 64)**
- First injured witness was given up on account of being deaf and dumb --- First witness was an adult, living active life and had so much maturity of understanding and conversing with others that he was picked up by the complainant to look after his cattle shed---Record of the case was silent regarding satisfaction of court in terms of Art. 3 of Qanun-e-Shahadat, 1984--

-Trial Court, under Art. 59 of Qanun-e-Shahadat, 1984,could have called for help of an expert having requisite expertise in specific field and through S. 543, Cr.P.C. could have recorded the evidence of deaf and dumb witness by using such expert as an interpreter---Services of an expert from some institute of deaf and dumb persons could conveniently have been procured but no effort was made in that regard---Court was otherwise competent to examine the said witness through some of his relative, well conversant with his signs and gestures after administering oath to him---Nothing was brought on record to the effect that said witness was an illiterate person, otherwise he could have been examined even in writing---Evidence of said witness could not have been discarded in the manner adopted by Trial Court. **(2019 P.Cr.LJ 1086 Lahore)**

45 EXPERT OPINION

45.1 Qualification and experience for being expert

Under Art. 59 of Qanun-e-Shahadat, 1984, opinion of a witness was only relevant and carried some probative value if he was an expert in the fields specified in the said Article---For the purpose of giving an opinion, the witness first had to establish the expertise vested in him whether on account of academic qualification or experience or otherwise---Without such foundation, an opinion could not by itself be taken as having evidentiary value for proving a fact in issue. **(PLD 2014 SC 696)**

45.2 Nature of expert opinion

Report of expert was a circumstantial evidence, which in absence of direct evidence, was a weak type of evidence, unless same was corroborated by other strong piece of evidence. **(2013 CLC 1171)**

45.3 Manifestly flawed or slipshod expert opinion

Manifestly flawed or slipshod expert opinion cannot override direct and positive proof, unambiguously spelling out culpability. **(2019 P.Cr.LJN 65)**

45.4 Medical Evidence

Medical evidence was only an expert opinion which could not always be accepted with mathematical precision and alternatively its absence would not affect the merits of the case if the evidence was straight-forward and reliable. **(2018 YLR 2034)** Medical evidence or expert's opinion has always been treated to be confirmatory in nature**. (2008 SCMR 1086)** Medical evidence based on the opinion of medico legal officer was a mere opinion of an expert and was confirmatory in nature and not corroboratory except those observations of the medico-legal officer which were based on physical examination which served as a corroboratory piece of evidence. **(2015 SCMR 840)**

45.5 Opinion of handwriting expert

45.5.1 Non binding effect

Expert opinion is not binding upon the Court. (**2019 CLC 1693)**

45.5.2 Nature of evidence

Opinion of handwriting expert is very weak type of evidence and is not of a conclusive nature---expert 's evidence is only confirmatory or explanatory of direct or circumstantial evidence and confirmatory evidence cannot be given preference where confidence inspiring and worthy of credence evidence is available---No doubt that opinion of handwriting expert is relevant but, it does not amount to conclusive proof and can be rebutted by overwhelming independent evidence---Always risky to base findings of genuineness of writing on expert 's opinion ---Nothing in Qanun-e-Shahadat exists which requires the evidence given by an expert in any particular case to be corroborated before it can be acted upon as sufficient proof of what the expert states---Question as to how much reliance a Court should place on the statement of any particular witness in any particular case must necessarily depend on the facts and circumstances of that case. (**2007 SCMR 1692, 2006 SCMR 193, 2005 SCMR 152, 2004 SCMR 1859, 2003 SCMR 884)**

45.5.3 Evidentiary value

Handwriting expert , opinion of---Scope---opinion of handwriting expert , though not having binding value in terms of Art.59 of Qanun-e-Shahadat, 1984 would certainly aid and assist court in determining genuineness or otherwise thumb impression on disputed documents and adjudication of matter. (**2019 CLD 894)**

45.5.4 Power of Court to compare handwriting

Hand writing expert need not be examined in every case--Court itself was entitled to make independent comparison of Handwriting apart from opinion of expert as contemplated by Art. 84, Qanun-e-Shahadat, 1984. (**1996 SCMR 464)**

45.5.5 When direct evidence available

Report of handwriting expert on its own cannot be made basis to discard the direct evidence---When direct evidence is available, there is no need of expert opinion , which otherwise is nothing but confirmatory and explanatory to direct evidence. **(2019 CLC 1693)**

46 HOSTILE WITNESS

46.1 Scope of hostile witness

Witness who is unfavorable is not necessarily hostile, for a hostile witness is one who from the manner in which he gives evidence, shows that he is not desirous of telling the truth to the court; that the witness's answer to certain question is in direct conflict with evidence of the other witnesses, is not and can never be a reason for allowing the witness to be treated as hostile and permitted to be cross-examined. **(PLD 2019 Lahore 594, 2019 P.Cr.LJ 1475, 2017 YLRN 172)**

46.2 Discretion of Court

Court can permit party to put any question to his witness but it is not a right of the party---Discretion by Trial Court is to be exercised with due caution and attention keeping in view the interests of both the parties, so that no one is prejudiced from the order of the court (**2019 P.Cr.LJ 1475)**

46.3 Impeach credit of witness

Normally a witness who becomes hostile or antagonistic to the party who produced him for recording statement in his support, is allowed to be cross-examined to impeach the credit of the witness by evidence of the kind mentioned in Art. 151 of Qanun-e-Shahadat, 1984---Party must establish that the witness is guilty of equivocation, or that he is varying in his statement, or is trying to suppress the truth or that he bears animosity towards the party who calls him---Absence of any act on the part of the witness of such a nature disentitles the party to cross-examine him to impeach his credit. (**2019 P.Cr.LJ 1475)**

46.4 Evidentiary value - hostile witness

Statement of hostile witness could not be brushed aside altogether and same could be taken into consideration, subject to availability of corroboration. Court was bound to consider and determine as to whether any part of evidence was worth believing, if examined in the light of other incriminating material and evidence on

record. (**2019 YLR 487 FSC, 2014 P.Cr.LJ 374 FSC).** However since a hostile witness spoke in different voices, therefore deposition of such witness had to be evaluated with great care and caution and utmost attempt was to be made to get independent corroboration thereof from surrounding circumstances of the case. (**2016 P.Cr.LJ 924)** Evidence of a hostile witness could be taken into consideration in order to determine that said witness was worthy of belief in the light of other evidence. Witness who was permitted to be cross-examined did not necessarily lose his credibility. Evidence of hostile witness could be relied upon by either party and conclusion could be drawn after considering of whole of his evidence. (**2017 YLRN 172)**

46.5 Evidence of hostile witness

Evidence of witness who had been declared as hostile by the prosecution could be ignored. (**2018 P.Cr.LJ 490)** Witness was declared hostile when he resiled from material parts of his earlier statement, and it was not safe to rely upon testimony of such witness. (**2016 CLC 848)**

46.6 Prosecution - confronting witness with previous statement

Prosecution could not be permitted to confront a witness with his previous statement recorded under S.161, Cr.P.C. for the purpose of contradicting him even after being declared hostile (**PLD 2013 SC 386)** Prosecution though was at liberty, to cross-examine or re-examine its own witness when he was declared as hostile, but it was not allowed to confront or contradict its own witness with the statement made by him before police during investigation. (**2001 YLR 1921 SC Azad Kashmir)**

46.7 Party failing to get his own witness declared hostile, held, bound by his evidence. (1984 MLD 461)

47 PUBLIC DOCUMENT

47.1 What are Public Documents

- Death register--public document having presumption of truth. **(2016 CLCN 62)**
- Nikah Nama was public document and presumption of truth was attached to entries made therein. **(2019 MLD 758)**
- Registered document would become a public document and presumption of correctness would attach to such document. **(2016 CLCN 20)**
- Divorce certificate" being a public document had presumption of correctness. **(2016 CLC 313)**
- Photostat copy of public document was not admissible unless it had been certified to be true copy by the officer concerned who had custody of the original document. **(2015 MLD 1412 SC AZAD-KASHMIR, 2013 CLC 343)**
- Birth certificate was a public document. **(PLD 2010 Lahore 422)**
- "Fard" and copy of Register Haqdaran-e-Zameen which was a public document. **(2010 CLC 1432)**
- Certified copy is poof of public document presumption in general is being attached thereto---Attested copy of public document is admissible in evidence without any objection in terms of Arts.47 and 88 of Qanun-e-Shahadat, 1984. **(2010 YLR 962)**
- Warrant was a public document and could have been proved by production of a certified copy as visualized by Art.88 of the Qanun-e-Shahadat, 1984. **(2010 P.Cr.LJ 231 FSC)**
- Passport is a public document. **(2009 YLR 2265)**

- Certified copy of mutation is admissible in evidence without further proof as to its contents. (**2007 CLC 1629)**
- F.I.R. was a public document. (**PLD 2007 Karachi 415)**
- Returned plaint was public document. (**2007 CLC 1848)**
- Official Gazette falls within the category of public document. (**2005 SCMR 1967)**
- Documents forming part of judicial record are public documents. (**2005 YLR 2129)**
- Postal certificate was a public document signed by Government functionary. (**2004 SCMR 1773)**
- Returned appeal/suit is a public document. (**PLD 1995 Peshawar 86)**
- "Roznamcha. Waqiati" was prescribed to be a public document maintained by Patwari in the discharge of his official duties as envisaged by Art.85, Qanun-e-Shahadat 1984. (**1994 MLD 585)**
- Khasra girdawari, held, a public document . (**1984 MLD 484)**
- School-leaving certificate a public document. (**1983 CLC 233)**
- Finger print slip prepared under Identification of Prisoners Act (XXXIII of 1920)-public document. **(PLD 1960 Lahore 416)**
- If a public officer maintains a record then the same would become the public record. (**PLD 2007 Karachi 415)**

47.2 Not Public Documents

- Judicial inquiry report prepared by a Tribunal or Commission appointed under the [Punjab] Tribunals of Inquiry Ordinance, 1969---Said report was not a public document in terms of Art. 85 of the Qanun-e-Shahadat, 1984. (**PLD 2018 Lahore 198)**
- Affidavit was not a public document and the same had to be proved in terms of Art.79 of Qanun-i-Shahadat, 1984. (**PLD 2016 Lahore 383)**

- Report of Bomb Disposal Squad was not a `public document', hence, not admissible in evidence. (**2009 PCrLJ 604)**

48 MISCELLANEOUS

48.1 Evidence by Reader of Court

Evidence though was recorded by Reader of Court, but same was recorded in presence of the Judge as also the counsel of parties and counsel for defendant/opponent not only had not raised any objection at relevant time, but had cross-examined witnesses at length without any objection. Trial Court in whose presence evidence was recorded by Reader had also given his certificate as required by R. 8 of O. XVIII of C.P.C: =Provisions of Rr. 5 & 8 of O. XVIII, C.P.C. having sufficiently been complied with no illegality was committed by Trial Court and in circumstances, decree passed could not be reversed nor case could be remanded on that ground. **(1995 CLC 1257)**

48.2 Evidence recorded in one suit and re-produced in other suit

Evidence of parties recorded in one suit reproduced in other two cases---Course adopted by Trial Court not objected to---Such course would be considered to have been undertaken with concurrence of the parties and their counsel---Petitioner having acquiesced in the procedure adopted was estopped to turn back and say that evidence in all the cases should have been recorded separately---Objection of the petitioner being only of technical nature did not defeat the ends of justice in circumstances. (**2008 MLD 307)**

48.3 Secondary evidence

If original documents were destroyed, lost or misplaced, Court was to resort to other secondary/circumstantial/corroborative evidence to reach the just conclusion of the case- **(2017 CLC 1221, 2010 CLC 1434)**

48.4 Conduct evidence

Circumstantial evidence/conduct evidence is that evidence which the witnesses think, believe or infer in respect of facts in dispute, as distinguished from their personal knowledge of facts themselves---Circumstantial evidence is exception to

the principle that direct evidence is the best evidence--Opinion" alone on the basis of conduct has been made relevant in terms of Art. 64, Qanun-e-Shahadat,1984--'Conduct" would, thus, become as the foundation of belief/opinion/judgment of witness---Opinion evidence of that witness was relevant who was possessed of special means of knowledge---Members of families were ordinarily presumed to have special means of knowledge with respect to relationship of members of their family ---Any outsider also, if he could show that he too possessed special source of knowledge, could also give "conduct evidence" **(PLJ 1994 LAHORE 331 = 1994 CLC 1570)**

48.5 Additional Evidence

- Additional evidence-Appellants though alleging mala fides of landlord in their written statement before Refit Controller but neither particulars of mala fides mentioned nor any evidence tendered before trial Court-Additional evidence not allowed at stage of second appeal. **(1982CLC 1179)**
- Ground for production of additional evidence that certain documents were not produced inadvertently being a vague assertion could not be treated as a sound reason for receiving additional evidence. **(1992 MLD 1219)**
- Recalling witness for examination and production of additional evidence---Scope---Provisions of O.XVIII, , R.17, C.P.C. relating to recalling a witness by the Trial Court and allowing additional evidence before Appellate Court under O.XLI, R.27, C.P.C. were an exception to the general rule of not allowing the same---Rationale behind said provisions was to ensure that parties produce their evidence in one-go and not in piecemeal, yet provided discretion to a court of law to allow evidence to be produced only in order to render complete justice---Such clear and vast authority with the court of law should not be exercised to allow one party to improve his case or to provide a second chance to him to fill up the lacunas in the case---Allowing party to produce additional evidence of calling witness again, would surely

be providing him an opportunity of improving his case and filling up the lacuna in his case. **(2011 CLC 1206)**

49 CANCELLATION OF INSTRUMENT

49.1 Relevant provision

Sections 39 to 41 of Specific Relief Act, 1877

49.2 Cancellation if a void or voidable instrument exist and could cause injury

Section 39 enables any person apprehending that a written instrument, which is void or voidable, and if left outstanding may cause him serious injury to approach a competent Court for getting the document so adjudged (**2003 YLR 1570)**.

49.3 Formation of suit for cancellation

The suit for cancellation or instrument would lie through a declaration for cancellation of the instrument declaring it to be void or voidable (**2004 YLR 57 Lhr)**.

49.4 Procedure of cancellation of Registered Instrument

That a copy of the Court's judgment shall be sent to the Registering Officer and the fact of cancellation shall be noted on a copy of the instruments in the Sub-Registrar's books. The granting of a decree therefore under Section 39, Specific Relief Act, involves the consequential relief that the document is cancelled (**AIR 1935 All 817)**.

49.5 Not obligatory to get void document cancelled but it may be prudent to do so.

There is no need for the person who is shown to be the executant of the forged document to sue for its cancellation or for setting it aside though he may be taking a risk in allowing the document stand, for proof of forgery may become difficult as time passes. (**PLD 2015 SC 212)**.

49.6 If instrument adjudged void or voidable, it stand cancelled

It is immaterial whether the plaint asks for the relief of cancellation or not, because if adjudged void or voidable, the written instrument is cancelled so far as the plaintiff is concerned (**AIR 1935 All 817)**.

49.7 Court fee on suit for cancellation

Though the suit was put in the form of declaratory relief for avoidance of registered sale deed yet the suit was visibly intended for cancellation of the sale deed alleged to be executed by the deceased plaintiff in his lifetime. Therefore, the plaintiff was liable to payment of ad valorem court- fee on the value of the subject matter in dispute under Article 1, Schedule 1 of the Court Fees Act and that valuation was already given in the registered sale deed. (**2016 YLR 1233 Lhr**).

49.8 Court may order payment of compensation to the losing party on cancellation of instrument

On adjudging the cancellation of an instrument, the Court may require the party to whom such relief is granted to make any compensation to the other which justice may require **(1959) 2 MLJ 225**.

49.9 Limitation for cancellation of a document

The suit was for cancellation of the documents on the allegations of fraud, forgery and misrepresentation, which (suit) shall squarely fall within the purview of section 39 of the Specific Relief Act and per Article 91 of the Act, the prescribed period of limitation shall be three years (**PLD 2015 SC 212)**.

50 DECLARATION

50.1 Relevant provisions

Sections 42, 43 of Specific Relief Act, 1877

50.2 When declaration may be sought

- Declaration can only be given in respect of a legal right or character (**2000 SCMR 204)**.
- Only a pre-existing right could be declared through a decree for declaration and a new right would not be created. **(**2020 SCMR 202=2020 PSC 247, 2020 SCMR 483, **2016 CLC Note 133, 2016 MLR 1761, 2016 YLR (NOTE)17)**
- It is well settled that in a suit under section 42 of the Specific Relief Act declaration can be sought either regarding the plaintiff's right to any legal character or with respect to any right as to property claimed by him (**1982 SCMR 1178)**.
- under the provisions of Section 42 of Specific Act, which requires any person entitled to any legal character or to any right as to any property, may institute suit against any person denying or interested to deny, his title to such character or right and the Court may in its discretion make therein a declaration that he is so entitled (**PLD 2018 Sindh 703)**.

50.3 Object of declaratory decree

The purpose of this jurisdiction vested in the civil Courts is plainly to prevent future litigation and to remove existing sources of controversy **(PLD 1959 SC 147)**

50.4 Declaration lies for pre-existing right

A suit for declaration declares pre-existing rights but no new right can be created (**2019 YLR 388)**.

50.5 Relief for declaration - plaintiff does not seek further relief to which he was entitled

The proviso to section 42 of the Specific Relief Act,. 1877, enacts that if a plaintiff does not seek a further relief than a mere declaration of title which is open to him, the relief for declaration is not to be granted, but (**PLD 1950 Lahore 414)**.

50.5.1 Amendment of plaint

There is no obligation on the Court to dismiss a suit if it is had under proviso to section 42 of the Specific Relief Act. Section 42 of the Act does not authorize the dismissal of a suit where the plaintiff being able to seek further relief than a mere declaration of title omits to do so. It only forbids the court to make the declaration, the prayer for which is not coupled with a prayer for a consequential relief. A suit which is defective under section 42 should not, therefore, be dismissed for failure on the part of the plaintiff to pray for further relief and the Court should allow the plaintiff to amend the plaint **(2012 CLC 1976 Lhr, PLD 1965 Lah. 172)**

50.6 Declaratory decree not implementable, not to be granted

No Court will grant a declaration which is useless or may not be honoured (**PLD 1965 (W. P.) Lahore 580)**.

50.7 Limitation

As far as the question of limitation in filing suit for declaration is concerned, we also would like to discuss it in some detail. In general, the time provided for such suit under Article 120 of the Limitation Act, 1908 is six years (**2017 SCMR 1476)**.

50.8 Public Documents pertaining to immoveable property- declaration

Non-impleading of public functionaries in the Suits for Declaration and cancellation of public documents pertaining to immovable properties, prejudices the rights of authorities to defend their actions and does not enable the Court to decide the matter effectively and adjudicate completely. **(2020 SCMR 202=2020 PSC 247)** It is settled by now that the Provincial Government and the relevant authorities appointed by the same, who

sanctioned a public document, are required to be produced before the Court when the validity of said document needs to be proved. This is because the person who scribes a document is needed to be produced before the Court to prove the validity of said document as under Article 78 of the Qanun-e-Shahadat Order 1984. (**CIVIL PETITIONS NO.2866 AND 2867 OF 2015; Sakhi Jan and others vs Shah Nawaz ,Ghulam Shabbir and others; SUPREME COURT OF PAKISTAN; CIVIL PETITIONS NO.2866 AND 2867 OF 2015)** Non-impleadment of the Provincial Government and relevant authorities who have sanctioned a document which has been impugned in a Court of Law, creates a serious defect in the Suit. **(2020 PSC 247)**

50.9 Declaration suit converted into specific performance

The plaintiff instead of filing the suit for specific performance, filed a suit for declaration, the plaint of which was rejected under Order 7 rule 11 CPC. The plaintiff in the said suit could pray for amendment so as to term it as a suit for specific performance. **(PLD 1990 Lahore 467; 2015 YLR 1845, 2011 YLR 1888, 2017 SCMR 347, 2014 SCMR 513, 2016 CLC 663 and PLD 2018 Peshawar 173)**.

50.10 Negative declaration-paternity

Plaintiff alleged that defendant was not his father's daughter and therefore not his heir and not entitled to inherit the properties left behind by him---Plaintiff sought a negative declaration and one which had nothing to do with his own legal character---To challenge another's adoption or legitimacy of birth did not assert the plaintiff's own legal character. Suit was barred by Art.128 of the Qanun-e-Shahadat, 1984---Only a putative father, within the time prescribed in Art.128, may challenge the paternity of a child- --Father of the parties had never challenged defendant's paternity---Article 128 of the Qanune-Shahadat, 1984 did not permit a putative brother to challenge his sister's paternitySuit filed by plaintiff was dismissed by the Supreme Court **(PLD 2019 SC 449)**

50.11 Declaration on the basis of agreement to sell

The agreement to sell by itself cannot confer any title on the vendee because the same is not a title deed and such agreement does not confer any propriety right, and thus, it is obvious that the declaratory decree as envisaged by section 42 of the Specific Relief Act, cannot be awarded because declaration can only be given in respect of a legal right or character. The only right arising out of an agreement to sell is to seek its specific performance and in case the vendee has been put in possession, the same is protected under section 53-A of the, Act (**2000 SCMR 204)**.

51 INJUNCTION

51.1 Relevant provisions

Sections 53 to 57 of Specific Relief Act, 1877

51.2 Meaning

A Court order commanding or preventing an action.[9]... Injunction is a judicial process whereby a party is ordered to do or to refrain from doing a particular act[10].

51.3 Types of injunction

- Temporary injunction (Section 53)
- Permanent/perpetual injunction (Section 54,56)
- Mandatory injunction (Section 55)
- Injunction to perform negative agreement (Section 57)

51.4 Temporary injunction

51.4.1 Relevant provisions

- Sec 53 of SRA, 1877
- Sec 94 & 151 CPC
- Order XXXIX of Code of Civil Procedure 1908
- Part-L, Chapter 1, Volume-I, Lahore High Court (Rules and Orders)

51.4.2 Grounds for grant of temporary injunction u/O 39 Rule 1 & 2 CPC

- Such orders can, by virtue of the provisions of Rule 1 of Order XXXIX of the CPC, be passed only upon a satisfaction of the Court being reached on the basis of affidavit or otherwise that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit **(1987 CLC 2479 Lhr**) Same principle narrated in **2014 GBLR 158, PLD 1972 Azad J&K 70, 2011 M L D 1 3 8)**

[9] Black's law dictionary, 11th edition P 937
[10] Messrs Hasani Estate Vs Messrs Victory Associates **(2012 YLR 158)**

- The Court has to satisfy the conditions listed under Rules 1 and 2 of Order 39 CPC. Under these provisions, it was enjoined to issue interim injunction when it was proved by an affidavit or otherwise:
    - (i) that any property, the subject of dispute in a suit is in danger of being wasted damaged or alienated by any party to the suit or wrongfully sold in execution of a decree, or
    - (ii) that the defendant threatened or intended to remove or dispose of his property with a view to defraud his creditors.

In presence of either of the conditions, it was permissible to issue interim injunction preventing the wastage, damage, loss, alienation, sale, removal or disposition of the property as the Court may think fit (**1994 MLD 912)**.

51.4.3 Conditions for grant of temporary injunction

For grant of such, relief, it is mandatory to establish that in order to obtain an interim injunction, the applicant has not only to establish that he has a **prima facia case**, but he has also to show that the **balance of convenience** is on his side and that he would suffer **irreparable injury/loss** unless he is protected during the pendency of suit. **(PLD 2016 SC 199, 2004 SCMR 1092, 1994 CLC 1601, 2004 SCMR 1092, PLD 1970 SC 180, P L D 2016 Sindh 445, 2019 CLC Note 62 Lhr, 2018 MLD 1449 Lhr, 2018 MLD 959 Lhr)**

51.4.4 Other Conditions

- whether the plaintiff has approached the Court with clean hands or not;
- whether the Court has been approached promptly or not;
- whether the grant of an injunction will be against public interest/policy;
- whether grant of an injunction to a party shall result into an undue advantage being given to him which would perpetuate injustice
- and whether a party approaching the Court for interim relief has concealed material facts and/or acted in a mala fide manner (**2013 CLC 454 Lhr)**.

51.4.5 Loss ascertainable in terms of money

Where the loss is ascertainable in terms of money, then it cannot be treated as a case of irreparable loss. In other words, where pecuniary compensation is an adequate relief, the injunction will not be granted in such cases (**2019 CLC 1 DB)**.

51.4.6 If justice demands injunction can be granted

Restraining orders are passed by the courts to cultivate cause of justice even if the case does not fall strictly within the provision of Rules 1 and 2 of Order XXXIX, C.P.C **(2012 Y L R 158)**

51.4.7 Temporary injunction u/s 94 & 151 of CPC

The Court can grant temporary injunction or appoint receiver by exercising inherent powers in the interest of justice after making reference to sections 94 and 151, C.P.C. **(2010 MLD 1180, PLD 1990 Kar 1, PLD 1983 Kar 303)**

51.4.8 Interim injunction - only tentative assessment of the case

For grant of injunction or refusal thereof, pleadings, documents and supporting evidence have to be examined and the assessment whereof shall be made tentatively (**2018 CLC 2020 Lhr)**.

51.4.9 Injunction, a discretionary relief

In case the answer of any of the questions is in the affirmative then the relief of an injunction being discretionary in nature can be declined (**2013 C L C 454)**.

51.5 Permanent Injunction

51.5.1 Relevant provisions

Section 54, 56 of Specific Relief Act, 1877

51.5.2 Injunction a discretionary relief

The grant of relief sought by the petitioner being discretionary, we upholding the preliminary objection raised by the learned counsel for the caveators, do not consider it a fit case for permanent injunction at this stage nor is it otherwise a fit case for grant of leave to appeal. **(1981 SCMR 778)**

51.5.3 Permanent injunction granted of - provisions of sec 54 & 56

In relation to suits, rights of the aggrieved party may, primarily, have to satisfy the requirements of Sections 42, 54 and 56 of the Specific Relief Act, 1877, where there are some restrictions and conditions, in details whereof it is unnecessary to go, of this stage, sufficing it to say that, in such matters declaratory relief is to pertain to rights in or to property and Permanent Injunction sought should conform to the requirements of Sections 54 and 56 ibid (**1989 CLC 2252**)

51.5.4 Injunction to be granted when damages cannot be calculated

Under section 54 of SRA an injunction can only be granted if it is proved to the Court that no standard existed for the calculation of damages suffered by the party to the contract and that pecuniary compensation could not be obtained **(2010 MLD 518)**

51.5.5 Injunction to be granted when compensation not an adequate relief or where compensation cannot be got

If compensation is not an adequate relief or where it is probable that pecuniary compensation cannot be got for the invasion the injunction may be granted **(1982 CLC 2369)**. The underlining would show that whenever there is an invasion or threat to invade the plaintiff's right to or enjoyment of property a perpetual injunction can competently be granted by the Court but subject to condition that 'invasion or threat to such right should not be capable of being compensated through pecuniary compensation or by order adequate relief' **(2016 YLR Note 35)**.

51.5.6 Injunction to prevent future or threatened injury

The use of the words "invades or threatens to invade" shows that the grant of an injunction is not limited to infringement of rights already taken place, but the basic idea of a suit for injunction is to restrain the doing of any, act and to prevent future or threatened injury or infringement, repetition of which must be stopped in order to prevent multiplicity of suits or judicial proceedings **(PLD 1980 Lahore 141**).

51.5.7 Injunction can be granted to prevent breach of an obligation

Section 54 of the Specific Relief Act, 1877 mandates that an injunction may be issued to prevent breach of an obligation existing in favour of the applicant, whether express or implied. According to this provision of law, a plaintiff can maintain a cause before the Court when defendant invades or threatens to invade his right (**2009 MLD 437, AIR 1974 Delhi 207)**.

51.5.8 Injunction to prevent multiplicity of the proceedings

The care may also be said to be one where the injunction would tend to prevent a multiplicity of judicial proceedings, and to that extent it is a proper case for the grant of a perpetual injunction (**59 Ind Case 271)**.

51.5.9 Perpetual injunction, plaintiff must establish his legal right and its violation

Before a perpetual injunction can be granted to restrain a private nuisance or the disturbance of an easement, the Court as a general rule requires the party to establish his legal right arid the fact of its violation **(1859) 7 HLC 600 (612)**.

51.5.10 One claiming injunction should approach the Court with clean hands

A plaintiff who asks for an injunction must be able to satisfy the court that his own acts and dealings in the matter have been fair, honest and free from any taint or illegality and that if in dealing with the person against whom he seeks the relief, he has acted in an unfair or un-equitable manner he cannot have this relief (**2010 MLD 1267**).

51.6 Perpetual injunction to be refused (Sec 56)

51.6.1 To stay judicial proceedings [56 (a)]

It is well-settled that except for the purpose of preventing multiplicity of proceeding, injunction cannot be issued by the Civil Court to stay judicial proceedings or to stay proceeding in superior Courts (**2003 MLD 201 Lhr**).

51.6.2 To stay proceedings not in a subordinate Court [56(b)]

The 'Rent Controller', in law, is not subordinate to a Civil Court hence the Civil Court legally cannot pass an order of staying the judicial proceedings pending before the Rent Controller (**2016 CLD 1453)**.

51.6.3 Injunction to stay proceedings of Courts

It is well-settled that except for the purpose of preventing multiplicity of proceeding, injunction cannot be issued by the Civil Court to stay judicial proceedings or to stay proceeding in superior Courts (**2003 MLD 201 Lhr**).

51.6.4 To interfere with public duties of Governmental Department [56 (d)]

As per provision of Section 56-(d) of Specific Relief Act, 1877, is concerned, no injunction can be issued to hamper the public work being performed by the public department as it amounts restraining of smooth running of government business (**2017 YLR 290, PLD 1970 SC 139**)

51.6.5 To stay proceedings in a criminal matter [56 (e)]

The Court dealing with civil suit is barred from staying the proceedings in any criminal matter in view of the embargo put by section 56(e) of Specific Relief Act (**2018 PCr.LJ 145**).

51.6.6 To prevent breach of contract which cannot be specifically enforced [56 (f)]

Such elemental principle in this behalf is enunciated in section 21 of the Specific Relief Act, 1877 and, therefore, in view of section 56(f) of the Specific Relief Act no injunction could be granted to restrain the breach there of (**2010 MLD 800 Lhr)**.

51.6.7 To prevent nuisance when not clear that the act falls in nuisance [56 (g)]

Clause (g) of section 56 of Specific Relief Act (I of 1877) prohibits grant of the injunction to prevent, on the ground of nuisance, an act of which it is not, reasonably clear that it will be a nuisance **(1992 MLD 2000).**

51.6.8 To Prevent breach where applicant has acquiesced [56 (h)]

The respondent having participated in post-remand proceedings for a period of about 3 years, had acquiesced in the same and was certainly not entitled to the discretionary relief of declaration and permanent injunction, prayed for (**1991 MLD 2072)**.

51.6.9 When equally efficacious remedy available [56 (i)]

View of provisions of section 56(1), no injunction should be granted when equally efficacious relief can certainly be obtained by any usual mode of proceedings (**2004 SCMR 1092)**

51.6.10 When conduct of the applicant disentitles him to such relief [56 (j)]

Plaintiff who asks for an injunction must be able to satisfy the court that his own acts and dealings in the matter have been fair, honest and free from any taint or illegality and that if in dealing with the person against whom he seeks the relief, he has acted in an unfair or un-equitable manner he cannot have this relief **(2010 MLD 1267).**

51.6.11 Where applicant with no personal interest in the matter [56 (k)]

Injunction is a personal right under ..... Specific Relief Act.....; the plaintiff must have personal interest in the matter. The interest of right not shown to be in existence, cannot be protected by injunction **(1994 SCC (5) 547)**

51.7 Mandatory Injunction

An Injunction that orders an affirmative act or mandates a specified course of conduct[11]

51.7.1 Relevant provisions

Section 55 of Specific Relief Act, 1877

[11] Black's law dictionary, 11th edition P 937/38

51.7.2 Injunction can either be mandatory or prohibitory

Injunction is a judicial process whereby a party is ordered to do or to refrain from doing a particular act **(2012 YLR 158).**

51.7.3 Mandatory injunction grant of as interim relief

A mandatory injunction cannot be granted by way of interim relief as a grant of such relief would be tantamount to a grant of final relief which would seriously prejudice the defendants (**2002 CLD 218**). The injunction prayed for will have to be made in the form of a mandatory injunction, which cannot be issued under Order XXXIX rules 1 and 2, C. P. C. (**PLD 1977 Lahore 481)**

Mandatory injunction at an interlocutory stage is issued in very rare cases and normally Court passes order to maintain status quo in respect of the subject-matter, does not mean that in appropriate cases Court cannot grant injunction in mandatory form (**2005 CLD 1805)**. It may also be observed that in suitable cases a mandatory injunction can also be issued as an interim relief under section 151, C.P.C. (**PLD 1973 Note 12, 1999 MLD 3354 Lhr, 2005 C L D 1805 DB, 1983 CLC 1695 Lhr)**

51.7.4 Mandatory injunction as interim relief, to restore the status quo as on the date of filing of suit

In case in which it is found expedient in the interest of justice to give minimum relief, the court can issue an injunction in a mandatory form not under Order XXXIX rules 1 and 2 but in exercise of the inherent powers of the court which are conferred by sec 151 CPC. This type of injunction can be issued only in exceptional circumstances and to maintain a status quo as on the date of the suit. It should not be granted to establish a new state of things which may be different from the state existing on the date when the suit was instituted (**PLD 1973 Note 12)** However, mandatory injunction can be granted in exceptional circumstances, for saving life, but that can be granted to restore the status quo as on the date of filing of suit not before the same (**1999 MLD 3354 Lhr**).

51.7.5 Mandatory injunction to prevent breach or to compel performance of an act

A bare reading of section 55 of the Specific Relief Act, 1877 provides that when, to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the Court is capable of enforcing, the Court may in its discretion grant an injunction to prevent the breach complained of, and also to compel performance of the requisite act (**1997 CLC 302, 2011 CLC 1086**)

51.7.6 Grant of mandatory injunction discretion of the Court

Mandatory injunction which is provided under section 55 of the Specific Relief Act, 1877 as well as in Order XXXIX, Rule 10, C.P.C. This section provides discretionary powers to the Court to grant an injunction which the Court is capable of enforcing in order to prevent breach of an obligation and when it is necessary to compel the performance of certain acts (**1997 CLC 302**).

51.7.7 Mandatory injunction where pecuniary compensation adequate relief

The Courts have recognized that, when the issue of a mandatory injunction would involve the removal of a completed structure which entails no inconvenience and only a slight invasion of the plaintiff's rights, not committed wantonly or after protest, pecuniary compensation is the more appropriate remedy **(1970) 2 MLJ 577)**.

51.8 Injunction to perform negative agreement

51.8.1 Relevant provisions

Section 57 of Specific Relief Act, 1877

51.8.2 Condition for grant of negative injunction

The well-recognized principle is that unless the affirmative covenant is coupled with a negative one, an injunction is not to be issued (**(1963) GLR 795)**.

51.8.3 Injunction against performance of negative agreement where Court cannot order specific performance

- Where the contract comprises of an affirmative agreement as well as an agreement not to do something, the Court is not precluded from granting an injunction to perform the negative agreement even if it is unable to compel specific performance **(1963) GLR 795, (2008 (2) BomCR 654)**.
- Section 57, however, provides that notwithstanding Section 56, Clause (f), where a contract contains an affirmative covenant to do a certain act coupled with a negative covenant not to do a certain act, the fact that the Court cannot compel specific performance of the affirmative contract shall not preclude it from granting an injunction to perform the negative covenant **(1963) GLR 795)**.

51.8.4 Sec 57 of Specific Relief Act - exception to Sec 27 of the Contract Act

Perusal of section 27 of the Contract Act would reveal that it contains the general rule that any agreement by which any lawful profession, trade or business is restrained shall be void. This, however, is subject to an exception contained in section 57 according to which an agreement restraining the carrying out of a business after the sale of goodwill is exempt from the operation of said section 27 (**2008 C L D 1258**).

51.8.5 For grant of injunction the applicant should perform his part of the agreement

The fact that the Court cannot compel specific performance of the affirmative contract shall not preclude it from granting an injunction to perform the negative covenant, provided of course that the applicant has not failed to perform the contract so far as it is binding on him (**(1963) GLR 795)**.

52 SUIT FOR POSSESSION OF IMMOVABLE PROPERTY

52.1 Relevant Provisions

Section 8 & 9 of Specific Relief Act, 1877

52.2 Important rules regarding suit u/S 8

52.2.1Any person entitled to property i.e owner, lessee, mortgagee etc can bring regular suit for possession u/s 8

It appears that the true intent of the legislature, as gathered from the ordinary meaning of the word entitled coupled with the natural spirit and the very reason of the provision, was to extend the scope of the right to seek possession to those persons who are eligible or qualified under the law to seek possession of an immovable property. This would thus include; an owner, lessor, lessee, mortgagee or mortgagee of immovable property, trustee or beneficiary of a trust (**2019 SCMR 84**).

52.2.2 Co-sharer of the property on dispossession may file suit for partition or u/s 9, but cannot file regular suit for possession u/s 8

When a co-owner of the disputed property seeks possession from another co-owner, who is in peaceful possession of the disputed undivided property, the remedy is to seek possession through partition, and not by a suit under section 8 of the Act of 1877 **(2019 SCMR 84, 1999 SCMR 2325, 2006 YLR 1071)**

52.2.3 For suit u/s 8, no requirement of prior declaration of entitlement

In a suit under section 8 of the Act of 1877, there is an inbuilt prayer for the declaration for entitlement to possession being sought by the plaintiff. In such circumstances, a prior declaration for the said entitlement under section 42 cannot be made a condition precedent for filing a suit for possession under section 8 of the Act of 1877 (**2019 SCMR 84**).

52.2.4 Onus to prove ownership

In a suit for possession, as owner of the disputed house, which was in the possession of defendant, the onus to prove the title of the disputed house rests upon the plaintiff under the mandate of Articles 117, 118, 119 and most importantly 126 of the Order of 1984 (**2019 SCMR 84**).

52.2.5 Co-owner can maintain suit for ejectment of a possessor in respect of entire property if following conditions are fulfilled....

Firstly, the said suit of the co-sharer cannot be considered as evidence of his-denial of the title of the other co-sharers; **Secondly**, that the suit brought by said co-sharer would be deemed to be for the benefit of the other co-sharers; and...T**hirdly**, when the said co-sharer acquires possession in consequence of the said proceedings, he would be in possession of the entire property, on behalf of all co-sharers and his said possession cannot be deemed as adverse to the other co-sharers (**2019 SCMR 84**)

52.3 Important rules regarding suit u/S 9

52.3.1Suit u/s 9, a summary suit

It intends to provide summary remedy for the restoration of possession to a party dispossessed without its consent, without going into the question of title of the property (**2010 SCMR 1108**)

52.3.2 Object of section 9

The object of section 9 is to discourage dispossession without the consent of the person in possession (**2010 SCMR 1108**)

52.3.3 Any person dispossessed of the immovable property can file the suit

Remedy under section 9 of the Specific Relief Act is admissible to any person whether owner or otherwise, who has been dispossessed from the premises in his possession without due process of law (**2010 SCMR 1254**).

52.3.4 Conditions precedent to file suit u/s 9

All that is necessary is that it must be proved that the plaintiff was in possession, that he was dispossessed and that the suit has been brought within 6 months from the date of the dispossession (**2001 SCMR 345).**

52.3.5 Limitation for filing the suit

All that is necessary is that it must be proved that the plaintiff was in possession, that he was dispossessed and that the suit has been brought within 6 months from the date of the dispossession (**2001 SCMR 345**).

52.3.6 The Plaintiff may not have a valid title at the time of dispossession

It is well-established legal position that "Title was not material in a suit falling under section 9 and any person who had been dispossessed, otherwise than in due course of law, could, without pleading or proving title, seek to be re-inducted into possession, even though such a relief was sought against true owner of property himself" (**2001 SCMR 345**)

52.3.7 Co-sharer of the property on dispossession may file suit for partition or u/s 9

If a co-sharer is dispossessed by another co-sharer his remedy is for partition of the joint property or a suit under section 9 of the Specific Relief Act for possession but a regular suit under section 8 is not maintainable **(1999 SCMR 2325, 2006 Y L R 1071)**

52.3.8 Offence under Illegal Dispossession Act against co-sharers?

It is well settled principle of law that all the co-sharers enjoy one and same status and until partition of joint property no one could be considered as exclusive owner of the land. As such, the provisions of section 3 of the Illegal Dispossession Act, 2005 are not attracted in such case. **2016 PCr.LJ Note 18**

53 SUITS FOR SPECIFIC PERFORMANCE OF CONTRACT

53.1 Relevant provision

Section 12 to 30 of Specific Relief Act, 1877

53.2 Agreement itself does not create any right or interest in property

The agreement itself does not create any right or interest in property. It only confers a right of enforcement of the promise (**2005 SCMR 1061**, **2019 MLD 415 Lhr)**

53.3 Remedy on basis of agreement to sell

The agreement to sell by itself cannot confer any title on the vendee because the same is not a title deed and such agreement does not confer any propriety right, and thus, it is obvious that the declaratory decree as envisaged by section 42 of the Specific Relief Act, cannot be awarded because declaration can only be given in respect of a legal right or character. The only right arising out of an agreement to sell is to seek its specific performance and in case the vendee has been put in possession, the same is protected under section 53-A of the, Act **(2019 SCMR 974, 2019 M L D 195, 2019 M L D 415 Lhr, 2019 C L C 1275, 2015 C L C 1216 Lhr, 2005 SCMR 969, 2002 YLR 2571 Lhr, 2001 SCMR 1254, 2001 YLR 2789 Lhr, 2000 SCMR 204, PLD 1996 Karachi 210, 1999 SCMR 2004, 1991 SCMR 177, PLD 1986 Lahore 399)**

53.4 Valuation of the suit

In a suit for specific performance the value of the suit has to be determined according to market value of the property prevailing in the locality. There is a specific provision in section 7(x) (a) of the Court Fees Act, 1870 that a suit for specific performance is to be valued for the purposes of court-tee and jurisdiction according to the sale consideration. The word "consideration", prima facie, means the amount agreed upon between the parties in respect of the contract and not a portion of the consideration remain payable at the time of suit **(2007 SCMR 551)**.

53.5 A Discretionary Relief

Relief of specific performance is discretionary in nature and despite proof of an agreement to sell, exercise of discretion can be withheld if the Court considers that grant of such relief would be unfair or inequitable **(2019 SCMR 524, 2015 SCMR 828, PLD 2015 SC 187 2012 SCMR 900, 2007 SCMR 1047, 2010 SCMR 1217, 2017 SCMR 1696)**

53.5.1Specific Performance not as of right

The remedy by way of specific performance is an equitable relief. It cannot be claimed as of right. Under section 22 of the Specific Relief Act, this remedy is discretionary and "the Court is not bound to grant such relief merely because it is lawful to do so"**(2012 SCMR 900)**.

53.5.2 Court may refuse the relief even when the agreement proved

Where the agreement to sell is validly proved by the plaintiff, for the reasons which are by now quite settled for the exercise of the discretion by the courts, the courts may refuse to allow the relief of specific enforcement **(PLD 2015 SC 187)**.

53.5.3 Discretion exercise of

It may be held that the rule of discretion in the specific enforcement cases should not be arbitrarily applied rather it should be invoked to promote fairness and equity **(PLD 2011 SC 119, 2010 SCMR 286, 2007 SCMR 1840)**

53.5.4 Suit dismissal where the plaintiff fails to deposit the remaining consideration price in Court

It is mandatory for the person whether plaintiff or defendant who seeks enforcement of the agreement under the Specific Relief Act 1877, that on first appearance before the Court or on the date of institution of the suit, it shall apply to the Court getting permission to deposit the balance amount and any contumacious/omission in this regard would entail in dismissal of the suit or decretal of the suit, if it is filed by the other side (**2017 SCMR 516, 2017 SCMR 2022)**

53.5.5 Where Relief can be denied

Where circumstances under which a contract is made are such as to give the plaintiff an unfair advantage over the defendant, though there may not be fraud or misrepresentation on plaintiffs' part, the relief of specific performance may be denied **(2017 SCMR 1696)**

53.5.6 Mere inadequacy of consideration no ground for denying relief

Mere inadequacy is no ground for refusing specific performance of agreement. Where the price is so inadequate as to shock Court's conscience, either by itself or in conjunction with any other circumstance such as illiteracy, oppression, etc., it evidences fraud or that undue advantage was taken by the other side, the Court will refuse the specific performance **(2008 SCMR 1639)**.

53.5.7 Suit not to be dismissed when plaintiff did not seek cancellation of sale deed in favour of another party.)

A suit is maintainable even if plaintiff failed to sue for cancellation of registered sale deed executed in favor of some other party while asking for specific performance of earlier sale agreement **(PLD 2015 SC 187, 1984 SCMR 1139)**

53.5.8 Consequences of non-mentioning of names of witnesses:

Non-mentioning of names of witnesses and date of completion of oral agreement specifically in unequivocal manner is fatal hence incorporation of these two elements in plaint in unequivocal manner were necessary without which the suit of the plaintiff was not maintainable. (**2017 MLD 1195)**

53.6 Proof of Contract

53.6.1 Contract not attested by two witnesses or marginal witnesses not produced to prove cannot be used in evidence

- The powerful expression "shall not be used as evidence" until the requisite number of attesting witnesses have been examined to prove its execution is couched in the negative, which depicts the clear and unquestionable intention of the legislature, barring and placing a complete prohibition for using in evidence any such document, which is either not attested as mandated by the law and/or if the required number of attesting witnesses are not produced to prove it **(PLD 2011 SC 241)**.
- Where an agreement to sell has been reduced to writing but not attested by witnesses its execution and the contract embodied therein can be proved by other strong evidence and attending circumstances which may vary from case to case. Needless to mention that such evidence can also be produced in the first category of cases as supporting evidence. ((2002 SCMR 1089), 2017 SCMR 98)

53.6.2 Scribe of agreement not substitute to attesting witness of the agreement

Another reason for not equating the testimony of a Scribe with that of an attesting witness is that both of them signed the document in a different capacity and with a different state of mind. They, as such, do not meet the requirements of Article 79 of the Qanun-e-Shahadat Order. Scribe, however, could be examined by the party for corroboration of the evidence of the attesting witnesses but not as a substitute therefor **(2016 C L C 1245, 2015 SCMR 1044, PLD 2011 SC 241)**

53.6.3 Unwritten agreement - proved through the evidence of unimpeachable character

It is cardinal principle of law that the unwritten agreement can only be proved through the evidence of unimpeachable character. **(2013 SCMR 1300)**.

53.7 Limitation

Under Article 113 of the Limitation Act, a suit for specific performance of contract is to be brought within three years from "the date fixed for the performance, or, if no such date is fixed, when the plaintiff has noticed that performance is refused" **(2011 SCMR 249)**.

53.7.1 Limitation - commencement

The limitation period shall commence forthwith from the date fixed by the parties, notwithstanding the alleged failure, inabilities of the respondent to perform its part of the obligations, the alleged interaction between the parties, their conduct, which all shall have no relevance in the context of the limitation of those suits covered by first part of the Article **(PLD 2012 SC 247)**.

53.7.2 Calculation of 'date' where only month is mentioned

When an agreement specifies the month and not the date of the month in, or by which, the promisor is to perform his part of the agreement, it can be performed on any day of the month. Thus, the final day for the performance of a contract would be the last date of the calendar month specified its performance. **(2011 SCMR 249)**.

53.7.3 Contract performance of when time not essence of the contract

Even where time is not of the essence of the contract, the plaintiff must perform his part of the contract within a reasonable time and reasonable time should be determined by looking at all the surrounding circumstances including the express terms of the contract and the nature of the property **(1997 (1) SCR 993,** Endorsed/reproduced in **P L D 2019 SC 704)**.

53.7.4 Plaint barred by limitation

Evidently the suit was filed beyond the period of limitation prescribed under Article 113 of the Limitation Act it must be stated that the fact of limitation is evident from

the averments made in the plaint itself. In such circumstances, the trial Court was not required to frame issue and record evidence. **(2008 S C M R 913)**.

53.7.5 Limitation in case of sale deed registered in favor of another person

It was admittedly instituted after a period of three years from the date of execution of the registered sale-deed by vendors in favour of third party on 24-12-1969. This sale transaction was clearly a refusal on the part of the vendors/owners that the agreement of sale, if any made, with the alleged purchasers was not going to be performed and completed. In this event, the starting point would be date of execution of registered sale deed in favour of third party. **(2009 SCMR 1045)**.

53.7.6 Limitation when the property was redeemed from the bank

The existence of the mortgage has no bearing on the question of limitation for the specific enforcement of the agreement to sell. That proceeds independently and on its own footing, and as presently relevant is covered by Article 113 of the Limitation Act. **(PLD 2018 SC 692)**.

53.8 When time essence of the contract

53.8.1 Starting & ending date mentioned in the agreement

If the agreement providing that the remaining part of the agreement would be performed within specified time **(2017 SCMR 902)**. When in the written agreement specific stipulation of timeframe was agreed to between the parties for the payment of balance sale consideration with consequential penalty clause of forfeiture of earnest money qua vitiation of agreement in favour of vendors or filing a suit for specific performance in the other situation, which is by itself sufficient to show clear intention of the parties that time was the essence of the agreement **(PLD 2014 SC 506, 2010 SCMR 334)**

53.9 When time not essence of the contract

53.9.1 Admission by the vendee about laxity of time

There is no cavil to the proposition that in a case in which time is not expressly provided for the performance of the contract or in the agreement of sale vendor acknowledged the right of the vendee in express terms for completion of sale beyond normal period fixed for its performance in the document, in such a case time may not be essence of the contract and limitation for filing the suit may be computed from the date of refusal (**2007 SCMR 1186)**.

53.9.2 When performance of contract depends upon attending circumstances, unforeseen eventualities etc

When time is not the essence of contract, performance whereof depends on various factors such as attending circumstances, unforeseen eventualities and intention of the parties which is to be ascertained from the contents of agreement executed between the parties (**PLD 2010 SC 952)**.

53.10 Contracts on behalf of minor

- With regard to contracts entered into on, behalf of a minor by his guardian or by a manager of his estate. In such a case it has been that the contract can be specifically enforced by or against the minor, if the contract is one which it is within the competence of the guardian to enter into on his behalf so as to bind him by it, and, further, if it is for the benefit of the minor. But if either of these two conditions is wanting, the contract cannot be specifically enforced at all." (**2007 SCMR 761, 1995 SCMR 982**, **PLD 1948 PC 52**)
- Where on admitted or true facts (like minority of a party) any particular law becomes applicable, it would be the duty of Court to apply such law even though plea relating thereto had not been raised by any party--Plea of 'minority was, thus, rightly raised and decided at appellate stage even though same had not been raised in written statement or during trial. **(1995 CLC 1751)**

53.10.1 Contract executed by defacto guardian (who later on became de jure guardian)

The agreement on his behalf had been executed by the de facto guardian who had been, subsequently, specifically appointed as the de jure guardian of the said minor especially .for the purpose of sale of the land was held enforceable **(2011 S C M R 9 2 1)**.

53.11 Transaction with illiterate pardanasheen lady

- It is legally obliged to prove and satisfy the Court; **firstly**, that the document was executed by ' Pardahnasheen' lady and **secondly**, that she had complete knowledge and full understanding about the contents of the document and **thirdly**, that she' had independent and disinterested advice in the matter before entering into the transaction and executing the document **(2012 SCMR 1258, 2010 S C MR 1116, 2001 S C M R 609, 2004 SCMR 1370).**
- It would not be sufficient to show that the document was read out to her but it must further be proved that she understood its nature and effect **(2004 SCMR 1259).**

53.12 Bona fide Purchaser

53.12.1 One having knowledge of prior agreement

The admission clearly establishes that the appellant was in knowledge about the dispute of the land, therefore, he cannot claim to be a bona fide purchaser **(2013 SCMR 1600, 2012 SCMR 345)**

53.12.2 Subsequent vendee not only to deny notice of any previous transaction but has to prove it by affirmative evidence as well

The subsequent vendee has not only to deny notice of any previous transaction to claim relief in equity but has to prove it by affirmative evidence as well. To plead exception in terms of clause `b' of section 27 of the Specific Relief Act, he has to

show first that he is a bona fide purchaser, second, for value and third, without notice of previous agreement**(2010 S C M R 988).**

53.12.3 Where subsequent vendee discharged his initial onus--it will the duty of the plaintiff to prove that subsequent vendee had notice of his agreement

The initial onus is on the subsequent vendee, however, it is light one, and once it is discharged, it shall be the burden and duty of the plaintiff to prove positively that the subsequent vendee had the notice of his sale agreement; besides, the subsequent transaction is without the passing of the due consideration; it is a colourable or a fraudulent transaction entered into with dishonesty of purpose by the vendor and the subsequent vendee in order to cause prejudice his rights under the sale agreement. **(PLD 2011 SC 296)**.

53.12.4 Protection of Sec 53-A, Transfer of Property Act

Protection under section 53-A is available where possession has been delivered in pursuance of written agreement and where person did not enter into possession of the property under the agreement, he could not claim protection under section 53-A **(2010 SCMR 1116)**.

53.13 Part performance of contract

53.13.1 Party unable to perform larger part of contract

Nevertheless, specific performance can be granted of such small part on the condition that the plaintiff relinquishes his claim to further performance, including a claim for compensation for the deficiency or for the loss or damage sustained by him through the default of the defendant **(PLD 2010 SC 976)**.

53.13.2 Only those contracts can be specifically enforced which are capable of division

Partial specific performance can be ordered only in the cases strictly falling within the provisions of above sections 14, 15 and 16. Only those contracts can be specifically enforced which are capable of division then the part which can be

specifically performed can be ordered to be specifically enforced **(2005 S C M R 1408)**.

53.13.3 Contract by unauthorized person executable to the extent of his own share (PLD 2010 SC 976).

53.14 Compensation to parties of the agreement

53.14.1 Court may order payment of compensation to any of the parties of the agreement

The scope of exercise of such discretion of the Court, by way of awarding reasonable compensation to the parties, keeping in view the other surrounding circumstances, such as rate of inflation, having direct bearing the value of suit property, inordinate delay/ passage of time and change in the circumstances or status of the subject property etc **(PLD 2014 SC 506)**.

53.14.2 Court may order additional consideration

The Hon'ble Supreme Court ordered additional consideration in view of the devaluation in currency and rise in the price of the property irrespective of their location in entire Islamabad as it would be in the interest of justice, fair play and equity **(PLD 2010 SC 952)**

53.14.3 On dismissal of suit Plaintiff entitled to interest

If grains of equity could be poured in one scale of justice while declining specific performance of contract to the petitioner, they could also be poured in other scale of justice to compensate the petitioner whose huge sum remained with the respondent Petitioner, in no case, be denied the bare minimum which he would have been given in the form of interest, had he deposited this much sum in the bank **(2018 SCMR 769, 2017 SCMR 1696, 2017 SCMR 902).**

53.15 Tenant & Specific Performance

53.15.1 Tenant position that he purchased the property, he has to vacate the property and file a suit for specific performance

It is settled law that where in a case filed for eviction of the tenant by the landlord, the former takes up a position that he has purchased the property and hence is no more a tenant then he has to vacate the property and file a suit for specific performance of the sale agreement whereafter he would be given easy access to the premises in case he prevails **(2011 SCMR 320).** A tenant could not be protected from ejectment merely by asserting agreement to sell in his favour or by filing a suit for specific performance of agreement to sell, unless sale-deed was executed in his favour and agreement to sell had been enforced. Filing of civil suit does not vitiate the title of the landlord unless the same was finally decided. (**2013 MLD 1648)**

53.15.2 Suit for Specific Performance of contract gives tenant no exception from payment of rent of the property

Once the petitioner was prima facie, shown to be inducted as a tenant of the demised premises, he could not claim any exemption from payment of rent on account of institution of suits for specific performance and for cancellation of sale-deed. Article 115 of the Qanun-e-Shahadat Order, 1984 lays down that no tenant of immovable property shall, during the continuance of the tenancy, be permitted to deny that his landlord had a title of such property. The relationship of landlord and a tenant is not severed even if the execution of an agreement to sell is admitted **(2009 SCMR 1396)**.

53.16 Specific performance of void transactions

Remedy of specific performance of a contract being equitable in nature cannot be granted to enforce a transaction declared void by a statute **(2012 SCM R 1526)**.

53.17 Enhance of time (mentioned in the decree) for deposit of (remaining) sale price

In the instant case, the order of deposit was made at the time and as a condition of passing the decree. It could not be extended without the consent of opposite party to whom valuable right had accrued **(2009 SCMR 157, 2018 YLR 2118, PLD 1997 Lahore 177).**

54 RECTIFICATION OF CONTRACT

54.1 Relevant provision

Sections 31 to 34 of Specific Relief Act, 1877

54.2 Unilateral mistake as ground for rectification

It is clear that unilateral mistake (not amounting to fraud, legal or equitable) is not a ground for rectification and would therefore if proved, not entitle the party alleging it to a decree or order rectifying or cancelling the document **(AIR 1931 Madrass 785)**

54.3 Grounds for rectification

The plaintiff must clearly prove that there was a prior complete agreement which according to the common intention was embodied in writing, but by reason of mistake in framing the writing this did not express or give effect to the agreement **(AIR 1921 Calcutta 730)**

54.4 Limitation in case of mutual mistake or fraud

There cannot be any time limit for the discovery of the mistake or of the fraud. At any time when a mistake is discovered or a fraud comes to light, it is open to the parties affected to come to court and institute a suit for the rectification of the mistake in the instrument (**AIR 1961 Assam 14**)

54.5 Conditions for rectification satisfied, suit not to be dismissed on failure to pray for rectification

If the conditions of section 31 are satisfied, the Court cannot refuse rectification merely on account of the omission of a prayer for it (**AIR 1954 Nagpur 328**).

55 RESCISSION OF CONTRACT

55.1 Relevant provision

Sections 35 to 38 of Specific Relief Act, 1877

55.2 Meaning of Rescission

A Party's unilateral unmaking of a contract for a legally sufficient reason, such as the other party's material breach or a judgment rescinding the contract[12]. .. The right of one party upon refusal by the other to perform the contract is described indifferently by the Act as a right to " put an end to " or " rescind " it[13]

55.3 Contract to be rescinded where it is voidable or terminable by the plaintiff or where the contract unlawful

We would also refer to S.35, Specific Relief Act which provides that a person interested in a contract in writing may sue to have it rescinded:

(a) Where the contract is voidable or terminable by the plaintiff.

(b) Where the contract is unlawful for causes not apparent on its face and the defendant is more to blame than the plaintiff **(AIR 1929 Allahabad 837)**

55.4 Contract may also be rescinded where decree holder fails to make payment in accordance with the decree

Admittedly the assignee defaulted in payment of the purchase money in terms of the impugned judgment. His case was squarely hit by section 35 clause (c) of the Specific Relief Act and the contract merits rescission on this short ground (**2007 SCMR 1464)**

---

[12] Black's law dictionary, 11th edition P 1562

[13] Muralidhar Chatterjee vs International Film Company (1944) 46 BOMLR 178

55.5 Time for payment given in decree

If specific performance decreed and no time for payment of remaining consideration is given, defendant needs to get his contract rescinded but if time given and payment not made, suit automatically stands dismissed and contract rescinded **(2003 YLR 55 Lhr**, **PLD 1997 Lahore 177**)

55.6 Application for rescission can also be filed

In the event of a party to the decree being in default another party could either file a suit for the rescission of the contract on which specific performance had been granted or he could even apply to that Court which could then rescind the decree (**1985 CLC 474 Lhr)**.

55.7 Court which passed the decree can declare that void

Reading S.56 of the Contract Act with S.35 of the Specific Relief Act we have little hesitation in coming to the conclusion that the court itself which passed the decree for specific performance, can and should, declare its own decree void if the act becomes impossible of performance or by reason of some event which neither party could prevent **(AIR 1954 Madras 1040)**

55.8 Party exercising Rescission should be restored to former position

A party exercising his option to rescind is entitled to be restored as far as possible to his former position **(AIR 1932 PC 89)**

56 DUTIES OF REGISTERING OFFICERS WHEN DOCUMENT PRESENTED

56.1 Registration of document

As per law, the Sub-Registrar could only register the instrument of sale if, it was duly presented before him by the executor, (**2002 CLC 1578)**

56.2 Copy of document

Under section 52(c) the document presented for a registration is to be copied in said book. **(P L D 2007 Lahore 689)**

56.3 Endorsement and certificate

Under section 61 the endorsements and certificates made in accordance with sections 59 and 60 of the said Act are also to be copies into margin of book No.1. **(P L D 2007 Lahore 689)**

56.3.1 Effect of certificate

Endorsement by the Sub-Registrar on a document contains presumption of correctness in terms of sections 52, 58 and 60 of the Registration Act and no more authenticated documentary evidence could be made available on the point of proof of payment of consideration as the facts entered in the endorsement/Certificate are presumed to have occurred and as the said endorsement/Certificate is admissible as an evidence of proof of its contents, hence the same is always presumed to be genuine. (**PLD 2007 Lahore 83)**

57 REGISTRATION OF DOCUMENTS

57.1 Purpose of Registration

The intention of section 17 (1) (b) was to make registration compulsory not only in cases where an instrument created rights in property but even where it created such rights as though not in the property itself have such a relation to it that ultimately they affect rights in it. **(PLD 1962 SC 134, PLD 2003 SC 159)**

57.2 Documents of which registration not compulsory

57.2.1 Acknowledgment of past transaction of oral gift

If a document in the form of memorandum of gift has been executed between the parties (donor and donee) as an acknowledgment of past transaction of oral gift, its non-registration will not have much bearing as regards its authenticity or validity, but the other important thing is the proof of fulfillment of three conditions of a valid gift "offer", "acceptance" and "delivery of possession". (**2016 SCMR 662)**

57.2.2 Abandoned property

But the claim of ownership in the abandoned property being subject to the scrutiny under section 14 of the Abandoned Properties Act, 1975, would need determination on the basis of documents of title either registered or unregistered and if such documents are found sufficient to establish the right of ownership in the property, the claim of a person cannot be rejected merely on the ground that sale agreement was not registered. **(2003 SCMR 1174)**

57.3 Documents of which registration compulsory

57.3.1Sale deed

At the relevant point of time, section 54 of the Act of 1882 was applicable to the area in question, requiring the sale to be effected through an instrument in writing, which obviously would necessitate its registration un*der the Registration Act, 1908*.....Such oral sale does not cloth the purported vendee of a right sufficient to maintain a suit for pre-emption on the basis thereof. (**2015 SCMR 620)** The law is

that sale agreement registered or unregistered may not as such confer title and unless the title is established under the law, it may not be ipso facto treated as document of title. (**2008 SCMR 510)**

57.3.2 Gift

Gift deed was compulsorily registerable under section 17 of the Registration Act and without getting it registered the title of the property in question could not have been conferred upon. **(PLD 2008 SC 73)**

57.3.3 Instrument purporting to transfer rights in praesenti

Where a donee claims transfer of immovable property by way of gift through an instrument purporting to transfer rights in praesenti, the instrument is compulsorily registrable under section 17 of the Registration Act. Failing registration, the provisions of section 49 of the Registration Act come into play and, as a consequence, the document does not operate to create any right, title or interest, whether vested or contingent in the property. **(2010 SCMR 342)**

57.3.4 Lease

It is abundantly and unequivocally clear that no lease in Pakistan (note: subject to section 117 of the TPA and leaving aside for the time being even section 17(d) of the Registration Act relating to agricultural properties) can be effected beyond the period of one year except by a registered instrument and if any lease is not so accomplished, it has no legal validity and sanction beyond the period of one year and would neither create nor purport to create any lease for the period exceeding one year (see Section 49 ibid). **(PLD 2015 SC 380)**

57.3.5 Value of more than one hundred rupees

In the normal circumstances a, document purported to create rights and interest in immovable property of the value of more than one hundred rupees requires compulsory registration as the document of title without registration being of no consequence would not pass the title. **(2003 SCMR 1174)**

57.4 Evidentiary value of registered document

- It is axiomatic principle of law that a registered deed by itself, without proof of the execution and the genuineness of the transaction covered by it, would not confer any right. Similarly, a mutation although acted upon in Revenue Record, would not by its own force be sufficient to prove the genuineness of the transaction to which it purports unless the genuineness of the transaction is proved. There is no cavil with the proposition that these documents being part of public record are admissible in evidence but they by their own force would not prove the genuineness and execution of that to which they relate unless the transaction covered by them is substantiated from independent and reliable source. **(1999 SCMR 1245)**
- The only effect of section 57(5) of Registration Act, as plainly warranted by its terms is that the certified copy of a registered document "shall be admissible for the purpose of proving contents of the original document". Admissibility of evidence is to be distinguished from proof. The certified copy of a registered document may prove the contents of the original document, but merely showing as to what were the contents of the original document, is not sufficient in absence of the proof of execution of the original document. Therefore, at best it is secondary evidence of the contents of the original. Still the question whether such secondary evidence could be produced depends upon the satisfaction of the conditions laid down in Article 76 of the Qanun-e-Shahdat, 1984, and in the present case clause (c) thereof is attracted, namely, that it must be proved that the original was destroyed in the manner alleged. Therefore, the appellant had no right to lead the secondary evidence of the contents of the original. (**1990 SCMR 1259)**
- The registered document has some presumptions attached to it under section 60 of the Registration Act, 1908. Although, the same are rebuttable; but for rebuttal of the said presumptions, the law is clear that

the party must produce evidence on the basis of standard as set forth by this Court. (**2020 SCMR 202)**

- Since the respondents did not plead loss or destruction of the original agreement, we would be legally justified in presuming that they are guilty of withholding best available primary evidence. We feel, had it been produced in Court, it would perhaps have been unfavourable to them. Since the original document has not been placed on record, we are not inclined to pass any order for impounding the same. Assumption of the trial Court as well as the High Court that the deed of sale being more than 30 years old was a valid piece of evidence within the contemplation of Article 100 of Qanun-e-Shahadat Order, appears to be misconceived. Suffice it to observe that the document itself being inadmissible in evidence, hardly any presumption of correctness or its validity can be attached to it in the circumstances. In the absence of original document, in our considered opinion, no presumption of correctness or its due execution can be drawn in this case (**PLD 2003 SC 410)**

57.5 Registration - a notice to general public

Registration of agreement to sell under the Registration Act, 1908 was in itself a notice to general public. We are also of the view that the publication of the public notices in the newspaper are to be considered as source of information to the existence or cancellation of the agreement and any prudent man would have inquired from the vendor about their stand on the validity and cancellation of the agreement. **(2012 SCMR 935)**

57.6 Effect of non-registration

- Failing registration, the provisions of section 49 of the Registration Act come into play and, as a consequence, the document does not operate to create any right, title or interest, whether vested or contingent in the property. **(2010 SCMR 342)**

- It is pertinent to note that section 49 of the Registration Act, 1908 relates to the effect of non-registration of document required to be registered according to which no document could operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, to or in immovable property or confer any power to adopt, unless it has been registered. (**2009 YLR 2294)**
- Section 49 of the Registration Act, no doubt, provides that if a document, which is compulsorily registrable, is not registered, then such a document does not affect any rights in the property dealt with under such a document. But section 53-A of the Transfer of Property Act makes an exception to this and provides that where a person obtains possession of or continues to remain in possession of a property under a document in writing which, though compulsorily registerable, has not been registered, then neither the person transferring the property nor any one claiming under him shall be entitled to enforce against the transferee or any person claiming under him any right in respect of that property. **(PLD 1964 SC 456)**
- Since contents of document purported to transfer absolute ownership of land, same required compulsory registration irrespective of fact, whether such document was agreement of sale or sale-deed. Such document lacking necessary particulars in respect of identity of land and being unregistered would not transfer any valid title in favour of plaintiffs. (**PLD 2003 SC 410)**
- The deed of contract being unregistered was neither a document of title nor it created right or interest in the subject property as envisaged under section 49 of the Registration Act, 1908 whereas declaratory suit under section 42 of the Specific Relief Act, 1877 on the basis of such document was not maintainable. So, there was no scope to attract the Article 120 of

the Limitation Act, 1908 to bring the suit within time. **2019 Y L R 1548 Lahore**

57.7 Proof of payment of consideration

The most authentic documentary evidence and the facts enumerated and the certificate signed by Registrar will be presumed to have occurred, and presumption of genuineness and correctness is attached to such certificate of the Sub-Registrar, because provision of section 60 of the Registration Act were complied with and the facts sought to be proved within the meaning of sections 52 and 58 of the Registration Act have also been proved, therefore, the Sub-Registrar's endorsement authenticating the acknowledgement of the vendor to have received the consideration is a proof of the payment of consideration. (**1996 SCMR 354)**

57.8 Presumption of correctness to registered

Presumption of correctness was attached to the registered sale-deed including the payment of sale consideration in view of the provisions of sections 52, 58 and 60 of the Registration Act (**2008 SCMR 1062). C**ertificate of registration is only to show the execution of the document and presumption beyond that cannot be drawn there from. (**2008 S C M R 1384)**

57.9 Precedence of registered documents over unregistered documents

There is no cavil to the proposition that the registered document will have precedence over the unregistered document if it was executed earlier in time as the title is determined from the date of execution and not from the date of registration of the document. **(2002 SCMR 1821)**

57.9.1Exception

- Section 48 provides that in case, the vendee under an unregistered document or agreement is delivered possession, the principle that registered document would take preference over unregistered document would not be applicable. (**2004 SCMR 530)**

- Reference to Section 48 of the Registration Act .....lays down the preference of a registered document over an oral agreement or declaration relating to an immovable property with the exception in cases where the agreement or a declaration has been accompanied or followed by delivery of possession and the same constitutes a valid transfer under any law for the time being in force. (**2003 SCMR 327, 1987 CLC 2237)**

58 TIME OF ENFORCEMENT OF REGISTERED DOCUMENTS

A registered document shall operate from the time, day, when it was written and signed and it will create right, title and interest in favour of the transferee from the date of execution and not from the date of registration. **(2011 SCMR 794, PLD 2003 SC 818, 2002 S C M R 1821, 2001 CI.C 751, 1992 S C M R 2300,)**Light can be taken from the judgment reported as AIR 1926 Madras 744. Relevant observation which reads as follows:--

> "In cases where a document has been executed and registered and the question arises as to the date it bears there can be little doubt that the presumption is that the document was executed on the date it bears, and the onus is on the contesting party to show that it was not. In all such cases lapse of time does strengthen the onus cast". (**2017 YLR 942 Multan)**

59 TIME FOR PRESENTING DOCUMENTS

59.1 Time for accepting documents for registration

Section 23 of the Registration Act only contains a direction to the registration authorities not to accept a document after four months of its execution. **(2007 MLD 382 Lahore)**

59.2 Directory nature

- Section 23 of the Registration Act only contains a direction to the registration authorities not to accept a document after four months of its execution. These provisions are merely directly as no penalty is provided either for the proper officer accepting the document for registration after expiry of the period of four months or for the person presenting such document for registration. **(2007 MLD 382 Lahore, 2017 CLC Note 120 Lahore)**
- Section 23 of the Act of, 1908 prohibits registration of a document executed earlier to four months from the date of its registration, but it does not invalidate the document registered in its violation. (**2004 CLD 1600)**

60 BENAMI TRANSACTION

60.1 Relevant provision

Section 41 Transfer of Property Act, 1882

60.2 Essential elements for determining nature of transaction

- The question, whether a particular sale is `Benami' or, not, is largely one of fact, and for determining this question, no absolute formulae or acid test, uniformally applicable in all situations, can be laid down, yet in determining the probabilities and for gathering the relevant indicia, the courts have usually laid down the criteria to determine the `Benami' transaction. Determining factors to be taken into consideration are enumerated as under:-
  i. Source of consideration
  ii. From whose custody the original title deed and other documents came in evidence.
  iii. Who is in possession of the suit property; and
  iv. Motive for the Benami transaction".**(2010 PSC 1255, PLD 2008 SC 146, 2009 SCMR 124, 2008 SCMR 143,2005 SCMR 577, 1991 SCMR 703, 2019 CLC 770, 2018 CLC 685,)**
- This may be seen that two essential elements must exist to establish the benami status of the transaction. The first element is that there must be an agreement express or implied between the ostensible owner and the purchaser for purchase of the property in the name of ostensible owner for the benefit of the person who has to make payment of the consideration and second element required to be proved is that transaction was actually entered between the real purchaser and seller to which ostensible owner was not party. **(PLD 2008 SC146)**

60.3 Requirements to prove a Benami Transaction

- Relevant factors for determination of benami transaction are source of consideration; who exercised custody over the original title deed and other relevant documents at the time they were introduced as evidence in court; who undertook the consideration of the property in question who was in point of fact enjoying qua possession over the suit property and motive for benami transaction. **(PLD 2011 SC 829)**
- The first element is that there must be an agreement, express or implied, between the ostensible owner and the purchaser for purchase of the property in the name of ostensible owner for the benefit of the person who has to make payment of the consideration; and, second element required to be proved is that transaction was actually entered between the real purchaser and seller to which ostensible owner was not party. The other question for consideration is the motive for benami transaction. **(2017 YLR 224)**
- For proving a 'Benami' transaction the necessary ingredients to be proved are that source of income of plaintiff be proved, the intention to purchase the property as 'Benamidar', the original possession of property and the original document of title. **(2017 MLD 1539)**

60.4 Motive - necessary ingredient to prove Benami transaction

- The motive part in the benami transactions is the most important one. A transaction cannot be dubbed as benami simply because one person happened to make payment for or on behalf of the other. There are certain transactions in peculiar circumstances of those peculiar cases where, for reason of certain emergencies or contingencies, the properties are purchased in the name of some other person without the intention that the title shall so vest permanently. If such motive is available and also is reasonable and plausible, a transaction can be held as benami, otherwise not. A property purchased with ones own sources in the name of some close relative like wife,

son or daughter cannot be dubbed as benami when purchased with full intention of conferring title to the purchaser shown. If this principle is denied and that of benami attracted simply because the sources of consideration could not be proved in favour of the named vendee, it would shatter the most honest and bona fide transactions thereby bringing no end to litigation. **(PLD 2010 SC 569)**

- The essential elements must exist for proving Benami transaction between ostensible owner and the purchaser for purchase of property in the name of ostensible owner for the benefit of person who has to make payment of consideration and importantly existence of motive for creation of Benami title is relevant. For purpose of determining that whether title vesting with the opposite party in the disputed property was merely Benami, absence of motive always goes against claimant. **(PLD 2016 Lahore 383)**

60.5 Burden of Proof

It is also well-settled law the initial burden of proof is on the party who alleges that an ostensible owner is a Benamidar for him and that the weakness in the defence evidence would not relieve a plaintiff from discharging the above burden of proof. However, it may be stated that the burden of proof may shift from one party to the other during the trial of a suit. Once the burden of proof is shifted from a plaintiff on a defendant and if he fails to discharge the burden of proof so shifted on him, the plaintiff shall succeed." **(2005 SCMR 577, 1991 SCMR 703)** It is an established principle of law that for determination of Benami transaction it is the duty of the party who raises such plea to produce legal, relevant and unimpeachable evidence. In such cases character of transaction is to be ascertained by the court by determining the intentions of the parties at relevant time to be gathered from all surrounding circumstances i.e. relationship of the parties, motive, transaction and any other subsequent conduct. Source and payment of consideration amount, custody of the original title documents and actual possession are also relevant and

material facts for determination of the nature of such transaction. **(2013 CLC 1810)**

60.6 The source of purchase money - not a conclusive proof

The source of purchase money is not conclusive in favour of the Benami character of a transaction though it is an important criterion and that where there are other circumstances showing that the purchaser intended the property to belong to the person in whose favour the conveyance was made, the essence of Benami being the intention of the purchaser, the Court must give effect to such an intention. In a Benami transaction the actual possession of the property or receipt of rents of the property is most important. **(2005 SCMR 577)**

60.7 Considerations for deciding the Benami character of a transaction

i. It is the duty of the party who raises such plea to prove such plea by adducing cogent, legal, relevant and unimpeachable evidence of definitiveness. The Court is not required to decide this plea on the basis of suspicions, however, strong they may be.

ii. That Court is to examine as to who has supplied the funds for the purchase of property in dispute, it is proved that purchase money from some person other than the person in whose favour the sale is made, that circumstance, prima facie, would be strong evidence of the Benami nature of the transaction.

iii. The character of a transaction is to be ascertained by determining the intentions of the parties at the relevant time which are to be gathered from all the surrounding circumstances i.e. the relationship of parties, the motives underlying the transactions and any other subsequent conduct.

iv. The possession of the property and custody of title deed.**(2005 SCMR 577, 1991 SCMR 703, 1994 CLC 1437)**

60.8 Gift - as Benami

The gift cannot be considered as Benami in nature. The concept of gift essentially pertains to the domain of Muhammadan Law. Once a donor has transferred his right in the property by way of lawful gift/Hiba, subsequently by way of a somersault he cannot be resiled from the gift transaction. **(2017 CLC Note 172)**

61 EXCHANGE

61.1 Relevant Provisions

Sections 118-121 Transfer of Property Act, 1882

61.2 Meaning

The essential character of transaction of exchange is mutually transfer of (ownership) of property by two persons.**(2007 CLC 1340)** The transaction is called an exchange when two persons mutually transfer the ownership of one thing for the ownership of another **(2007 MLD 204)**

61.3 Burden of proof and essentials to prove 'Exchange'

The onus lay very heavily on the defendant-appellant to prove that a valid exchange of the properties in question had taken place between the parties; that the mutation in question had been attested with the consent and at the instance of the plaintiff-respondent and that a valid title had been passed on to the parties vis-a-vis the properties which were the subject-matter of the said alleged exchange.**(2008 SCMR 1454)**

61.4 Distinction between exchange and sale

The essential character of transaction of exchange is mutually transfer of (ownership) of property by two persons. Thus, where there is a transfer of ownership by one of the parties only and not by the other, the transfer is not as an exchange as there is no mutual transfer of ownership. There can be no exchange between the property and the money, it will amount to sale, which has been defined by section 54 (ibid) as "transfer of ownership in exchange for a price" paid or promised, and part paid or part-promised, whereas, as per section 119 (ibid) each party to the exchange has the rights and subject to liabilities of a seller in respect of property, which he gives and that of a buyer, which he takes. The right is conferred on the parties by section 120 (ibid) which refers back to section 52, which enumerates the rights and liabilities of buyer and seller. Section 55(6) (ibid) creates

charge in favour of a buyer to the acceptance of seller interest in the property for the money paid in anticipation of delivery.**(2007 CLC 1340)** The distinguishing feature between the two types of transaction is that if money is paid or promised or partially paid then the transaction is one of sale and if no such payment in cash has been made and only two properties have changed hands, then it is an exchange. Thus, it is obvious that to determine the nature of the transaction, crucial point is to determine whether any money was or was not paid by either of the parties. **(2006 Y L R 824)**

61.5 Right of Pre-Emption - 'Exchange'

Even right of pre-emption can be defeated by legitimate device like exchange and gift. Such device cannot be declared ineffective as law permits so. All that is necessary is that the device must possess all the essentials of exchange or gift. If the law exempts transaction of exchange from pre-emption it is open to a person to resort to the same in order to save his land from pre-emption and the courts of law always permit such device to be pursued, if the transaction of exchange is completed as defined in section 118 of the Transfer of Property Act.**(2014 CLC 1819)**

61.6 Agreement to 'Exchange' - 'Agreement to Sale'

According to the settled law, an agreement of exchange, which is akin to an agreement to sell, does not create or purport to create any right in the immovable property, and the only right a person may have, is to seek the specific enforcement of such agreement. **(2006 CLC 803)**

61.7 Exchange included in term 'transfer' and thus property so acquired protected u/s 53-A

- The word transferee does cover the word of exchange as the person in whose favour an exchange takes place becomes the transferee of that property. The word transferee does not confine itself to the word purchase only as defined in Black's Law Dictionary Fifth Edition the word transferee means he to whom transfer is made and the word transfer means `an act of the parties or

of the law by which the title to property is conveyed from one person to another, the sale and every other method, direct or indirect of disposing of or parting with property or with an interest therein or with the possession thereof or of fixing a lien upon property or upon an interest therein absolutely or conditionally, voluntarily or involuntarily by or without judicial proceedings as a conveyance, sale payment, pledge, mortgage, lien, encumbrance, gift, security or otherwise. Transfer means every mode direct or indirect absolute or conditional, voluntary or involuntary of disposing of or parting with property or with an interest in property including retention of title as a security interest. The transfer as above said implied that the properties which are exchanged are covered within the word transfer. Hence it is held that the exchange in favour of the defendant No.2 and then the sale in favour of defendant No.3 is protected.**(2007 MLD 204)**

- It is settled principle of law that solitary/disparity in price in transaction or exchange cannot be demolished transaction itself in view of definition prescribed under the provisions of Transfer of Property Act with regard to sale in section 54 and exchange in section 118 of the said Act. Both the terms have distinctive features and independent of each other. It is also settled principle of law that areas and quantities of the properties said to be exchanged were unequal, no irresistible inference of sale can be drawn. **(1973 SCMR 649, PLD 1968 Lahore 428, 1992 SCMR 1785, 1997 CLC 1819, 2004 SCMR 838, 2005 MLD 672)**

61.8 Exchange of property by co-sharer to the extent of his share

A co-sharer in possession of a portion can transfer that portion subject to adjustment of the rights of the other co-sharers therein at the time of the partition and that the other co-sharers' rights will be sufficiently safeguarded if they are granted a decree by giving them a declaration that the possession of the transferee in the lands in dispute will be that of the co-shares subject to adjustment at the time

of partition. **(PLD 1985 SC 254)** The learned trial Judge was absolutely justified in maintaining exchange but subject to the rights of the other co-sharers. He was right in observing that respondent No.2 had merely stepped into the shoes of respondent No. 1 and become a co-owner in the joint holding in, place or respondent No. 1. This was absolutely correct approach consistent with the law laid down by the superior Courts.**(2002 Y L R 2603)**

62 GIFT

62.1 Relevant provisions

Sections 122-129 Transfer of Property Act, 1882

62.2 Meaning

To gift any property to any person mainly without any consideration in shape of tangible material, is due to love and affection of donor with the donee.**(PLD 2016 Lahore 287)** Gift means voluntary transfer of something to another without any consideration irrespective of the fact as to whether the donor or donee has any relation with each other or not.**(P L D 2013 Lahore 498)**

62.3 Essentials of oral gift

- It is necessary to mention the date, time and place of the alleged gift. Further, necessary to mention the names of witnesses in whose presence the donor allegedly gifted the property in his favour. Likewise, there must also be mentioning of acceptance of the gift in presence of witnesses in the written statement as required by law. It is settled law that the onus to establish the factum and ingredients of the gift is on the beneficiary who claims such gift and which is denied or challenged by the other legal heirs.**(2020 SCMR 276)**
- It has been held that mutation was not a proof of title and beneficiary there under must prove the original transaction of gift by proving in evidence the time, date, place, intention of declaration and witnesses in whose presence declaration of gift was made by the donor. **(2016 SCMR 1417)**
- "In Muhammadan Law, offer, acceptance and delivery of possession are the three essential ingredients of a valid gift and the onus was on the petitioner to prove these components." **(2012 SCMR 1602)**

62.4 Difference between “Gift” and “Temleek”

The only line of distinction which can be drawn between "Gift" and "Tamleek" is that in the former, the donor can transfer property to anybody else, but where the property is to be transferred under the latter, the condition precedent is that same should be amongst the family members/legal heirs. **PLD 2013 Lahore 498**

62.5 Registration of gift deed

A gift deed under Section 123 of the Transfer of Property Act as well as under Section 17(a) of the Registration Act, 1908 is compulsorily required to be registered, failing which provisions of Section 49 of the Registration Act would come into play with the consequence that the document would be considered as devoid of creating any legal right, title or interest, either vested or contingent in the property. **(2010 SCMR 342, PLD 2008 SC 73, PLD 2018 Lahore 819)**

62.6 Registered gift deed - original transaction of gift when it disinherited other heirs

A donee claiming right under a gift excluding other heir, was required by law to establish the original transaction of gift irrespective of whether such transaction was evidenced by a registered deed and that the gift deed must justify the cause of disinheritance of another heirs. **(2018 SCMR 139)**

62.7 Muslim Personal Law not applicable to non-muslims and T.P.A will apply

Admittedly, both the parties are Christian by faith. The Muslim Personal Law is not applicable to them. The provisions of sections 122 and 123 of the Transfer of Property Act, 1882, governing gift of an immovable property in such a case.**(PLD 2009 SC 191)** Further as per Article 260(3) of the Constitution of Islamic Republic of Pakistan, 1973 the followers of Ahamadia Faith have been declared as non-Muslims and they could not be governed by the Muslim Personal Law, rather they have to follow their own personal law of inheritance and are debarred to take benefit of Muslim Personal Laws whereas admittedly no such Personal Law relating to the

gift, Tamleek and Will Deed are available in Fiqa Ahmadia and in absence of any such personal law relating to gift, Will Deed and Tamleek under the Ahmadi Faith, the codified law of Transfer of Property Act would be applicable to cater such issue until their fiqah or jurisprudence formulate any consensus opinion on the subject. As provisions of Transfer of Property Act, 1882 are made applicable to the issue of gift/Tamleek as well as the Will Deed on the followers of Fiqah Ahmadia and the dispute between the adverse parties is also relating to Will Deed as well as the oral gift same would be adjudicated and decided according to the said enactment.**(PLD 2018 Lahore 819)**

62.8 Right of pre-emption - property is transferred by gift

Even right of pre-emption can be defeated by legitimate device like exchange and gift. Such device cannot be declared ineffective as law permits so. All that is necessary is that the device must possess all the essentials of exchange or gift. If the law exempts transaction of exchange from pre-emption it is open to a person to resort to the same in order to save his land from pre-emption and the courts of law always permit such device to be pursued, if the transaction of exchange is completed as defined in section 118 of the Transfer of Property Act.**(2014 CLC 1819)**

62.9 Gift by Attorney

Gift is a personal action which can be performed by the owner only. The attorney in whose favour there is a power of attorney to transfer the suit property through gift has no right to gift the property to any person on his own behalf. These powers can only be used in case the principal transfers the property through gift and only in order to complete the formalities of transfer in shape of registration of gift deed or entry of attestation of gift mutation, the powers can be used and the agent i.e. the attorney cannot gift the suit property on his own behalf. **(PLD 2016 Lahore 287)** The donor can only make a gift himself and not through the attorney; the attorney can only be appointed for facilitating the steps for the valid conferment of the rights under the gift, made by the donor. **(2006 CLC 1893)**

62.10 Transfer made U/S123:

i. of Immovable property
   - Transfer must be effected by registered instrument
   - Signed by or behalf of donor
   - Attested by 2 witnesses

ii. Of Movable property
   - Either by registered instrument
   - Or by delivery

63 LEASE

63.1 Relevant provisions

Sections 105 to 117 Transfer of Property Act, 1882

63.2 Meaning

Section 105 of the Transfer of Property Act, 1882 is of relevance which defines a lease of immovable property as to transfer of right to enjoy such property. Therefore to create a lease or sub-lease, a right to exclusive possession and enjoyment of the property should have to be conferred on another person. Thus if there is no parting with possession, neither sub-lease nor subletting can be achieved." **(2017 YLR 1873)** "the lease/tenancy has its genesis (note: except the statutory tenancies) in a contract between two parties, the lessor and the lessee. According to Black's Law Dictionary (Eight Edition) lease is defined as: "a contract by which a rightful possessor of real property conveys the right to use and occupy the property in exchange for consideration, for a fixed period, or for a period terminable at will".**(PLD 2013 SC 775)**

63.3 Kinds of lease under Section 107 T.P.A 1882

i. Lease from year to year
ii. Lease for a term exceeding a year
iii. Lease reserving a yearly rent
iv. Perpetual lease
v. Other lease i.e., month to month or for a term of a year or less than a year

63.4 Lease - Registration

Section 17 of the Registration Act mandates certain instruments to be compulsorily registerable and subsection (d) of section 17 provides in the list of such documents "a lease of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent". The effect of non-registration of such instruments

is provided by Section 49 of the Registration Act. Similarly it is clear from Section 107 of TPA that a lease of any property beyond one year could only be effected by a registered instrument From the reproduced part of the two statutes above, it is abundantly and unequivocally clear that no lease in Pakistan (note: subject to section 117 of the TPA and leaving aside for the time being even section 17(d) of the Registration Act relating to agricultural properties) can be effected beyond the period of one year except by a registered instrument and if any lease is not so accomplished, it has no legal validity and sanction beyond the period of one year and would neither create nor purport to create any lease for the period exceeding one year **(PLD 2015 SC 380) "**It is settled law that a lease of immovable property from year to year or for a term exceeding one year or reserving yearly rent can only be made through a registered instrument. In view thereof, the Lease Agreement for the period beyond one year would, therefore, be bad in law**.**
(2019 MLD 772-Lahore, PLD 2013 Lahore 119)

63.5 'Lease in perpetuity' and determined if a lease in perpetuity

It is clear that the word perpetuity, without much difficulty and improvisation, can also be construed in the sense of permanence and therefore a lease in perpetuity can be held to be a transaction of immovable property which is irreversible or non-returnable. If the lease is through an unregistered instrument, there is no question at all about it being in perpetuity. But where it has been created by a registered lease document, determination of whether it is permanent in nature or not, will depend on the interpretation of the lease deed. Such interpretation shall obviously be done keeping in view the known rules for the interpretation of the statutes as a contract between the parties is a piece of private legislation and the primary function of the law is facultative leaving the parties to make their own contract on terms of their choice. It is treated as a piece of private legislation and the function of the Court is merely to resolve a dispute arising between the parties for the actual operation of the contract Therefore from the language of the lease document, when it is clear that

the tenancy is for a fixed period of time, even if it (the deed) contains a clause for renewal, but such renewal is left at the option of the lessor, the lease cannot be held to be permanent in nature. The fact that the lessee has been allowed to raise construction over the property of a permanent nature and to even sub-let/sublease the same specifically where the same is subject to the consent/approval of the lessor, by itself shall not be a factor for holding a lease to be one in perpetuity. (**PLD 2015 SC 380)**

63.6 Lease of property mortgaged without authorization from lessor

The lessee was not authorized to mortgage the properties to the Bank, as the properties vest with the appellant and the same was, statedly, mortgaged in favour of the respondent by an unauthorized person, to which no exception was taken by the respondent-Bank at the relevant time. We feel that properties could not be sold in execution of the decree passed against respondents Nos.2 to 4. Learned counsel for the appellant, however, concedes that the lease hold rights vested in respondent No.2, could have been mortgage in favour of respondent-Bank, which is now within its rights to sell the lease hold rights. **(2006 CLD 1432-Lahore [DB])**

63.7 Lease under T.P.A - tenancy under Punjab Rented Premises Act, 2009

Neither the tenancy can be termed as "lease" nor the procedure regulating the "lease" can be applied to the premises under tenancy. As such the applicability of the provisions of Transfer of Property Act over the provisions of Rent Law are in complete negation of section 4 of latter one and cannot be allowed to sustain. **(2013 CLC 675-Lahore)**

63.8 Unregistered lease deed – use of

The only exception, in such cases, shall be that such document, could be used for co-related purposes and the lessee could avail of the benefit of the lease if his case fell under section 106 of the Transfer of Property Act. **(2009 YLR 2294)**

63.9 Holding over lease under Section 116 T.P.A 1882

- What Section 116, Transfer of Property Act, contemplates is that on one side there should be an offer of taking a renewed or fresh demise evidenced by the lessee's or sub-lessee's continuing in occupation of the property after his interest has ceased and on the other side there must be a definite assent to this continuance of possession by the landlord expressed by acceptance of rent or otherwise." "The ordinary legal consequence of accepting payment as indicated by the debtor would follow in such cases, however, much the creditor might attempt to repudiate them. This being the position it must be held on the facts of this case that money was not only paid as rent by defendants 2 and 3 but was received as rent by the plaintiff and consequently a monthly tenancy under the provision of section 116, Transfer of Property Act, did come into existence. **(AIR 1949 FC 124)**
- When the existence of relationship of landlord and tenant has once been proved and the landlord after the expiry of the lease neither takes rent nor brings a suit for ejectment for so long a period as six years, as in the present case, it might well be presumed that he had assented to the holding-over."**(1970 SCMR 386, 1987 CLC 108)**
- There was correspondence between the parties and no specific denial or refusal by the appellant is established on the record for extension of the lease period. After the expiry of the lease period, the appellant continuing his possession over the site in dispute and his status of holding over possession clearly falls within the ambit of section 116 of the Transfer of Property Act.**(2006 CLC 131)**

63.10 Liabilities of lessor

a) To disclose defects in property
b) To disclose defects in title
c) To put lessee in possession

d) Quite enjoyment
e) To protect possession
f) To protect lessee from all disturbances
g) Liability to make payments
h) To make repairs

63.11 Liabilties of lessee

a) To disclose material defects
b) To keep property in good condition
c) To pay rent
d) To pay portion of rent
e) To restore property in good condition
f) To give notice about any encroachment
g) To make good the loss
h) To use property prudently
i) To protect lessor's interest
j) Not to use property for any other purpose
k) Not to cause damage
l) Not to cause any destructive act
m) Not to erect the structure
n) To restore possession

63.12 Rights of lessor

a) Rent and premium
b) Possession
c) Right to have compensation
d) To repudiate contract

63.13 Rights of lessee

a) To possession
b) Right of quiet enjoyment

c) To deduct expenses
d) To recover money
e) To acquire crops
f) To mortgage
g) To sub lease
h) To repudiate lease
i) Not to pay rent
j) To sue for benefit
k) To refuse premium

64 LIS PENDENS

64.1 Relevant provision

Section 52 Transfer of Property Act, 1882

64.2 Basis of the doctrine and its essential ingredients

The doctrine of lis pendens in pith and substance is not only based on equity but also at good conscience and justice. The essential ingredients of section 52 ibid or the conditions precedent to attract this principle were construed as follow:--

i. the pendency of any suit or proceeding in a court law;
ii. the court must have jurisdiction over the person or property;
iii. the property must have specifically described and should be affected by the termination of the suit or proceedings;
iv. the right to the said property be directly and specifically be in question in any suit or proceeding;
v. an alienation of such immovable property without the permission or order of the court; and
vi. the alienation should be during the pendency of any such suit or proceeding and a suit or proceeding in question is not collusive.

(2012 SCMR 983, (1983) 9 All LR 269 (271) (All)

64.3 Object and scope

- The rule and the section is founded upon the maxim "pendente lite nihil innovetur", which means that pending litigation, nothing should be changed or introduced. The virtual and true object of lis pendens is to protect and safeguard the parties to the suit and their rights and interest in the immovable suit property against any alienation made by either of the parties, of that property, during the pendency of the suit in favour of a third person. The rule unambiguously prescribes that the rights of the party to the snit, who ultimately succeed in the matter are not affected in

any manner whatsoever on account of the alienation, and the transferee of the property shall acquire the title to the property subject to the final outcome of the lis. Thus, the transferee of the suit property, even the purchaser for value; without notice of the pendency of suit, who in the ordinary judicial parlance is known as a bona fide purchasers in view of the rule/doctrine of lis pendens shall be bound by the result of the suit stricto sensu in all respects, as his transferor would be bound. The transferee therefore does not acquire any legal title free from the clog of his unsuccessful transferor, in whose shoes he steps in for all intents and purposes and has to swim and sink with his predecessor in interest. The foundation of the doctrine is not rested upon notice, actual or constructive, it only rest on necessity and expediency, that is, the necessity of final adjudication that neither party to the litigation should alienate the property so as to effect the rights of his opponent. If that was not so, there would be no end to litigation and the justice would be defeated. **(PLD 2011 SC 905)**

- The rule of lis pendens is founded upon the principle that it would be impossible that any action or suit could be brought to a successful termination if the alienation pendente lite are permitted to prevail and the subsequent transferee is allowed to set out his own independent case, even of being the bona fide transferee against the succeeding party of the matter and ask for the commencement of de novo proceedings so as to defeat the claim which has been settled by a final judicial verdict. **(2020 YLR 461-Lahore)**

64.4 Condition precedent to attract the principle

The essential ingredients of section 52 ibid or the condition precedent to attract this principle were construed as follow:-

i. The pendency of any suit or proceeding in a court law;

ii. The court must have jurisdiction over the person or property;
iii. The property must have specifically described and should be affected by the termination of the suit or proceedings;
iv. The right to the said property be directly and specifically be in question in any suit or proceedings;
v. An alienation of such immovable property without the permission or order of the court; and
vi. The alienation should be during the pendency of any such suit or proceeding and a suit or proceeding in question is not collusive **(2017 CLC Note 184-Lahore)**

64.5 Doctrine of Lis Pendens - limitation to file appeal against such judgment or decree

Pendency commences from the date of the presentation of the plaint or the institution of the proceedings in a Court of competent jurisdiction and continues inter alia till the final decree, or complete satisfaction or discharge of such decree "or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force." Thus if the appeal against a judgment and decree has not been filed but the period of limitation to file has not expired, the proceedings would be deemed to be pending. **(2012 SCMR 983)** Thus if the appeal against a judgment and decree has not been filed but the period of limitation to file has not expired, the proceedings would be deemed to be pending. If therefore an alienation of a suit property has been made by a party to the lis, who succeeds at one stage (such as trial), but the transfer is during the, period of limitation available to the other (unsuccessful) party, to challenge that decision and ultimately the decree/order is over turned in its further challenge, such alienation made shall also be hit and shall be subject to the rule of lis pendens." **(PLD 2011 SC 905)**

64.6 Section 41 TPA, Exception to the principle of Lis Pendens

There is an exception to this principle which is contained in section 41 of the Transfer of Property Act which stipulates that "where, with the consent, express or implied, of the persons interested in immovable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorised to make it: provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith"**.(2014 SCMR 33)**

64.7 Subsequent transferee, bound by the outcome of suit

A subsequent transferee cannot sustain his transfer (e.g. the sale) if he has purchased the property during the pendency of the suit. He is bound by the outcome of the suit, obviously that shall be so if the case is decided against the transferor from whom he is purchasing the property or against the transferee if he is a party to the case, but if the lis is decided in his favour, there shall be no question about the application of the rule of lis pendens. Lis pendens shall only be applicable in case of success of the appellants, but not in the case of their defeat and failure. **(PLD 2015 SC 187)**

64.8 When principle of lis pendens not be applicable

The principle of lis pendens would not be applicable and candidly held that section 52 of Transfer of Property Act and the principle of lis pendens enshrined therein is circumscribed by three conditions: "(1) the suit must be relating to a specific immovable property in which any rights of the parties are directly and specifically in question (2) the suit should be pending at the time when the alienation in favour of the third person has been made (3) neither the suit itself nor the outcome thereof must be collusive, fraudulent and/or is meant to entrap, deceive, and defraud an innocent transferee specially a bona fide purchaser". **(PLD 2011 SC 905, 2014 SCMR 33)**

65 MORTGAGE

65.1 Relevant provisions

Section 58, 60-76 of Transfer of Property Act, 1882

65.2 Definition

A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of a loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability. **(2011 CLC 1218)**

65.3 Kinds of Mortgage

1) Simple mortgage
2) Mortgage by conditional sale
3) Usufructuary mortgage
4) English mortgage
5) Mortgage by title deeds
6) Anomalous mortgage

65.4 Essentials of mortgage by deposit of title deeds

The requirement of law, for creation of a mortgage by deposit of title deeds are (i) existence of debt (ii) delivery of documents of title and (iii) intention that the documents of title shall be security for the debt.**(2015 SCMR 319)**

65.5 Mortgage by deposit of title deeds equivalent to simple mortgage

Mortgage by deposit of title deeds, which is known in English law as equitable mortgage, is accepted in the Indian Sub-Continent as equivalent to a simple mortgage. A mortgage even by its definition is transfer of an interest in specific immovable property as security for repayment of a debt. Therefore, the right which the mortgagor possesses after executing the mortgage is only a right to redeem the mortgage. **(1999 SCMR 2874)**

65.6 Section 78 TPA - an exception to the doctrine of priority

As per section 48 of the Transfer of Property Act, a later right created over any property, in the absence of a special contract or reservation binding the earlier transferee, is normally subject to the rights previously created. This self-evident proposition is expressed in the equitable maxim qui prior est tempore est jure. However, section 78 of the Transfer of Property Act creates an exception to this equitable doctrine of priority i.e. where through the fraud, misrepresentation or gross-negligence of a prior mortgagee another person has been induced to advance money on the mortgaged property, the prior mortgage shall be postponed to the subsequent mortgagee. **(2009 CLD 756)**

65.7 Registered mortgage - unregistered

A registered mortgage is a notice to the entire world of the factum of registration. Section 50 of the Registration Act is another exception to the equitable doctrine of a prior mortgagor being superior to subsequent mortgagor. The said section provides that a registered mortgage, though created later in time, over any property takes priority over an earlier mortgage, which has not been registered.**(2009 C L D 756)**

65.8 Concept of Mortgage by conditional sale

In legal history, mortgages underwent a process of evolution. A mortgage by conditional sale was a very early form of mortgage amongst Hindus. Amongst Mohammedans the mortgage by conditional sale was a device to evade the Islamic Prohibition of interest. This was ordinarily called as bye-bil-wafa i.e. a sale with promise so that the mortgagee enjoys the rent and profit in lieu of interest and became absolute owner of the property if the debt was not paid. The earliest form of Mohammedan security was the rahn or pledge or mortgage with possession corresponding to the Roman Pignus which was a transfer not of ownership but of possession without liability to forfeiture. In such cases a moment of weakness of needy person is exploited by the mortgagee. He enjoys the usufruct of the mortgaged property in his possession with increased market

value attracting all the ingredients of interest forbidden in Islam. In such circumstances Courts of law and equity are expected to construe various transactions concerning mortgage in such. a liberal way that the right of rightful owner survives and the one who has enjoyed the possession of usufructuary of the mortgaged property for a considerable time and thus has recovered the amount manifold, should not be allowed to get away with the mortgaged property as well. **(1991 SCMR 2063, PLD 2014 Lahore 26)**

65.9 Difference between mortgagee and tenant

It is an essential condition for a tenant to pay rent for that land to other person whose land he holds on tenancy and the tenancy a parcel of land held by a tenant under landlord in one lease or on one set of condition. It would mean that the tenancy can only continue if there are some set of conditions between the tenant and the landlord. Most important condition of the tenancy and the liability of the tenant is to pay rent of that land meaning thereby, the share of the crops or output to the landlord. If there is no payment of rent or lease money to the landlord, then the relationship of landlord and tenant would not exist between the parties. The mortgagee has to make the payment to the mortgagor in advance or to be advanced by way of loan, an existing or future debt. The mortgagee is not to pay the share to the landlord of the crops sown by him. It is the payment of the share or batai is the liabilities of the tenant only. From the above discussion it is manifestly revealed that a mortgagee is not to inherited in the definition of the tenant. **(2001 MLD 392)**

65.10 Attestation of mortgage deed by two witnesses

Attestation of a mortgage-deed by at least two witnesses, is an essential pre-requisite for the creation of a valid and enforceable mortgage. If the deed is not attested by two witnesses as required, the mortgage, in fact, does not come into existence. The necessary consequence, which follows from a want of proper attestation, is that no interest in the property is transferred to the putative mortgagee. **(2004 CLD 1289)**

65.11 Right to redemption of mortgage statutory one not controlled through agreement

The provisions of section 60 of Transfer of Property Act is a statutory right through which the mortgagor has a right to redeem her property where the transaction is of mortgage irrespective therefore of a stipulated condition in the mortgage deed to the effect that if the mortgage is not redeemed within a specified period the land will become the absolute property of mortgagee. Section 60 of Transfer of Property Act affirms the right of redemption in all mortgages and no clog can be put against the statutory rights. The right of redemption is available under section 60 of Transfer of Property Act cannot be controlled by an agreement between the mortgagee and mortgagor. **(2011 CLC 1218)**

65.12 Limitation for redemption of mortgaged property

Redemption of mortgaged property under Article 148 of the Limitation Act is 60 years from the date of mortgage.**(2011 CLC 1218)**

65.13 Usufrctuary mortgage - receipt of produce amounts to acknowledgement for the purpose of limitation

In a usufructuary mortgage where mortgaged land is in the possession of the mortgagee, the receipt of the rent or produce of such land is always deemed to be a payment for the purpose of subsection (1) of section 20 of Limitation Act, amounting to acknowledgement giving fresh period of limitation. **(2009 SCMR 191)** The enjoyment of usufruct and the receipt of produce every time by mortgagee amounts to an acknowledgement giving fresh start to limitation. **(1999 SCMR 2531)**

65.14 Rights of Mortgagor

1. Right to redeem u/s 60
2. To require the mortgagee to transfer the third party u/s 60A
3. Right to inspect u/s60-B
4. Right to require production of documents u/s60-B

5. Right to redeem separately or simultaneously u/s 61
6. Right of usufructuary mortgagor to recover possession u/s 62
7. Entitled to accession u/s 63
8. Entitled to the improvement u/s 63A
9. Right to have the benefit of the new lease u/s 64
10. Right to transfer the interest u/s 65(a)
11. Right to defend the title u/s 65(b)
12. Right to lease the property u/s65A

65.15 Liabilities of mortgagor

1. Liability to defend title u/s 65(b)
2. Liability to pay public charges u/s65(c)
3. Liability to perform and observe the contract u/s 65(d)
4. To discharge the principal money due on
5. Encumbrance u/s 65(e)
6. Liability not to comment destructive acts u/s 66

65.16 Rights of mortgagee

1. Right to foreclosure u/s 67
2. Right to cause sale u/s 67
3. Right to sue for mortgage money u/s 68
4. Right to sale u/s 69
5. Right to appoint receiver u/s 69A
6. Entitled to accession u/s 70
7. Entitle to new lease u/s 71
8. Rights of mortgagee in possession u/s 72
9. Entitled to claim payment of mortgaged money in certain cases u/s 73

65.17 Liabilities of mortgagee

1. To transfer the third party if mortgagor requires
2. Bound to bring one suit in respect of several mortgages u/s 67A

3. Manage the property u/s 76(a)
4. To collect the rents and profits u/s 76 (b)
5. To pay the government revenue u/s 76(c)
6. To pay other charges u/s 76(c)
7. To make necessary repairs u/s 76(d)
8. Not to commit destructive acts u/s 76(e)
9. To reinstate the property u/s 76(f)
10. To maintain accounts u/s 76(g)
11. Reduction in to mortgage money u/s 76(h)

65.18 Claim right of redemption U/S 91 T.P.A

a) Mortgagor
b) Another person having any interest on property
c) Any person having interest on right of redemption any surety
d) Any creditor obtaining decree of sale

66 SALE AND AGREEMENT TO SELL

66.1 Relevant Provisions

Section 54 and 55 Transfer of Property Act, 1882

66.2 Essential ingredients

- The essential elements of sale as (i) the parties, (ii) the subject matter, (iii) the transfer or conveyance and (iv) price or consideration. **(2017 SCMR 1787, 2017 YLR Note 348, 1984 SCMR 94)**
- The essential elements for sale of immovable property are (a) payment of sale price of the property or promise to pay the same by the buyer to the seller, and (b) delivery of possession of the property. In case, these two essential terms of sale of immovable property can be determined on the basis of contents of the agreement between the parties, with certainty, it may constitute a valid agreement of sale between the parties which, subject to discretion of the Court, can be directed to be specifically performed. **(2019 SCMR 524)**
- Under the law, a contract for sale of immovable property is a contract that sale of such property is taken place on terms settled between the parties and sale of ownership in exchange for a price paid or promised part paid or part promised while the essential elements of sale are: (i) parties (ii) subject-matter, (iii) transfer of all conveyance (iv) price and consideration **(2018 YLR Note 142)**

66.3 Agreement to sell not a title document unless proved

It is settled law that agreement to sell is not a title document until or unless it is proved through cogent and confidence inspiring evidence. **(2020 MLD 100)**

66.4 An agreement to sell not signed but acted upon

An Agreement to Sell not signed by one of the parties if proved to have been accepted and acted upon would be a valid Agreement to Sell, is a valid contract enforceable in law **(2017 SCMR 98)**

66.5 Agreement to sell - interest or charge on property

- Under section 54 of Transfer of Property Act, a contract of sale of immovable property does not of itself create any interest in or charge on such property. Meaning thereby agreement to sell would not create any right or, title on property.**(2011 CLC 1566)**
- Nobody would become owner of property by entering into sale agreement because mere contract of sale by itself would not create any interest in or charge on such property. **(1987 MLD 2922, 2008 YLR 2434, 2011 MLD 31)**

66.6 Unregistered agreement to sell - rights in property

It is also mandated in the second part of section 54 of the Act that such an agreement would not confer any right to the property. Moreover the provisions of section 49 of the Registration Act, 1908 read with section 17 of the Act also come in the way of the appellants as the agreement to sell of the property would not confer any title in favour of Allah Rakha allegedly executed by Barkat Ali which could further confer any rights in the immovable property unto the appellants. **(2017 SCMR 367)**

66.7 Registration of agreement to sell of immovable property, notice to general public

Registration of agreement to sell under the Registration Act, 1908 was in itself a notice to general public. **(2012 SCMR 935)**

66.8 Declaratory decree, on the basis of agreement to sell

When the alleged agreement is not signed by the plaintiff himself he was not entitled to press the said agreement before the Court. A declaration cannot be

sought by the plaintiff admittedly on the basis of an agreement to sell, the declaration of title cannot be granted in favour of a plaintiff who claims a right in the immovable property on the basis of agreement to sell because a declaratory decree declares a pre-existing right and cannot create or confer a new right. **(2010 SCMR 334, 2016 CLC 114)**

66.9 Binding nature of agreement to sell

The consistent view of the superior courts in this context is that agreements to sell in respect of immovable property are never treated to be binding unless and until the intention is also expressed in the agreement that in case the agreement to sell is not specifically enforced within the stipulated and specified period then the agreement shall cease to exist or be not enforceable after the expiry of the period. **(2013 CLC 880)** It is well-settled that intention to make time the essence of the contract must be expressed in unmistakable language and it may be inferred from what passed between the parties before, but not after, the contract is made. A mere mention of a specified period in an agreement for completion of sale has been held as not to make the time of essence of the contract. In contracts of sale of immovable property, ordinarily intended by the parties the terms of the contract do not permit of any other interpretation. **(PLD 2003 SC 430)**

66.10 Distinction between 'absolute sale' and Mortgage with conditional sale

The absolute sale' and `mortgage with conditional sale' are two different types of transactions. In the first category relationship of borrower and creditor do not exist between the parties and the title in the c property is absolutely passed on to the vendee by virtue of the sale deed. The second category however manifests the arrangement for borrowing money much below the value of the property which is tendered as security for payment of the loan and if it is not paid the creditor can fall back on the security. **(PLD 2014 Lahore 26)**

67 TRANSFER BY OSTENSIBLE OWNER AND RIGHTS OF BONA FIDE PURCHASER

67.1 Relevant Provisions

Section 41 Transfer of Property Act, 1882

67.2 Underlying principle of the concept

The general principle of law of Transfer of Property is enunciated by the maxim that no man can transfer to another or can confer a right or title greater or higher than what he himself possesses and he gives not who hath not. In other words, generally a purchaser cannot take more than what the vendor has to sell. Section 41 (ibid) whenever one of the two innocent persons has to suffer by the act of third person, he who has enabled that person to occasion the loss, must sustain it or where one of the two innocent persons suffer from the fraud of third party, the loss should fall on him who has created or could have prevented the opportunity for fraud. **(PLD 2006 SC 84)**

67.3 Ingredients of Section 41 Transfer of Property Act

a. The transferor is the ostensible owner;
b. he is no by the consent, express or implied, of the real owner;
c. the transfer is for consideration; and
d. the transferee has acted in good faith, taking reasonable care to ascertain that the transferor had power to transfer.**(2001 CLC 1021, PLD 2006 SC 84, 2007 YLR 1636, 2005 YLR 2379, 2002 SCMR 1447, 2013 MLD 1547)**

67.4 Ostensible owner

When at the time of transfer of property by ostensible owner in favour of any person, who is person claiming the title and interest in the property remains silent on that transfer, it means that he has impliedly admitted that transfer. **(PLD 2013 Lahore 517)**

67.5 Duty of bona fide purchaser to claim protection

As regards the bona fide purchaser, he had a duty to look to the registered deeds. Enquiry through the Revenue record was not sufficient and in the absence of having made any enquiry and looked up section 14 of the Act, his interest cannot be held to be bona fide or protected. **(1991 SCMR 2513)**

67.6 Essential conditions for claiming protection u/s 41

- The essential ingredients of this section are, (a) that the transferor was the ostensible owner; (b) that the transfer was made by consent express or implied of the real owner; (c) that the transfer was made for consideration; and (d) that the transferee while acting in good faith had taken reasonable care before entering into such transaction. **(2017 SCMR 81)**
- The essential ingredients for invoking section 41 ibid can be described as (1) that the transferor was the ostensible owner, (2) that the transfer was made by consent of the real owner, (3) that such transfer was for a consideration, and (4) that the transferee while acting in good faith had taken reasonable care before entering into the transaction. **(2014 SCMR 33)**

67.7 Transferee must have acted in good faith and taken reasonable care

- A sale transaction is protected if the ostensible owner, with the implied or express consent of the real owner, transfers the property to a third person for consideration, provided the transferee after taking reasonable care to ascertain that the transferor had the power to make the transfer, has acted in good faith.**(2015 SCMR 452)**
- In order to avail of this equitable doctrine as contained in section 41 of the Transfer of Property Act (Proviso) which protects a subsequent transferee, it must be established by him that he had acted in good faith and taken reasonable care before entering into the transaction and that he had given valuable consideration for such transfer. This equitable doctrine is a

deduction from the law of estoppel which must be pleaded clearly with specific facts to be relied upon in this regard. Naturally the onus to prove that a person is entitled to the benefit of section 41 of Transfer of Property Act is always upon the person who pleads such protection. **(2002 SCMR 2003, 2012 SCMR 84)**

- It is a settled principle of law that a bona fide transferee while seeking protection of section 41 of the Act is required to prove on record that he entered into transaction of sale in good faith having believed that the transferor is the ostensible owner of the property in question. In other words section 41 of the Transfer of Property Act protects a transferee provided he acted in good faith and took reasonable care to ascertain that the transferor had power to make the transfer. In this exercise inquiry into valid title is involved.**(2010 SCMR 1871)**

67.8 Section 41 TPA, exception to Section 52 TPA

Section 52 of the Transfer of Property Act enshrines doctrine of lis pendens which means the jurisdiction or control which a court acquires over a property involved in a suit during its pendency. However, there is an exception to this principle which is contained in section 41 of the Transfer of Property Act which stipulates that "where, with the consent, express or implied, of the persons interested in immovable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorised to make it: provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith". **(2014 SCMR 33)**

67.9 Comparison of Section 41 TPA & 114 Qanun e Shahadat Order, 1984

This exception which is the form of equitable doctrine of estoppel as embodied in Article 114 of the Qanun-e-Shahadat, 1984 with a distinction as intentional inducement and unintentional inducement as in Article 114 ibid that a person

pleading estoppel should act on the representation of the other while under section 41 ibid that if a person allows the other to hold himself out as the owner of the property and the third person purchases it for value from the ostensible owner in the belief that he is the real owner then the latter shall not be permitted to recover upon his secret title. In this he shows that the purchaser had direct or constructive notice of his ownership. **(PLD 2006 SC 84)**

67.10 Doctrine of Caveat Emptor and protection u/s 41 TPA

It is settled law that a purchaser is saddled with extraordinary responsibility of taking care and caution to deeply scrutinize the genuineness or originality or legality of the title of the vendor before entering into the transaction of purchasing the land under the principle of caveat emptor subject to incidence of sections 10 and 11 of Transfer of Property Act and if any infirmity or deficiency subsequently emerges in the title of the vendee that shall always travel with the land and purchaser is precluded to raise plea of protection under Section 41 of the Transfer of Property Act rather they have to face the rigors of their own negligence for non-conducting a bona fide and reasonable investigation into title of the vendor under the principle of Caveat Emptor. **(1976 SCMR 489, 2019 MLD 201)**

68 WEST PAKISTAN LAND REVENUE ACT, 1967

68.1 Jurisdiction

- Any land that was occupied as the site of a town or village and was not assessed to land revenue was exempt from the operation of the provisions of the Act. However, every case must be decided on its merits and the mere inclusion of a certain area within a town/village for jurisdictional purposes did not trigger the exemption from land revenue under the law. (**PLD 2019 SC 297)**
- When it was pleaded in a suit that with the connivance of the revenue officials any mutation was got attested and the same was challenged through a civil suit, the Provincial Government as well as the revenue officials against whom the connivance for attestation of the mutation was alleged, were necessary parties in the suit. (**2020 SCMR 214)**

68.2 Evidentiary value of Mutation

- Mutation per se was not a document of title and was meant for fiscal purpose only, to prove a transaction appearing/embodied in a mutation, some strong piece of evidence was required under the Qanun-e-Shahadat, 1984. (**2019 SCMR 567)**
- Presumption of correctness or truth was not attached to the contents of mutation. (**PLD 2018 Lahore 803)**
- No doubt, the entries in the mutation are admissible in evidence of a case, but the same are required to be proved independently by the person relying upon it through affirmative evidence, because an oral transaction reflected therein neither confers the title in favour of its beneficiary nor can establish the same. (**2018 YLR 1028)**
- Revenue authorities could not review the mutation sanctioned on the basis of a decree passed by the Court when said judgment and decree had been

challenged and its final decision was yet to be made. Title of suit land could not be determined by the Revenue Authorities and it was within the jurisdiction of Civil Court to finally adjudicate the question of title. Impugned mutation had been cancelled without following the mandate of law. (**2019 YLR 710)**

- In terms of S. 42 of the Punjab Land Revenue Act, 1967, it was obligatory that a mutation for an oral gift be sanctioned in Majlis-e-Aam so that every person of the village may have knowledge of such alienation and the possibility of fraud, collusion or secretly undertaken transaction may be eliminated. (**2020 SCMR 276)**

68.3 Applicability of Limitation Act, 1908

Section 5 of Limitation Act, 1908 for condonation of delay was not applicable to proceedings before Revenue hierarchy under Punjab Land Revenue Act, 1967, as special limitation was provided under special law. (**2017 CLCN 32)**

68.4 Onus to prove

When a mutation was challenged by person on whose behalf it was said that same had been attested then if while appearing in witness box such person denied the same on oath, onus to prove said mutation shifted upon other side being beneficiary. (**2016 YLR N 81)**

68.5 Fresh Cause of Action

Every fresh entry in the revenue record gave rise to fresh cause of action to the aggrieved party, mutation in question being a subsequent entry gave rise to a fresh cause of action. (**2020 CLC 99)**

68.6 Jurisdiction of Civil Court

- Revenue authorities were under obligation to sanction mutation on the basis of decree passed by Civil Court and could not refuse mutation on the ground that decree had not been put into execution within prescribed period of limitation and had become ineffective. (**2019 CLC 1380)**

- Section 172 of Punjab Land Revenue Act, 1967 excluded the jurisdiction of civil court in the matter with regard to correction of any entry in the record-of-rights, periodical records or register of mutation. Whenever any such entry interfered with a right of a person pertaining to the land in question he could approach the civil court for declaration of his rights in terms of S.53 of Punjab Land Revenue Act, 1967. (**2017 CLC 264)**
- When there was no controversy with regard to title of any of the party, jurisdiction would lie with the Revenue Court. Section 172(2), Punjab Land Revenue Act, 1967 barred jurisdiction of Civil Court in the matter. (**2018 CLC 292)**

68.7 Encroachment of Land

Section 175, Punjab Land Revenue Act, 1967 provides procedure for eviction of an encroacher over the land reserved for common purposes irrespective of the fact that a building has been erected thereupon. (**2019 CLC 1405)**

68.8 Constitutional Jurisdiction

Constitutional Court must approach and examine a remand order passed by the Board of Revenue with care and circumspection, so as to sparingly interfere with it, unless, the remand order was facially perverse, without jurisdiction or otherwise void. (**2018 SCMR 1177)**