

ORDER SHEET
IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Constitution Petition No. D-452 of 2024

(*MuhammadNaeemuddin& othersVs. Province of Sindh & others*)

DATE OF HEARING	ORDER WITH SIGNATURE OF JUDGE
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Before;
Adnan-ul-Karim Memon, J;
Muhammad Abdur Rahman, J;

Date of hearing : 02 May 2024.

Date of Announcement : 21 May 2024

Syed Israr Ahmed Shah, Advocate for the Petitioners.

Mr. Liaquat Ali Shar, Additional A.G, Sindh & Mr. Ali Raza Baloch, Assistant Advocate General, Sindh a/w Bhooral Mal Secretary Services & General Administration Department, Sanaullah Qazi Section Officer Services & General Administration Department and Mukhtiarkar New Goth on behalf of the Respondent No.5.

ORDER.

MOHAMMAD ABDUR RAHMAN J:- The Petitioners have maintained this Petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, seeking the following relief:

“ ... (a) This Honorable Court may kindly be pleased to declare, that the respondents' acts, omission, failure, or refusal, whereby they are not allowing the petitioners to join their respective services/jobs, which is illegal void, unlawful, abinitio, as all the four (4) cases of the petitioners for appointments, was duly recommended by the District Recruitment Committee, through its approved minutes and the subsequent issuance of offer of appointment, such legitimate expectancy in favor of the petitioners were already on record and sufficient to claim their right, therefore cannot be curtailed or usurped.

(b) That this Honorable Court, may kindly be pleased to direct the respondents to allow the petitioners to join their respective services/jobs, as per their own (Public Health Engineering Department), recommendations of the District Recruitment Committee, and subsequent issuance of offer letter for the appointments, to the petitioners, for non-technical positions/posts as per the recommendations of DRC forthwith without any further delay.

(c) That this Honorable Court may also further be pleased to pass an order thereby holding that the order passed earlier in C.P. No. D-124 of 2023 and in C.P. No.D-424 of 2019, passed by this Honorable Court's Divisional Bench, both dated 03-05-2023, regarding the recruitment guidelines and SOPs framed, still holds the field and has attained finality, therefore needs to be implemented in its letter and spirit, despite any order passed by any other court, except the Honorable Supreme Court.

(d) That this Honorable Court may also further be pleased to declare that the subject recruitments, nontechnical posts, BPS-01 to BPS-04, were being

conducted strictly in accordance with the directions issued by this Honorable Court on 03-05-2023, in CP No. D- 124 of 2023 and CP No. D-424 of 2019, for eligibility criteria, guidelines, and SOPs, for recruitments in BPS 01 to BPS-04, and BPS-5 to BPS-15, respectively

(e) That, this Honorable Court may also further be pleased to pass an order, whereby directions be issued to the respondents, including respondent No. 1, Chief Secretary Sindh, to continue with the recruitment process throughout Sindh, in view of the directions passed by this Honorable Court, in C.P. No D-124 of 2023 and CP No D-424 of 2019, without being influenced by any other order, passed by any court, except the Honorable Supreme Court

(f) That this Honorable Court may kindly be pleased to pass an order whereby, declaring that the present petitioners have been appointed in accordance with the SOPs and Guidelines framed for such purpose, as per the instructions/directions of this Honorable Court, passed in CP No. D 124 of 2023 and C.P.No.D- 424 of 2019, on 03-05-2023

(g) That this Honorable Court, may also further be pleased to pass an order, declaring thereby that a Single Bench of this Honorable Court exercising its civil jurisdiction, under the Civil Procedure Code on Original Side cannot pass an order, in the presence of an order (referred above passed in C.P.No.D- 124 of 2023 and C.P.No D-424 of 2019, on 03-05-2023), passed by the Honorable Divisional Bench, exercising Constitutional Jurisdiction and only the order of Supreme Court can undo such order, which was earlier passed by the Divisional Bench of this Honorable Court

(h) That, this Honourable Court while exercising its Extraordinary and vast Constitutional Jurisdiction, may kindly be pleased to pass an order, to do complete justice, whereby the rights created in favor of the petitioners, and thousands of similarly placed successful candidates, have been accrued as of today, in favor of the petitioners and thousands of other successful and eligible candidates, their rights, as stated above, shall not be prejudiced under any act or omission on part of any official respondents or any political party, whatsoever.

(i) That, this Honourable Court, as an interim measure may be pleased to direct the respondents to immediately allow the successful candidates including the petitioners, recommended by the minutes of DRC concerned and till final disposal of this case such DRC, minutes or offer letter shall also not be canceled or withdrawn.

(j) That, this Honourable Court may also be pleased to restrain the respondents from floating any fresh advertisement for the subject non-technical posts in BPS-01 to BPS-04, as the petitioners rights and thousands of successful candidates having been created and the order being communicated to them, the right therefore created in such scenario, thus cannot be taken away, or be rescinded, under the garb of Section-21, of General Clauses Act, 1897, Doctrine of Locus Poenitentiae, the names therefore as finalized by the DRC concerned for successful candidates, and the subsequent issuance of offer letters, have created rights in favour of the petitioners which cannot be taken away, therefore the respondents may also kindly be strictly directed and restrained not to annul or cancel or scrap the whole of appointment process, which would be detrimental to the rights already accrued to the petitioners and thousands of others candidates, scattered throughout the province, prior to the passing of the order dated 09-08- 2023, passed by the Single Bench of this Honourable Court at Karachi, whose cases are akin to the cases of the present petitioners”

A. The Facts

2. A Suit bearing No. Nil (-1564) of 2023 (hereinafter referred to as the “Suit at Karachi”) has been presented before this Court at its principal seat at Karachi in its Original Civil Jurisdiction impugning various advertisements for recruitment of

persons to be considered for employment by the Government of Sindh. Ex parte ad interim injunctive orders were passed on 9 August 2023 (hereinafter referred to as the “Order in the Suit”) in those proceedings as hereinunder:

“ ... *Points raised by the learned counsel require consideration. Let notice be issued to the defendants for 30.08.2023. Meanwhile the operation of all the advertisements attached as Annex C to C-93, D to D-6 and K to K-4 to the plaint and induction processes commenced by the defendants, Government of Sindh or any of its Offices, Autonomous and other Bodies, Departments and processes commenced through said advertisements are suspended till the next date of hearing*”

The Petitioners are aggrieved by the Order in the Suit as they contend that they applied on the basis of the advertisements maintained in the Suit and were selected for employment but written orders confirming their employment are not being issued to them and instead oral representations are being made by the Respondents No. 4, the Respondent No. 5 and the Respondent No. 6 that such written orders confirming their employment cannot be issued on account of the Order in the Suit.

3. Mr. Syed Israr Ahmed Shah who has entered appearance on behalf of the Petitioners has contended that the Petitioners are not party to the Suit at Karachi and that as they are not party to those proceedings, the Order in Suit is not binding on them. He argued that the reliance by the Respondents No. 4, the Respondent No. 5 and the Respondent No. 6 on the order in the Suit was in effect a technicality and that they were deliberately “creating hurdles” prejudicing the Petitioners right to be appointed to government service. He submitted that the Order in the Suit being of an interim nature could not prevent this Court for exercising its jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973. He concluded that a vested right had accrued in favour of the Petitioners as against the Respondents No. 4, the Respondent No. 5 and the Respondent No. 6 to secure their employment in government service and under the doctrine of locus poenitentiae they could not now be denied such an opportunity on account of the Order in the Suit.

4. The learned Additional Advocate General has submitted that the Government of Sindh, SGA&CD had advised all departments of the Government of Sindh to expedite the process of recruitment against non-technical posts in BS-01 to BS-04 through the respective Selection Committees after following all codal formalities. Accordingly, the Deputy Commissioner, Sukkur placed an advertisement dated 2 May 2023 for Walk-In Interviews on various dates including, but not limited to, an interview for the office of the Executive Engineer PHE Division

Sukkur on 20 May 2023 and which was, inter alia, impugned in the Suit at Karachi and which is subject to the Order in the Suit and which they were bound to follow.

5. We have heard the Counsel for the Petitioner and the learned Advocate General Sindh and have perused the record.

B. Concurrent Jurisdiction

6. The issue in this Petition is as to whether this Court **can or should** exercise its jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 and by the exercise of which jurisdiction an order passed by this Court would directly or indirectly either decide a separate lis or decide an application in such a lis, which is pending before another Court of competent concurrent jurisdiction.

(i) Section 9 of the Code of Civil Procedure, 1908 and the Specific Relief Act, 1877

7. The original civil jurisdiction exercised by a court is invoked under Section 9 of the Code of Civil Procedure, 1908 and which reads as hereunder:

“ ... 9. *The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.*”

While in the rest of Pakistan such a jurisdiction is exercised by a Civil Judge or a Senior Civil Judge, however in respect of Karachi on account of Section 7 read with Section 24 of the Sindh Civil Courts Ordinance, 1962 the jurisdiction of the Civil Court is exercised by the High Court on the basis of a pecuniary valuation of a Suit. Such a jurisdiction is colloquially referred to as the “Original Civil Jurisdiction” and relief in which jurisdiction is regulated by the provisions of Specific Relief Act 1877 (hereinafter referred to as the “SRA, 1877”). In respect of the enforcement of public duties such a relief was regulated by Section 45 to 51 of the SRA, 1877, the provisions of which read as hereunder:

“ ... **CHAPTER VIII
OF THE ENFORCEMENT OF PUBLIC DUTIES.**

45. *Power to order public servants and others to do certain specific acts : The High Court of East Bengal may make an order requiring any specific act to be done or forborne, within the local limits of its ordinary original civil jurisdiction, by any person holding a public office, whether of a permanent or a temporary nature, or by any corporation or interior Court of Judicature :*

Provided –

(a) that an application for such order be made by some person whose property, franchise or personal right would be injured by the forbearing or doing (as the case may be) of the said specific act.

(b) that such doing or forbearing is, under any law for the time being in force clearly incumbent on such person or Court in his or its public character, or on such corporation in its corporate character ;

(c) that in the opinion of the High Court such doing or forbearing is consonant to right and justice ;

(d) that the applicant has no other specific and adequate legal remedy ; and

(e) that the remedy given by the order applied for will be complete.
Exemptions from such powers : Nothing in this section shall be deemed to authorize the High Court –

(a) to make any order binding on the Central Government or any Provincial Government ;

(b) to make any order on any other servant of the Crown as such, merely to enforce the satisfaction of a claim upon the Crown ; or

(c) to make any order which is otherwise expressly excluded by any law for the time being in force.

46. Application how made. Procedure thereon :

Every application under Section 45 must be founded on an affidavit of the person injured, stating, his right in the matter in question, his demand of justice and the denial thereof ; and the High Court may, in its discretion, make the order applied for absolute in the first instance, or refuse it, or grant a rule to show cause why the order applied for should not be made.

Order in alternative : If, in the last case, the person, Court or corporation complained of shows no sufficient cause, the High Court may first make an order in the alternative, either to do or forbear the act mentioned in the order, or to signify some reason to the contrary and make an answer thereto by such day as the High Court fixes in this behalf.

47. Peremptory order :

If the person, Court or corporation to whom or to which such order is directed makes no answer, or makes an insufficient or a false answer, the High Court may then issue a peremptory order to do or forbear the act absolutely.

48 Execution of, and appeal from, orders :

Every order under this Chapter shall be executed, and may be appealed from, as if it were a decree made in the exercise of the ordinary original civil jurisdiction of the High Court.

49 Costs :

The costs of all applications and orders under this Chapter shall be in the discretion of the High Court.

50 Bar to issue of mandamus

Neither the High Court nor any Judge thereof shall hereafter issue any writ of mandamus.

51. *Power to frame rules : The High Court shall, as soon as conveniently may be, frame rules to regulate the procedure under this Chapter ; and until such rules are framed, the practice of such Court as to applications for and grants of writs of mandamus shall apply, so far as may be practicable, to applications and orders under this Chapter."*

(ii) Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973

8. Every High Court in Pakistan, under Article 199 of the Consitution of the Islamic Republic of Pakistan, 1973 (hereinafrer referred to as the "Constitution"), has been conferred jurisdiction to redress grievances as against a "person" as defined in Sub-Article (5) of Article 199 of the Constitution and which reads as hereinunder:

" ... 199. Jurisdiction of High Court.

(1) Subject to the Constitution, a High Court may, if it is satisfied that no other adequate remedy is provided by law,-

(a) on the application of any aggrieved party, make an order-

(i) directing a person performing, within the territorial jurisdiction of the Court, functions in connection with the affairs of the Federation, a Province or a local authority, to refrain from doing anything he is not permitted by law to do, or to do anything he is required by law to do; or

(ii) declaring that any act done or proceeding taken within the territorial jurisdiction of the Court by a person performing functions in connection with the affairs of the Federation, a Province or a local authority has been done or taken without lawful authority and is of no legal effect; or

(b) on the application of any person, make an order-

(i) directing that a person in custody within the territorial jurisdiction of the Court be brought before it so that the Court may satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner; or

(ii) requiring a person within the territorial jurisdiction of the Court holding or purporting to hold a public office to show under what authority of law he claims to hold that office; or

(c) on the application of any aggrieved person, make an order giving such directions to any person or authority, including any Government exercising any power or performing any function in, or in relation to, any territory within the jurisdiction of that Court as may be appropriate for the enforcement of any of the Fundamental Rights conferred by Chapter 1 of Part 11.

(2) Subject to the Constitution, the right to move a High Court for the enforcement of any of the Fundamental Rights conferred by Chapter 1 of Part II shall not be abridged.

(3) An order shall not be made under clause (1) on application made by or in relation to a person who is a member of the Armed Forces of Pakistan, or who is for the time being subject to any law relating to any of those Forces, in respect of

his terms and conditions of service, in respect of any matter arising out of his service, or in respect of any action taken in relation to him as a member of the Armed Forces of Pakistan or as a person subject to such law.

(4) *Where-*

(a) *an application is made to a High Court for an order under paragraph (a) or paragraph (c) of clause (1), and*

(b) *the making of an interim order would have the effect of prejudicing or interfering with the carrying out of a public work or of otherwise being harmful to public interest or State property or of impeding the assessment or collection of public revenues, the Court shall not make an interim order unless the prescribed law officer has been given notice of the application and he or any person authorised by him in that behalf has had an opportunity of being heard and the Court, for reasons to be recorded in writing, is satisfied that the interim order-*

(i) *would not have such effect as aforesaid; or*

(ii) *would have the effect of suspending an order or proceeding which on the face of the record is without jurisdiction.*

(4A) *An interim order made by a High Court on an application made to it to question the validity or legal effect of any order made, proceeding taken or act done by any authority or person, which has been made, taken or done or purports to have been made, taken or done under any law which is specified in part I of the First Schedule or relates to, or is connected with, State Property or assessment or collection of public revenues shall cease to have effect on the expiration of a period of six months following the day on which it is made, provided that the matter shall be finally decided by the High Court within six months from the date on which the interim order is made.*

(5) *In this Article, unless the context otherwise requires, -*

"person" includes any body politic or corporate, any authority of or under the control of the Federal Government or of a Provincial Government, and any Court or tribunal, other than the Supreme Court, a High Court or a Court or tribunal established under a law relating to the Armed Forces of Pakistan; and "prescribed law officer" means

(a) *in relation to an application affecting the Federal Government or an authority of or under the control of the Federal Government, the Attorney-General, and*

(b) *in any other case, the Advocate-General for the Province in which the application is made."*

This jurisdiction of the High Court is colloquially referred to as the "Constitutional Jurisdiction of the High Court".

(iii) The Repeal of Sections 45 to 51 of the Specific Repeal Act, 1877 and its impact on the Courts Jurisdiction under Section 9 of the Code of Civil Procedure, 1908

9. As is apparent the above quoted provisions of the SRA, 1877 permitted a court to issue a writ of *mandamus* and which jurisdiction being concurrent could be exercised either by this Court in its Constitutional Jurisdiction or by a Civil Court in its Original Civil Jurisdiction. The overlap between the two jurisdictions created

problems, none more so than on account of the bar to jurisdiction contained in Section 51 of the SRA, 1877 and also on account of Article 201 of the Constitution whereby the decision of this Court, to the extent that it decided a principle of law, would bind the Civil Court. Possibly, on account of this overlap, Sections 45 to 51 of the SRA, 1877 were repealed by Section 3 read with the IIInd Schedule of the Federal Laws (Revision and Declaration) Ordinance, 1981¹ prima facie with the intent of leaving the jurisdiction to issue such directions with the High Court in its Constitutional Jurisdiction.

(iv) The Problem created by the Repeal of Sections 45 to 51 of the Specific Relief Act, 1877 and the Interpretation of Section 42 of the Specific Relief Act, 1877

10. In practical terms, however various problems remained unattended to by the legislature. The Constitutional Jurisdiction of this Court, aside from being discretionary, cannot be invoked for example where disputed questions of facts arise requiring evidence to be adduced and hence in cases where there were such a dispute, relief could not be granted by this Court in its Constitutional Jurisdiction. It would therefore seem that an anomalous situation could occur that persons who sought to enforce their rights in the Constitutional Jurisdiction of this Court, which would include the enforcement of their fundamental rights as guaranteed under the Constitution, could not avail such a remedy before this Court in its Constitutional Jurisdiction on account of such a bar and could also not obtain such relief in a court's Original Civil Jurisdiction on account of the repeal of Section 45 to 51 of the SRA, 1877. This was primarily on account of the fact that to obtain either a mandatory or a prohibitory injunction under Chapter IX and Chapter X of the SRA, 1877 a person would have to apply for a declaration under Section 42 of the SRA, 1877 to show their "legal character" or "right to a property" and only once established could such injunctive relief be sought. As is apparent it would be quite difficult at times to identify "legal character" or "right to a property" in terms of administrative actions or in terms of fundamental rights within such perimeters and which in effect deprived persons of a remedy.

11. This "wrong" was corrected by two judgments of this Court. The first is an order of Ata ur Rehman J., in the decision reported as ***Messrs H.A. Rahim & Sons***

¹ See also Report 9 of the Law Commission of India available at <https://www.advocatekhaj.com/library/lawreports/specificreliefact/index.php?Title=Specific%20Relief%20Act,%201877>

vs. Province of Sindh and another² in which where the vires of a law was challenged in the Original Civil Jurisdiction of this Court it was held that:

“ ... 9. There is another aspect of the matter. The present suit has been filed for declaration and permanent injunction. A suit for declaration would lie under section 42 of the Specific Relief Act whereunder persons seek declaration with regard to their legal character in the sense of status or with regard to any right to property. The case of Muhammad Farooq Khan v. Sulaiman A.G. Punjurani PLD 1979 Kar. 88 is referred. The term right to, property can mean both tangible and intangible rights. In coming to this conclusion reliance is placed on the case of T.J. Trust, Bombay v. CIT (Appeal) PLD 1958 SC (Ind :) 140 and Ahmed Arif v. CWT (1969) 2 CC, 471, wherein it has been held that the term property is a term of the widest import, and subject to any limitation or qualification which the context might require, it signifies every possible interest which a person can acquire, hold or enjoy. In case of Ahmed Ali v. The State PLD 1957 Lah. 207 it was held that "property" may not have a market value for the person concerned yet it may not be quantifiable in monetary terms. In the present case the plaintiff has claimed his right to be dealt in accordance with Constitution. This right is a valuable property right as citizen of the country, though intangible in nature. Even otherwise the plaintiff has in substance claimed that it is not obliged to pay a certain amount of money as fee under an alleged invalid law. In other words, he right in money is substantially in issue. Traditionally the Courts have construed section 42 of the Specific Relief Act very strictly resulting in non-suiting litigants on mere technicality. The Courts thereafter have developed techniques to defeat the technicalities and provide substantial justice to litigants through the process of construction and interpretation. In Muhammad Ilyas Hussain v. Cantonment Board PLD 1976 SC 785 the Supreme Court had observed that it was not always necessary for the plaintiff to sue for declaration for his title as substantive relief for injunction only as a consequential relief. In Hyderabad Municipal Corporation v. Fateh Jeans Ltd. 1991 MLD 284 a learned Single Judge of this Court while interpreting section 42 of the Specific Relief Act was pleased to hold that even if the person was not an owner of the property he could be entitled to a declaration in relation thereto. In ICP v. S. Ahmed Sarwana, Advocate 1987 MLD 2442 another learned Single Judge of this Court found that even where a person was disentitled to, declaratory relief under section 42, he could be granted permanent injunction. A somewhat similar view was also taken by another learned Single Judge of this Court in Shahid Mahmood v. KESC 1997 CLC 1936 wherein it was observed that even if the plaintiff could not be granted a declaration as to legal character, relief by way of permanent injunction to prevent breach of an obligation could always be granted and this was independent of his right to seek damages. The traditional strict view of section 42 that the same is exhaustive now seems to have watered down. Earlier also in Robert Fischer v. Secretary of State of India (1899) ILR 22 Mad. 270 (Privy Council it was held that section 4.2 of the Specific Relief Act was not exhaustive of the circumstances in which a person could ask for a declaratory relief. In the case of Shri Krishina Chandra v. Mahabir Parsad AIR 1933 All. 488 the Allahabad High Court categorically held that section 42 of the Specific Relief Act was not exhaustive so as to exclude all other forms of declaratory suits. Similar view have been taken in the case of Vangipuram Venkatacharyulu v. Shri Rajah Vasireddi AIR 1935 Mad. 964, Desu Reddiar v. Srinivasa Reddi AIR 1936 Mad. 605 and Sisir Kumar Chandra v. Smt. Monrama Chandra AIR 1972 Cal. 283 at p.290. The Supreme Court of India has also recognized in Ramasraghava Reddy v. Sheshu Reddy AIR 1967 SC 436 that where the declaration sought by the plaintiff falls outside the purview of section 42 of the Specific Relief Act, the declaration could be governed by the general provisions of the Civil Procedure Code like section 9 or Order VII, rule 7, **I subscribe to latter line of cases and hold that. Section 42 of the Specific Relief Act is not exhaustive of the circumstances in which declaration is to be given. A declaration may well be given in circumstances not covered by section 42 of the Specific Relief Act in which case the general provisions of law shall govern the declaration sought. It serves no useful purpose to beat about the bush and spend enormous time and effort only to determine the much debated issue as to whether a plaintiff possesses**

² 2003 CLC 649

the legal character so as to afford him a declaration under section 42. No doubt there is some conflict in judicial authority as to whether section 42 is exhaustive, however, the line of authorities which spell out that section 42 if not exhaustive is to be given preference. Even in Pakistan there is direct authority for the proposition that the section 42 is not exhaustive. The case of Salimullah Beg v. Motia Begum PLD 1959 Lah. 429 is referred. The Court in substance has to see whether the plaintiff in the facts and circumstances of the case should or should not be granted a declaration. At the end of the day the Court has to dispense substantive justice and assess what is fair or unfair in the attaining circumstances. The case of Imtiaz Ahmed v. Ghulam Ali PLD 1963 SC 382 is referred."

The decision of the Learned Single Judge having held that Section 42 of the SRA, 1877 was not exhaustive, it was therefore open for this Court to also grant relief that was available in its Constitutional Jurisdiction in the Original Civil Jurisdiction of a Court.

12. This decision was approved and followed by a Division Bench of this Court in the matter reported as **Arif Majeed vs. Board of Governors Karachi Grammar School³** wherein this Court allowed for a declaration to be issued regarding an illegality perpetuated by public functionaries or by persons performing duties akin to public functions and wherein it was held that:

" ... "18. We have given our anxious consideration to the question involved after having noticed that both views, as to Section 42 being exhaustive or otherwise have been taken by superior Courts in the subcontinent. Possibly one reason for divergence of judicial opinion appears to be that when the Specific Relief Act was enacted in 1877 the concept of rights which could be enforced through Courts was largely confined to "status" as understood in a feudal social context or rights pertaining to property in a laissez-faire economy. With the development of jurisprudence over more than a century a large number of other rights which did not strictly speaking, relate to status of an individual or deal with tangible property came to be recognized by law and some of them in the form of guaranteed fundamental rights. The right of privacy, to carry on the business of one's choice, access to public information and a large body of social and cultural rights neither relate to status in the traditional sense nor tangible property. Keeping in view the well-settled principle that wherever there is a right there must always be a remedy to enforce it persuaded Courts not to remain bound within the technicalities of Section 42 for the purposes of granting relief.

19. Moreover, Article 4 of the Constitution guarantees to every citizen the inalienable right to be treated in accordance with law. This guarantee, which has been often described as embodying the right of law does not operate merely against the instrumentalities of the state. Article 5 stipulates obedience to the law and the Constitution as the inviolable obligations of every citizen. **It would indeed be anomalous to suggest that a victim of illegal action has to go without redress because sub-constitutional legislation does not lay down the mode for enforcing his rights. For this reason too, we are persuaded to hold that the view that the provisions of Section 42 of Specific Relief Act are not exhaustive seems to be preferable."**

Each of these decisions has held that the provisions of Section 42 of the SRA, 1877 are not exhaustive and it is open for a plaintiff to seek declaratory relief to

³ 2004 SBLR (Sindh) 433

challenge the vires of a law or to seek a declaration as to an illegal act committed by a public officer in excess of their jurisdiction and once such a declaration is given, needless to say, orders granting injunctive relief to restrain such an act could be issued by a Court in its Original Civil Jurisdiction.

C. The Anomalies Created By the Concurrent Jurisdiction of a Court exercising Original Civil Jurisdiction and Constitutional Jurisdiction and the Remedies Available to Courts to Deal with Such issues

(i) The Anomalies

13. We have no hesitation in holding that each of these two decisions mentioned hereinaove are clearly correct. However, what has been found by such an interpretation having been cast on Section 42 of the SRA, 1877 is that an overlap now exists as between the Constitutional Jurisdiction exercised by this Court with the Original Civil Jurisdiction of a Civil Court and being concurrent jurisdictions it would therefore be open to a person to either elect to file a Suit in the Original Civil Jurisdiction of a Civil Court or in the alternative to file a Petition in the Constitutional Jurisdiction of this Court to seek the same relief. Unfortunately neither of these two decisions has opined on how such concurrent jurisdictions are to be regulated, if at all. Amongst, the problems that arise are that:

- (a) a Suit is filed in the Original Civil Jurisdiction of this Court against the Government and Injunctive relief is obtained restraining the Government from acting in particular manner. A third party who is not a party to that Suit but who is impacted by that order files a Petition in this Court's Constitutional Jurisdiction and without making the Plaintiff in the Suit a party, seeks to compel the Government to do the same act which has been restrained in the Suit and obtains orders thereby "trumping" the order passed in the Original Civil Jurisdiction;
- (b) In a common cause as against the Government, Suits are filed by various persons in the Original Civil Jurisdiction of this Court and Petitions are filed by different persons in the Constitutional Jurisdiction of this Court and wherein interim relief which was not granted in one jurisdiction is granted in the other; and

- (c) a Suit is filed in the Original Civil Jurisdiction of this Court against the Government by a person and having failed to obtain an interim Injunctive relief the person withdraws that *lis* and invokes this Court's Constitutional Jurisdiction having not disclosed the filing of the original *lis* and thereafter obtains injunctive relief, the Court being none the wiser.

Such issues, which can solely be attributed to the Courts concurrent jurisdiction, are a cause of some concern as the litigant indulges in practices which have come to be known as "Forum Shopping" and which lead to various "tactics" being used by ably advised litigants and which at times prevents a person from obtaining relief on merits and on other occasions can lead to consequences which only be referred to as an "abuse of process." Clearly the state of affairs is not acceptable.

(ii) **Res Sub-Judice**

14. There are various legal principles that can be invoked to deal with the issues identified hereinabove. Section 10 of the Code of Civil Procedure, 1908 codifies the rule of Res Subjudice and states that:

" ... 10. No Court shall proceed 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, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in Pakistan having jurisdiction to grant the relief claimed, or in any Court beyond the limits of Pakistan established or continued by the Central Government and having like jurisdiction, or before the Supreme Court.

Explanation.- The pendency of a suit in a foreign Court does not preclude the Courts in Pakistan from trying a suit founded on the same cause of action."

In a decision reported as **Ali Mushtaq and others vs. Federation of Pakistan and others**⁴ a Learned Single Judge of this Court while considering the scope of Section 10 of the Code of Civil Procedure, 1908 has held that:

" ... 20. The object of Section 10 is to prevent courts of concurrent jurisdiction from simultaneously trying two parallel suits in respect of same matter in issue and thus the insertion of section 10 is to avoid two parallel trials on the same issues. Even if the cause of action and some consequential relief prayed for is added and/or some of the issues in a former and subsequent suits may differ, that will not be a ground for non-application of Section 10 *ibid*, if it is being observed that the final decision in the earlier suit may either operate as *res judicata* or would materially affect the proceedings and trial of subsequent suit, which effect could be seen is

⁴ 2024 CLC 18

the instant case. Reliance is placed on the case of Shri Ram Tiwari v. Bholi Devi reported in AIR 1994 Patna 76.

21. The legislature has purposely carved out the language of Section 10 to include all those issues which are directly and substantially in issue in previously instituted suit and does not talk about identical and similar nature of issues and reliefs. It is enough if the relief claimed in the subsequent suit is somehow directly and substantially linked with the earlier one. Any formal or informal addition of a party having no substantial effect to the proceedings and the relief claimed, will not materially affect the operation of Section 10 CPC. Reliance is placed on the case of S.K. Rangta & Co. v. Nawal Kishore Debi Prasad reported in AIR 1964 Calcutta 373."

We are inclined to agree with the Learned Single Judge in terms of the interpretation of Section 10 of the Code of Civil Procedure, 1908 and are clear that wherever concurrent jurisdictions exist, the courts should avoid to simultaneously try two suits the issues involved in which to be decided are "*directly and substantially*" the same. While there can be no question that this provision is applicable as between two civil courts exercising its Original Civil Jurisdiction and as to the principles of the Code of Civil Procedure, 1908 applying to regulate the procedure of the Constitutional Jurisdiction of this Court, we are mindful that while the provisions of Article 199 are "subject to the constitution", there is no exception created in Article 199 of the Constitution whereby this Court's Constitutional jurisdiction cannot be invoked on account of the pendency of a suit in another jurisdiction. Nevertheless, we are of the opinion that, **where applicable**, the **principles** of the provisions of Section 10 of the Code of Civil Procedure, 1908 should be applied as between proceedings pending in the Original Civil Jurisdiction of a court and in the Constitutional Jurisdiction of this Court to stay a proceeding when another court has jurisdiction over the same *lis* in either of its jurisdictions.⁵

(ii) The Principles of Judicial Propriety and Comity

15. The Supreme Court of Pakistan has in the decision reported as **Water and Sanitation Agency, Lahore through M.D. vs. Lottee Akhtar Beverages (Pvt.) Ltd. Lahore and others**⁶ opined that where two Courts each have concurrent jurisdiction and one court has assumed jurisdiction of an issue, propriety would demand that the second court should not have invoked its jurisdiction. In this matter the Supreme Court of Pakistan had taken *suo moto* notice of an issue under Sub-Article (3) of Article 184 of the Constitution. A petition was moved before the Lahore High Court, Lahore in its Constitutional Jurisdiction on the same issue

⁵ See **The Election Commission of Pakistan vs. Pakistan Tehreek-E-Insaf** PLD 2024 SC 295 where the principles of Section 10 of the Code of Civil Procedure, 1908 were invoked by the Supreme Court of Pakistan in respect of two petitions preferred under Article 199 of the Constitution before two separate High Courts in different provinces.

⁶ 2019 SCMR 1146

and in which orders were passed which in effect negated orders passed by the Supreme Court of Pakistan. While acknowledging that the jurisdiction of the Supreme Court of Pakistan under Sub-Article (3) of Article 184 of the Constitution and the Constitutional Jurisdiction of the High Court were concurrent it was held that:

“ ... 2. The LDA notification dated 18.01.2019 levies a water tariff in the purported compliance of the directions contained in our order dated 06.12.2018. The private respondents are aggrieved by the tariff charged under the LDA notification. However, instead of bringing their objections before the Implementation Bench, the respondents chose to file a Writ Petitions before the learned Lahore High Court to express their misgivings. By the impugned order dated 28.02.2019 the learned High Court suspended the LDA notification. We consider that any flaws or deficiencies in the steps taken by the Provincial Governments for the enforcement of this Court's directions are to be highlighted in the proceedings of SMC No.26 of 2018 before the Implementation Bench of this Court. By entertaining and adjudicating such a challenge to the LDA notification, the learned High Court has surprisingly and to our disappointment assumed jurisdiction over a lis that is sub judice before this Court. Such course of action clearly offends the settled norms of judicial propriety and comity, which is disapproved.”

16. As per the order of the Supreme Court of Pakistan where a court has assumed jurisdiction of a *lis* and passed an order and which *lis* remains sub-judice before that Court, another Court, even if it had concurrent jurisdiction should not invoke its jurisdiction over such a matter and should instead direct the person instituting such a *lis* to approach the Court who passed that order to redress whatever grievance they may have. We note however that whether or not such a rule would apply irrelevant as to the judicial hierarchy of a Court has not been addressed by the Supreme Court in their decision. We however are of the opinion that under the principles of Judicial Propriety and Comity, where a court has assumed jurisdiction over an issue and has passed an order which is impacting a person who chooses to invoke the same cause before another court having concurrent jurisdiction, the course of action that should be adopted by the Court is to direct the litigant to seek his relief by seeking to become a party in those proceedings and to seek modification of the order or by filing an appeal as against that order to set the order aside and not to indirectly circumvent the order by seeking contradictory relief from a Court which is higher in the judicial hierarchy.

(iii) Whether this Court can invoke its Constitutional Jurisdiction against an order passed by a Learned Single Judge of this Court exercising its Original Civil Jurisdiction.

17. The Suit at Karachi has been maintained under this Courts Original Civil Jurisdiction. As clarified hereinabove the jurisdiction being exercised by this Court

is that of a Civil Court under the provisions of Section 7 read with Section 24 of the Sindh Civil Courts Ordinance, 1962. Notwithstanding the status of our Court being that a High Court such a jurisdiction has been considered to be a jurisdiction of a civil court as opined by the Supreme Court of Pakistan in the decision reported as **Searle IV Solution (Pvt.) Limited v Federation of Pakistan**⁷ where while making such a distinction held that:

“ ... *Therefore, even prior to the Order of 1955, this Court, in light of section 14 of the Act of 1926, was a "High Court" merely exercising the original civil jurisdiction for the District of Karachi. As insisted upon by the learned counsel for the appellants, we are convinced by the argument that in light of the above, the Single Bench of the Sindh High Court, regardless of what jurisdiction it exercises, is a "High Court" and will always remain a High Court because it is a constitutional Court and is not a District Court, therefore the two cannot be equated by any stretch of imagination.*”

The Status of this Court as being a “High Court” constituted under Sub-Article(1) of Article 175 of the Constitution of the Islamic Republic of Pakistan, 1973 and not a District Court having been clearly articulated by the Supreme Court of Pakistan, the secondary question is as to whether when exercising its Original Civil Jurisdiction, the High Court of Sindh at Karachi exercises its jurisdiction as a High Court or that of a District Court? This question was also unequivocally answered by the Supreme Court of Pakistan in **Searle IV Solution (Pvt.) Limited v Federation of Pakistan**⁸ wherein it was held that:

“ ... The question of the status of the Single Bench of the Sindh High Court at Karachi, stands conclusively decided in the judgment of Province of Sindh v. Haji Razaq judgment (supra) which relies almost entirely on Justice Waheeduddin Ahmed, J's judgment in Firdous Trading Corporation v. Japan Cotton and General Co. Ltd. (supra) wherein he had in unequivocal words stated that:

*"I have not the slightest doubt on the language of section 3 of Sindh Act, 1926 and the definition of "District" in section 2(4) of the Civil Procedure Code, **that it was exercising District Court jurisdiction in contradistinction to the ordinary original civil jurisdiction of the High Court.** In my opinion the mere fact that the Sindh Chief Court later on was included within the definition of High Court under section 219 of the Government of India Act, did not change the nature of this jurisdiction."*

This view, being the conclusive view of this Court ever since Haji Razzaq's case (supra) as the settled law on the matter shall prevail.”

⁷ 2018 SCMR 1444. This decision was relied upon in an unreported Division Bench judgement of this Honorable Court, dated 12.03.2021, passed in C.P. No. D-1465 of 2021: **Ahmed & Kamran Trader (Pvt.) Limited v Federation of Pakistan.**

⁸ *Ibid*

By this decision the Supreme Court of Pakistan has clarified that while this Court continues to be a “High Court” constituted under Sub-Article (1) of Article 175 of the Constitution of the Islamic Republic of Pakistan, 1973 it has the capacity to exercise jurisdictions conferred on it in accordance with Sub-Article (2) of Article 175 of the Constitution of the Islamic Republic of Pakistan, 1973 by “the Constitution or by or under any law” and is in law exercising the jurisdiction of a District Court.

18. The Constitutional Jurisdiction exercised by this Court under under Sub-Clauses (i) and (ii) of Clause-(a) of Sub-Article 1 of Article 199 of the Constitution and under Sub-Clauses (i) and (ii) of Clause-(b) of Sub-Article 1 of Article 199 of the Constitution are each to be invoked as against a “person”. The expression person is defined in Sub-Article (5) of Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 and which reads as hereinafter:

“ ... (5) In this Article, unless the context otherwise requires, -

"person" includes any body politic or corporate, any authority of or under the control of the Federal Government or of a Provincial Government, and any Court or tribunal, other than the Supreme Court, a High Court or a Court or tribunal established under a law relating to the Armed Forces of Pakistan; and "prescribed law officer" means

(a) in relation to an application affecting the Federal Government or an authority of or under the control of the Federal Government, the Attorney-General, and

(b) in any other case, the Advocate-General for the Province in which the application is made."

As is apparent the definition of the expression “person” as used in Sub-Article (5) of Article 199 of the Constitution inter alia excludes right to pass an order against the Supreme Court of Pakistan or against a High Court and as against and hence while exercising our jurisdiction under Article 199 we are of the opinion that while exercising our Constitutional Jurisdiction we cannot give a direction as against a High Court i.e. any judge of a High Court. We are therefore left to consider that despite the jurisdiction being exercised by this Court at a principal seat at Karachi of an original civil jurisdiction being that of District Court while, the status of this Court remains that of a High Court can our jurisdiction under Article 199 of the Constitution be exercised as against any order passed by this Court under its original civil jurisdiction?

19. We have considered this issue and are of the opinion that while the jurisdiction being exercised by a Learned Single Judge hearing a suit in the

Original Civil Jurisdiction of this Court is clearly that of a District Court, nevertheless the status of the Judge passing such an order is unquestionably that of a Judge of the High Court. In the decision of the Supreme Court of Pakistan reported as **Chief Justice of Pakistan Iftikhar Muhammad Chaudhry vs. President of Pakistan through Secretary**⁹⁹ while interpreting the expression “person” as indicated in Sub-Article 5 of Article 199 of the Constitution it was held that:

“ ... *What emerges from the provisions of clause (5) of Article 199 of the Constitution and also from some precedent cases is that writs should not issue from one High Court to another High Court or from one Bench of a High Court to another Bench of the Same High Court because that could seriously undermine and prejudice the smooth and harmonious working of the Superior Courts. But this should never be understood to mean that no writ could ever issue to a Judge in his personal capacity or where a Judge was working as a PERSONA DESIGNATA.*”

On the basis of the above judgement, we believe that the correct position is that if a Judge is exercising a Judicial function, as opposed to an administrative function, in a High Court, the same cannot be challenged, either directly or indirectly, in this Court’s Constitutional Jurisdiction. However if this Court is acting in a personal capacity, an administrative capacity or as a Persona Designata, the Constitutional Jurisdiction of a a Court can be invoked. In respect of the matter in hand we are clear that in the event that we exercise our Constitutional Jurisdiction we would in effect, directly or indirectly be impugning the Order in the Suit which is a **judicial order** of a Judge of the High Court and which to our mind is specifically prohibited by the exclusion of a High Court in the definition of the expression “person” as given under Sub-Article 5 of Article 199 of the Constitution.

D. The Opinion of this Court

20. On the basis of the facts of this Petition as narrated hereinabove, we have considered that jurisdiction of this Court, keeping in mind that the impact of any order passed by this Court in its Constitutional Jurisdiction would directly or indirectly impact proceedings in the Suit at Karachi by negating the order in the Suit. In respect of the issue of Res Subjudice we are of the opinion that while the issue in this Petition is “*directly and substantially in issue*” in the Suit at Karachi, it cannot be considered that the Suit at Karachi is as between the “*same parties, or between parties under whom they or any of them claim litigating under the same*”

⁹⁹ PLD 2010 SC 61, See also **Gul Taiz Khan Marwat vs. The Registrar, Peshawar High Court, Peshawar** PLD 2021 SC 391

title". We are therefore of the opinion that as Section 10 of the Code of Civil Procedure, 1908 cannot be invoked to stay the proceedings in this Petition.

21. Regarding the principles of Judicial Propriety and Comity as clarified by the Supreme Court of Pakistan in respect of concurrent jurisdictions of courts, we are obligated to follow the decision reported as **Water and Sanitation Agency, Lahore through M.D. vs. Lottee Akhtar Beverages (Pvt.) Ltd. Lahore and others**¹⁰ wherein it was held that where two courts have concurrent jurisdiction and where a court has already exercised such a jurisdiction over a *lis*, the Second Court should refrain from exercising its jurisdiction over the same *lis*. On this basis as it is accepted that the sole obstacle in the Petitioners obtaining relief is on account of the Order in the Suit, we are inclined not to exercise our concurrent Constitutional Jurisdiction to interfere with orders passed in those proceedings.

22. Finally, we are mindful, that the Learned Single Judge who has exercised his jurisdiction to adjudicate the Suit at Karachi has done so in his judicial capacity and has not exercised such a jurisdiction in either in his personal capacity, administrative capacity or as a Persona Designata. We therefore are also of the opinion that exercising our Constitutional Jurisdiction we would in effect be partially setting aside the order passed by the Learned Single Judge in the Suit at Karachi and which jurisdiction we do not have on account of the definition of the expression "person" in Sub-Article 5 of Article 199 of the Constitution.

23. While concluding we have been made aware of an unreported order passed by a Division Bench of this Court in CP No. D-176 of 2023 entitled **Ajid Ali Jatoi and others vs. Province of Sindh and others** where in similar circumstances on 19 March 2024 directions were given to finalise the employment of those Petitioner notwithstanding the pendency of any interim orders in any suit. We have given our anxious consideration to that order but respectfully find ourselves of the opinion that in light of the decision of the Supreme Court of Pakistan reported as **Water and Sanitation Agency, Lahore through M.D. vs. Lottee Akhtar Beverages (Pvt.) Ltd. Lahore and others**¹¹ and **Chief Justice of Pakistan Iftikhar Muhammad Chaudhry vs. President of Pakistan through Secretary**¹² in which the aforementioned principles of law have been settled, that decision is clearly per incuriam and cannot be followed.

¹⁰ 2019 SCMR 1146

¹¹ *Ibid.*

¹² PLD 2010 SC 61, See also **Gul Taiz Khan Marwat vs. The Registrar, Peshawar High Court, Peshawar** PLD 2021 SC 391

24. For the foregoing reasons we are of the opinion that:

- (i) in terms of principles of Judicial Propriety and Comity as clarified by the Supreme Court of Pakistan in respect of concurrent jurisdictions of courts, we are obliged to follow the decision reported as **Water and Sanitation Agency, Lahore through M.D. vs. Lottee Akhtar Beverages (Pvt.) Ltd. Lahore and others**¹³ and in accordance with this Court should not exercise its Constitutional Jurisdiction on account of jurisdiction of the *lis* having been invoked before a Learned Single Judge of this Court in the Suit at Karachi;
- (ii) in terms of the definition given to the expression “person” in Sub-Article 5 of Article 199 of the Constitution, by exercising our Constitutional Jurisdiction in this Petition we would in effect be setting aside the Order in the Suit which is a judicial order passed by a Judge of a High Court, and which we are jurisdictionally prohibited from doing.

The Petition is as such not maintainable and is dismissed along with all listed applications, with no order as to costs.

Judge

Judge

¹³ 2019 SCMR 1146

Nasim/P.A