KTBA Karachi Tax Bar Association

07th OF 2024 KTBA ONE PAGER CASE LAW UPDATE (AUGUST 19, 2024)

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Dear Members,

A brief update on a judgment by the Supreme Court of Pakistan on **"A High Court decision is not binding on other High Courts; A Supreme Court decision is binding on all courts but not on Supreme Court"** is being shared with you for your knowledge. The order has been attached herewith the update.

This update is in line with the efforts undertaken by our **"CASE LAW UPDATE COMMITTEE"** to apprise our Bar members with important court decisions.

You are equally encouraged to share any important case law, which you feel that should be disseminated for the good of all members.

You may contact the Committee Convener Mr. Shams M. Ansari or at the Bar's numbers 021-99212222, 99211792 or email at info@karachitaxbar.com & ktba01@gmail.com

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President

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Hon. General Secretary

07th OF 2024 KTBA ONE PAGER
CASE LAW UPDATE
(August 19, 2024)

A High Court decision is not binding on other High Courts

A Supreme Court decision is binding on all courts but not on Supreme Court

Appellate Authority: Supreme Court of Pakistan (SC)
Appellants: The Additional Collector (Adjudication)
Section: 3A of the FED Act, 2005

Detailed judgment was issued on June, 12 2024.

Background: An appeal was filed against the SHC judgment dated February 22, 2013, which declared Section 3A of the FED Act, 2005 void ab-initio. Section 3A was introduced by the Finance Act, 2007 and omitted by the Finance Act, 2011. It allowed the Federal Government to issue a SRO 655 of 2007 specifying goods for special excise duty, effective from July 1, 2007. The SC had previously addressed the controversy in another judgment dated October 18, 2011, but two counter-appeals were resolved in the latest judgment. The SC over-ruled the SHC judgment.

Decision of the Court:

First Ruling of the Court:

BINDING PRECEDENT

The SC had confirmed the validity of a Notification related to Section 3A, making it binding on other courts. Consequently, the SHC should not have ruled on a matter that had already been settled by the SC. The LHC decision, upheld by the SC earlier was final and binding, rendering contrary ruling by the SHC unsustainable.

Without altering the final outcome of the judgment, the Chief Justice of the Supreme Court did not agree about the binding nature of Lahore High Court judgment on the Sindh High Court and held that a judgment is only binding on a sub-ordinate court.

Second Ruling of the Court:

LIMITED LEGISLATIVE DELEGATION

Section 3A of the FED Act, 2005, intended to levy a "Special excise duty" on all goods produced, manufactured and imported into Pakistan. The Federal Government was empowered to select specific goods for this duty and could set conditions and restrictions through official notifications. The collection of this duty was at the discretion of the Federal Government but the rate and guidelines were set by the legislature. The delegation of power to the Federal Government was limited to ancillary functions, with clear standards and principles provided by the legislature.

Third Ruling of the Court:

JUDICIAL DEFERENCE (RESPECT) FOR LAW

This Supreme Court held that laws should be upheld rather than invalidated and courts should favor their constitutionality. Legislating is the exclusive prerogative of the legislature, presumed to act validly and constitutionally. Courts cannot rewrite laws or the Constitution and should not lightly strike down laws. They must reconcile statutes with the Constitution, invalidating them only when absolutely necessary. Laws cannot be struck down on ethical or philosophical grounds and no malice can be attributed to the legislature. Courts must support representative governance and apply strict criteria in judicial reviews.

Fourth Ruling of the Court:

ALL POWERS EXCEPT THE POWER TO MAKE LAW, CAN BE DELEGATED

It is established that essential legislative functions cannot be delegated beyond reasonable limits, as this would violate the Constitution. The fundamental legislative responsibility cannot be delegated. The Majlis-e-Shoora (Parliament) must fulfill primary constitutional functions, while it may delegate ancillary and administrative tasks to other agencies or authorities.

Fifth Ruling of the Court:

NO PRESUMPTION ALLOWED

Upon reviewing the High Court's reasoning for striking down Section 3A of the Act of 2005, it is clear that the decision was based on presumptions regarding the potential abuse of power by the Federal Government. This approach contradicts established principles regarding the striking down of legislative acts. The legislature did not relinquish its essential functions; rather, it delegated incidental and ancillary functions to the Federal Government. Consequently, the doctrine of impermissible excessive delegation of legislative authority was not applicable, and Section 3A should not have been invalidated.

THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:
Justice Qazi Faez Isa, CJ.
Justice Amin-ud-Din Khan
Justice Athar Minallah

CIVIL APPEALS NO.749 TO 758 of 2013, 900 OF 2014, 918, 943 TO 946 OF 2018 AND 1022 OF 2019

(Against the judgments dated 27.06.2011 of the Lahore High Court, Lahore passed in ICA No.288/2011, dated 22.02.2013 of the High Court of Sindh, Karachi passed in CP Nos.D-2123, D-2124, D-2126, D-2156, D-2127, D-2128, D-2129, D-2130 and D-2131 of 2011, dated 23.12.2013 of the High Court of Sindh, Karachi passed in CP Nos.D-4011 of 2013, dated 11.08.2015 of the High Court of Sindh Karachi passed in D-1116 of 2014, dated 2.10.2017 of the High Court of Sindh, Karachi passed in Exc. Ref. Appl. No.17 of 2013, Fed. Exc. Duty Spl. Ref. No.29 of 2013, Spl.F.E.R.A. No.156 of 2013 and dated 25.10.2018 of the High Court of Sindh, Karachi passed in CP-D-1094 of 2015)

Shahtaj Sugar Mills Ltd. and others *(in CA-749/2013)*

Commissioner Inland Revenue *(in CAs 750 to 758 of 2013, 900 of 2014, 918, 943, 944, 946 of 2018 & 1022 of 2019)*

The Additional Collector (Adjudication) *(in CA-945/18)*
Appellants.

Versus

Govt. of Pakistan thr. Secretary Finance, etc. *(in CA-749/2013)*
Sakrand Sugar Mills Ltd. *(in CA-750/2013)*
Habib Sugar Mills Ltd. *(in CA-751/2013)*
Al-Noor Sugar Mills Ltd. *(in CA-752/2013)*
Faran Sugar Mills Ltd. *(in CA-753/2013)*
Mirpur Khas Sugar Mills Ltd. *(in CA-754/2013)*
Sindh Abadgar's Sugar Mills Ltd. *(in CA-755/2013)*
Shahmurad Sugar Mills Ltd. *(in CA-756/2013)*
Mehran Sugar Mills Ltd. *(in CA-757/2013)*
Al-Abbas Sugar Mills Ltd. *(in CA-758/2013)*
M/s Dewan Cement Ltd. and others *(in CA-900/2014)*
M/s Pakistan Beverages Ltd. *(in CA-918/2018)*
M/s Bawani Sugar Mills Ltd. *(in CA-943/2018)*
M/s Baba Farid Sugar Mills Ltd. *(in CA-944/2018)*
M/s Shabbir Tiles & Ceramics Ltd. etc *(in CA-945/2018)*
M/s Dewan Sugar Mills Ltd. *(in CA-946//2018)*
M/s Hamza Sugar Mills Ltd. and another *(in CA-1022/2019)*
Respondents

For the appellant(s): Rana Munir Hussain, ASC
(In CA 749/13)

Mr. Irfan Mir Helepota, ASC
(in CAs 750 to 758/2013, 900/2014, 943 & 946/2018 & 1022/2019)

Dr. Shah Nawaz, ASC
a/w Usman Azam Bhatti, Dy. Commissioner
Abid Rasool, Addl. Commissioner
Abdul Wahid Shar, Addl. Commissioner
(In CA 918 and 945/2018)

Ch.Muhammad Zafar Iqbal, ASC
(In CA 944/2018)

For the Federation: Rana Asadullah Khan, Addl. Attorney General
(In CA 749/2013)

For respondent No.1: Mr.Tariq Bilal, ASC
(In CA 900/2014)

Mr.Khalid Javed Khan, ASC
(In CA 918/2018) (via video link, Karachi)

Mr. Iqbal Salman Pasha, ASC
(In CA 943 and 946/2018)

Mr. Arshad Shahzad, ASC
(In CA 945/2018) (via video link, Karachi)

Mr. Khalid Mahmood Siddiqui, ASC
(In CA 1022/2019)

Date of hearing: 06.12.2023

JUDGMENT

Athar Minallah, J.- These appeals before us involve common questions of law and, therefore, we shall decide them through this consolidated judgment. The petitions were converted into appeals pursuant to grant of leave vide order dated 27-06-2013.

2. All the appeals, except one, have arisen from the judgment of the High Court of Sindh, dated 22-02-2013, while the latter assails the consolidated judgment passed by the Lahore High Court. The constitutional petitions filed before the High Court of Sindh were allowed and the department has challenged the consolidated judgment, while the petitions filed before the Lahore High Court were dismissed.

As will be explained later, the consolidated judgment of the Lahore High Court was upheld by this Court and thus it has attained finality.

3. The dispute was regarding the vires of section 3A of the Federal Excise Act 2005 ('**Act of 2005**') and the notification issued by the Federal Government in exercise of powers conferred there under. A Bill was introduced in the National Assembly of the Majlis-e-Shoora (Parliament) and it was passed on 22.6.2007. The object was to amend the Act of 2005 by inserting of a new provision i.e. section 3A. It received the assent of the President on 30-06-2007. The Finance Act 2007 was thereafter published in the official gazette and the insertion of section 3A took effect on 01-07-2007. Section 3A, which was inserted through the Finance Act 2007, had empowered the Federal Government to levy and collect, subject to such conditions, limitations or restrictions as it may deem fit to impose, special excise duty on goods produced or manufactured in Pakistan and goods imported into Pakistan. The exercise of this power was through the publication of a notification in the official gazette. The legislature had expressly fixed the rate of the levy and collection as one percent of the value of the specified goods. Subsequently, the rate was increased to two and half percent of the value through the Federal Excise (Amendment) Ordinance, 2011. It is noted that section 3A was omitted through the Finance Act 2011 which was assented on 29.06.2011. The Federal Government had issued a notification i.e. S.R.O. 655(I)/2007, dated 29.6.2007 ('**Notification**'), specifying the goods for the purposes of levy and collection of the special excise duty under section 3A of the Act of 2005. It was explicitly stated in the notification that it shall take effect on 01.07.2007. The Notification was assailed before the Lahore High Court by several aggrieved persons but they had not questioned the vires of section 3A of the Act of 2005. The petitions were dismissed by a Single Judge vide

judgment dated 30.5.2011 and the Intra Court Appeals heard by a Division Bench were also dismissed vide judgment dated 27.6.2011. The said judgment was assailed before this Court by seeking leave under Article 185(3) of the Constitution. A Bench, consisting of three Judges of this Court, refused to grant leave and consequently dismissed the petitions vide judgment dated 18.10.2011.[1] This Court had observed that no prejudice or injustice was caused because the notification was acted upon after 01.07.2007 when insertion of section 3A had also taken effect. It is not disputed that the judgment of the Lahore High Court had attained finality. However, one of the petitions, i.e. CPLA No.1625-L of 2011, which had also assailed the consolidated judgment of the Lahore High Court, could not be fixed with the other petitions. This petition came up for hearing much later and it was converted into an appeal i.e. CA 749 of 2013, pursuant to leave having been granted vide order dated 27.6.2013. The petition was fixed and heard along with multiple petitions that had assailed the judgment of the High Court of Sindh. We have observed that the crucial fact regarding the dismissal of several petitions and upholding the judgment of the Lahore High Court by this Court was not brought to the attention of the Bench which appears to have led to grant of leave. Nonetheless, the consolidated judgment of the Lahore High Court, which had sustained the vires of the Notification, had already attained finality since leave was refused and all the petitions, except the aforementioned petition, filed under Article 185(3) of the Constitution were dismissed. The vires of section 3A and the Notification had also been assailed by aggrieved persons before the High Court of Sindh. The petitions were allowed through a consolidated judgment dated 22.02.2013 and consequently section 3A was declared *void ab initio*, a nullity in law and

[1] Shakarganj Sugar Mills and others v. Government of Pakistan and others (PTCL 2012 CL 604)

of no legal effect. The Notification was likewise declared a nullity and of no legal effect. The High Court had held that section 3A, inserted in the Act of 2005, was hit by the doctrine of impermissible and excessive delegation of legislative power to the delegatee i.e. Federal Government and therefore, it was struck down on this sole ground.

4. We have heard the learned counsels for the parties at great length and their written submissions have been carefully perused.

5. The controversy before us is regarding the vires of section 3A of the Act of 2005 and the Notification. The Notification was challenged before the Lahore High Court without questioning the vires of section 3A of the Act of 2005. The grievance was solely confined to the legality of the Notification. The High Court had dismissed the petitions and leave was refused by this Court. This Court had observed that since the demand for recovery of the special excise duty was raised after section 3A of the Act of 2005 had taken effect, therefore, no prejudice or injustice was caused to the petitioners. The judgment of the Lahore High Court attained finality and, therefore, the vires of the Notification stood affirmed. The order dated 18.10.2011 of this Court, whereby the judgment of the Lahore High Court had been upheld, was published in one of the law reports.

6. The petitions filed before the High Court of Sindh in 2011 were decided in 2013. We have noted, and it is obvious from the impugned judgment that none of the parties before the High Court had brought the judgment of this Court to the attention of the learned judge. It is also unexplained why one of the petitions challenging the judgment of the Lahore High was not fixed along with the other petitions. Moreover, at the leave granting stage the Bench was not informed that the judgment of the Lahore High Court had already been upheld and that

all the petitions fixed for hearing were dismissed. As already noted, the question regarding the vires of the Notification had attained finality and since this Court had upheld the judgment of the Lahore High Court, therefore, it had become binding on the other courts. The Sind High Court, therefore, could not have decided a matter which had attained finality after it was adjudicated by this Court by upholding the sustainability of the vires of the Notification. Even otherwise, it was correctly observed while upholding the judgment of the Lahore High Court that no prejudice nor injustice was caused because the demand was raised after 01-07-2007 i.e when the insertion of section 3A had taken effect. The finality attained by the judgment of the Lahore High Court had a binding effect on the other High Courts to the extent of the legality and vires of the Notification. The Sindh High Court could not have taken a contrary view by declaring the Notification as illegal and thus striking it down. The Notification was, therefore, declared to be valid and effective by the Lahore High Court and the judgment was upheld by this Court. It had attained finality and thus the judgment of the Sindh High Court was not sustainable regarding the legality and vires of the Notification.

7. The question regarding the vires of section 3A was challenged before the Sindh High Court in addition to the legality of the Notification. The vires of section 3A inserted in the Act of 2005 had not been questioned before the Lahore High Court. The High Court of Sindh had struck down section 3A on the touchstone of the doctrine of impermissible and excessive delegation of legislative power. Before we examine whether section 3A attracted the doctrine, it would be beneficial to discover the legislature's intent in the imposition of the especial excise duty there under. Section 3 provides that there shall be levied and collected duties of excise on goods and services specified in

clauses (a) to (e) of sub section 1 ibid. Sub section 3 empowers the Federal Board of Revenue to levy and collect duties subject to the fulfilment of the conditions expressly mentioned therein. The Federal Government has been vested with power and jurisdiction to charge, levy and collect a further duty at the rate of two percent of the value in addition to the specified rate. This power may be exercised by notification in the official gazette. The legislature, in the case of excise duties, has empowered the Board or the Federal Government, as the case may be, to levy and collect duties of excise and the conditions for exercising the powers have been specified. The legislature has manifestly expressed its intention to levy and collect duties of excise and has empowered the Board or the Federal Government to give effect to the levy and charge by fulfilling certain conditions. Such delegation of power by the legislature is not an unusual phenomenon. The legislature merely delegates the power to the Federal Government so as to enable it to work out certain details and exercise its discretion in order to achieve the object of the statute. The legislature, by no stretch of the imagination, abdicates its power and authority expressly provided under Article 77 of the Constitution. The delegation of powers under the respective sub sections of section 3 to the Federal Government or the Board, as the case may be, do not attract the mischief of the doctrine of impermissible and excessive delegation of legislative authority nor has it been declared as such by this Court. The purpose of referring to the delegation of powers to an outside authority was to show that it was not an unusual phenomenon. Such delegation of power to an outside entity has been made in other taxation statutes as well such as the Customs Act 1969 (**'Act of 1969**').

8. Section 3A was inserted through the Finance Act, 2007. A plain reading of the section shows that the legislature had intended to levy a

'special excise duty' on two categories; all goods produced and manufactured in and goods imported into Pakistan. The Federal Government was empowered to identify and select goods or classes of goods from the two aforementioned categories for the purposes of giving effect to the imposition of the special excise duty and such levy and collection was subject to conditions, limitations or restrictions as the Federal Government may deem appropriate. The power was exercisable by the Federal Government through the issuance and publication of a notification in the official gazette. The legislature had expressly fixed the rate of levy and collection of the special excise duty which was initially one percent and later it was increased to two and a half percent of the value of the specified goods. The levy of the special excise duty under section 3A was expressly declared by the legislature in addition to the duties of excise levied, charged and collected under section 3. It is obvious from the language of section 3 that the legislature had levied special excise duty on the two categories and goods but its collection was suspended and left to the discretion of the Federal Government. The rate of such levy and collection was fixed by the legislature itself. The policy of the imposition of special excise duty was implicit and the legislature itself had set forth the guidelines to be followed by the delegated authority. By no stretch of the imagination can it be construed that the legislature had delegated the essential legislative functions to the Federal Government. The legislature had merely delegated the ancillary and incidental functions to the Federal Government. The legislature had empowered the Federal Government to determine the goods for the purposes of collection of the special excise duty. Section 3A does not delegate unfettered power in the absence of standards set out by the legislature. The legislature has prescribed intelligible guiding principles to be applied while exercising the

delegated authority. The question that is to be answered is; whether the High Court was justified in striking down section 3A on the touchstone of the doctrine of impermissible and excessive delegation of legislative authority. In order to answer this question it would be beneficial to examine the settled principles regarding striking down a statutory provision and the relevance of the doctrine of impermissible and excessive delegation of legislative authority.

9. The Constitution is based on the seminal principle of trichotomy of powers. The legislature makes the laws, the executive executes it while the judicial branch is entrusted with the duty to interpret it. Article 141 of the Constitution explicitly declares that, subject to the Constitution, the Majlis-e-Shoora (Parliament) may make laws, including laws having extra-territorial operation, for the whole or any part of Pakistan. Likewise, a Provincial Assembly may make laws for the respective province or any part thereof. Article 142 sets out the powers of the Majlis-e-Shoora (Parliament) to make laws. Article 77 expressly provides that no tax shall be levied for the purposes of the Federation except by or under the authority of an Act of the Majlis-e-Shoora (Parliament). The Constitution has clearly set out the limits for each organ of the State and crossing these limits amounts to encroaching upon the domain of the other and consequently breaching the provisions of the supreme law. As already noted, making the law falls exclusively within the domain of the legislature. The judicial branch has no jurisdiction to promulgate laws and, therefore, stringent rules and principles have been laid down in the context of the exercise of the power of judicial review, relating to examining the vires of a law promulgated by the legislature. The foundational rule of interpretation is a presumption in favour of constitutionality. The burden to prove that the promulgated law is invalid is on the person who challenges its vires.

Based on the said rule, this Court has enunciated the principle that law should be saved rather than be destroyed and that courts must lean in favour of upholding the constitutionality of legislation.[2] The function of legislation is the exclusive prerogative of the legislature. The wisdom of the legislature to promulgate a law and to achieve a particular object and purpose cannot be questioned and, therefore, it is presumed that laws have been legally, validly and constitutionally promulgated on the basis of its competence. The courts have no jurisdiction or power to rewrite the laws and the Constitution. The promulgated laws or its provisions cannot be struck down lightly and it is the duty of the courts to make every possible effort to reconcile the statute to the Constitution and to strike it down when it becomes impossible to do so.[3] The courts are not empowered to strike down a law or its provision on higher ethical notions or on the basis of philosophical concepts and no mala fide can be attributed to the legislature. It is the duty of the courts to give effect to the scheme of representative governance of the State which is the foundation and the edifice of the Constitution is built on it. This Court has, therefore, laid down stringent and narrow grounds in the context of striking down a law or a provision while exercising the power of judicial review. In Ms. Imrana Tiwana's case[4] this Court, after surveying its jurisprudence, has summarised the grounds for striking down a law and they are as follows;

(i) There is a presumption in favour of constitutionality and a law must not be declared unconstitutional unless the statute is placed next to the Constitution and no way can be found in reconciling the two;

(ii) Where more than one interpretation is possible, one of which would make the law valid and the other void, the Court must prefer the interpretation which favours validity;

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[2] Elahi Cotton Ltd. v. Federation of Pakistan and others (PLD 1997 SC 582)
[3] Pakistan Lawyers Forum and others v. Federation of Pakistan and others (PLD 2005 SC 719)
[4] Lahore Development Authority and others v. Ms. Imrana Tiwana and others (2015 SCMR 1739)

(iii) A statute must never be declared unconstitutional unless its invalidity is beyond reasonable doubt. A reasonable doubt must be resolved in favour of the statute being valid;

(iv) If a case can be decided on other or narrower grounds, the Court will abstain from deciding the constitutional question;

(v) The Court will not decide a larger constitutional question than is necessary for the determination of the case;

(vi) The Court will not declare a statute unconstitutional on the ground that it violates the spirit of the Constitution unless it also violates the letter of the Constitution;

(vii) The Court is not concerned with the wisdom or prudence of the legislation but only with its constitutionality;

(viii) The Court will not strike down statutes on principles of republican or democratic government unless those principles are placed beyond legislative encroachment by the Constitution.

(ix) Mala fides will not be attributed to the Legislature

10. The Constitution does not expressly empower the Majilis-e-Shoora (Parliament) to delegate certain functions to an outside agency, authority or a person. However, this Court has consistently held that delegation of certain powers and functions is not an unusual phenomenon, rather it has become necessary in the present complex modern world to delegate certain functions in order to implement the object of a statute and to work out certain details.[5] But, simultaneously, it is settled law that since the Majilis-e-Shoora (Parliament) is a creation of the Constitution, therefore, it cannot exceed the boundaries expressly set out therein. The power to exercise legislative authority expressly provided under the Constitution cannot be abdicated by the legislature by way of delegation. The difficulty in discerning the exact limits within which the legislature may avail itself

[5]Federation of Pakistan and others v. Shaukat Ali Mian and others (PLD 1999 SC 1026)
Zaibtun Textile Mills Ltd. v. Central Board of Revenue (PLD 1983 SC 358)

of delegating certain functions to an outside agency or authority has been recognised in the United States by the Supreme Court. Chief Justice Marshal, who had delivered the opinion of the Court, observed that 'maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry, into which a Court will not enter unnecessarily.[6]

11. This Court, in Sirajul Haq Patwari's case[7] has cautioned that the doctrine of impermissible excessive delegation of legislative power must be exercised with greatest circumspection. Hamood-ur-Rehman, J., as he then was, has observed that before striking down a law a great amount of caution and care was necessary because it was bound to result, of necessity, in upsetting the legislative scheme. The cardinal principle of interpretation of the law should be to interpret it in such a manner that it should rather be saved than destroyed. The courts should lean in favour of upholding the constitutionality of the legislature and it is therefore incumbent upon the courts to be extremely reluctant to strike down laws as being unconstitutional. It was emphasized that this power should be exercised only when absolutely necessary, for injudicious exercise of this power was likely to result in grave and serious consequences.

12. It is settled law that the essential legislative functions cannot be delegated beyond reasonable limits because doing so would be in violation of the Constitution. The legislature, being the creation of the Constitution, does not inherently possess absolute legislative power but the same can only be exercised in conformity with the powers granted by the Constitution. The legislature, therefore, determines the legislative

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[6] Wayman v. Southard, 23 U.S. 1 (1825)

[7] The Province of East Pakistan and others v. Sirajul Haq Patwari and others (PLD 1966 SC 854)

policies and sets out the principles and standards for guidance of the delegated authority. The fundamental legislative responsibility, undoubtedly, cannot be delegated. The delegation must adhere to certain constraints. The general principles set out for exercising the power of legislation are met by the Majlis-e-Shoora (Parliament) and once that has been done, the delegation of the authority is confined to making subordinate legislation or to attend to other matters of administration and details. The primary functions expressly stated in the Constitution have to be fulfilled by the legislature itself while the latter may delegate ancillary and incidental functions to an outside agency or authority. This Court, in Shaukat Ali Mian's case[8] has drawn a distinction between a provision of a statute which may be ex facie discriminatory and the provisions which may be capable of pressing into service in an arbitrary and illegal manner. This Court has held that in case of the latter eventuality, the provisions cannot be struck down on the ground that it is capable of being used in a discriminatory manner. Any action taken pursuant to powers delegated under a provision will obviously be subject to the judicial review of the courts. In Mehram Ali's case[9], a statue had empowered the government to amend the schedule of the statute in order to add, modify or omit any entry by a notification. The argument raised before this Court that it attracted the doctrine of excessive delegation of legislative power and therefore it was ultra vires was not found to be persuasive. It was held that the delegation of such powers to the government by the legislature was not an unusual phenomenon. The delegation of legislative authority will be impermissible and excessive when the legislature has not laid down the policy of law, has failed to provide standards for guidance or when the essential legislative functions have been delegated to an outside entity

[8] Federation of Pakistan and others v. Shaukat Ali Mian and others (PLD 1999 SC 1026)
[9] Mehran Ali and others v. Federation of Pakistan and others (PLD 1998 SC 1445)

in violation of the limits set out in the Constitution. As long the legislature has set out procedural safeguards and has prescribed the standards, the delegation cannot be construed as impermissible or excessive. Moreover, the doctrine may become relevant if the delegated legislative authority is unrestricted and uncontrolled. In order to strike down a law on the basis of the doctrine of impermissible and excessive delegation of legislative power, great care has to be exercised by the courts. In case of doubt, the question of vires must be resolved in favour of upholding the law and every effort must be made to sustain the validity. Apprehension that the law could be abused cannot be a ground for striking it down.

13. We have already discussed the nature and extent of delegation under section 3A of the Act of 2005. We have also carefully perused the reasoning of the High Court in support of striking down section 3A of the Act of 2005. The reasoning is based on presumptions, rather on the apprehension, that the power vested in the Federal Government could be abused. This ground is definitely in violation of the principles enunciated in the context of striking down a law promulgated by the legislature as highlighted above. The legislature had not abdicated its essential legislative functions, rather, incidental and ancillary functions were delegated to the Federal Government. The doctrine of impermissible excessive legislative authority was not attracted and, therefore, section 3A could not have been struck down in the circumstances.

14. Lastly, whether the High Court, while allowing the petitions, was justified to order refund of the special excise duty which was levied and collected under section 3A, the answer is in the negative. We have already held the declaration by the High Court regarding striking down of section 3A not to be sustainable. The respondents were not entitled

to claim the refund. But assuming that a claim of refund was made out, even then the High Court was not competent to order the refund in violation of the provisions of the Act of 2005. Section 44 of the Act of 2005 sets out the conditions and procedure for claiming refund. It is noted that duty of excise or special excise duty fall within the ambit of indirect taxes. The burden is transferred to the consumer. In the case of refund, a competent authority has to be satisfied that the burden has not been transferred to the consumer before allowing the claim. This becomes crucial in order to ensure that the claimant is not unjustly enriched. The claimant will not be entitled to refund if the latter fails to discharge the onus that the burden of duty was not transferred to the consumer. The High Court was, therefore, not justified nor competent to order the refund of the special excise duty collected under section 3A of the Act of 2005 despite having struck down the said provision. Even in such an eventuality the only remedy available to a claimant would have been to file an application for refund under the Act of 2005.

15. For the reasons stated above, we allow the appeals, except CA-749/2013 and, accordingly, set aside the impugned judgments dated 22.2.2013, 23.12.2013, 11.8.2015, 02.10.2017 and 25.10.2018 of the High Court of Sindh. CA-749/2013 stands dismissed and, consequently, the impugned judgment of the Lahore High Court dated 27.6.2011 is hereby upheld.

I am in respectful agreement with this clearly expounded judgment, except for a couple of sentences in paragraph 6, and shall add my separate note.

Sd/-
Chief Justice

I agree with the note of
Hon'ble Chief Justice
Sd/-
Judge

Sd/-

Judge

Announced in open Court on this **25th day of July 2024**
at Islamabad

Sd/-
Judge

APPROVED FOR REPORTING

(Aamir Sheikh/Rameen Moin, LC)

Qazi Faez Isa, CJ.

1. I have had the pleasure of reading the clearly expounded judgment written by my distinguished colleague Hon'ble Justice Athar Minallah and with the exception of two sentences in paragraph six (6) I am in respectful agreement therewith. Removing these sentences from the judgment does not affect the outcome of the decision. However, since these two sentences may be used/misused in some other case, they need to be attended to.

2. The portion of paragraph 6, where the said two sentences reside, is reproduced below, and for identification the said sentences are highlighted:

> '**The finality attained by the judgment of the Lahore High Court had a binding effect on the other High Courts to the extent of the legality and vires of the Notification. The Sindh High Court could not have taken a contrary view by declaring the Notification as illegal and thus striking it down.** The Notification was, therefore, declared to be valid and effective by the Lahore High Court and the judgment was upheld by this Court. It had attained finality and thus the judgment of the Sindh High Court was not sustainable regarding the legality and vires of the Notification.

With respect I cannot bring myself to agree with the aforesaid highlighted sentences.

3. Article 201 of the Constitution of the Islamic Republic of Pakistan ('**the Constitution**'), reproduced hereunder, stipulates that a High Court's decision is *binding on all courts subordinate to it*:

> '201. Subject to Article 189, any decision of a High Court shall, to the extent that it decides a question of law or is based upon or enunciates a principle of law, be binding on all courts subordinate to it.'

4. Article 201 does not state that a High Court's decision is binding on other High Courts too. On the other hand Article 189 of the Constitution, reproduced hereunder, stipulates that the decisions of the Supreme Court are binding *on all other courts*, which would include all High Courts, but not the Supreme Court itself since the word *other* is used in Article 189.

> '189. Any decision of the Supreme Court shall, to the extent that it decides a question of law or is based upon or enunciates a principle of law, be binding on all other courts in Pakistan.'

Reference in this regard may also be made to the case of *Hussain Raza v Lahore High Court*.[1]

5. Article 201 commences with the words *Subject to Article 189* which removes all doubts (if at all there could be any) that the decisions of the High Court are only binding on all courts *subordinate to it*, which are those within its territorial jurisdiction. Therefore, while a decision of a High Court is persuasive and may be followed by another High Court it is not binding on it, and another High Court may make a different decision. This also accords with the very first Article of the Constitution which states that '*Pakistan shall be Federal Republic*' and mentions the '*territories of Pakistan*'. The High Court of each federating unit is independent, and a fortiori that it acts independently. Their independence can only be curtailed to the extent that the Constitution itself may do so. There is no constitutional provision which supports the said two sentences, on the contrary Article 201 of the Constitution states the opposite, which is iterated by its Article 189.

6. Law and good practice also requires that judgments be written soon after the hearing has concluded. This case was heard on 6 December 2023 and, on the same day, it was marked to Hon'ble Justice Athar Minallah for writing the judgment. The judgment took over six months to write, or precisely 223 days. His lordship sent the judgment to me on 18 July 2024 and the very next day on 19 July 2024 I wrote my note thereon and signed it.

7. Order XX, rule 1(2) of the Code of Civil Procedure, 1908 ('**the Code**') prescribes that judgments should be written within thirty days:

> 'The Court shall, after the case has been heard, pronounce the judgment in open court, either at once or on some future day not exceeding thirty days, for

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> which due notice shall be given to the parties or their advocates.'

In the case of *MFMY Industries Ltd. v Federation of Pakistan*[2] this Court held that:

> '6. ... In my view, the expression *"not exceeding thirty days"* makes it mandatory for the Trial Court to render its judgment within the prescribed time period. If the same is not done, without a sufficient cause i.e. a cause beyond the control of the Judge, the judgment is impaired in value if not invalid and disciplinary action can be taken against a Judge who is found habitual in delaying his judgments beyond that period, obviously following proper legal steps for such action and in any case at least this vice of the judge must adversely reflect in his ACR's.

8. However, in the case of an appeal against the judgment and decree of a trial court, the relevant provision is Order XLI, rule 30, of the Code, which states that:

> 'The Appellate Court after hearing the parties or their pleaders and referring to any part of the proceedings whether on appeal or in the Court from whose decree the appeal is preferred to which reference maybe considered necessary, shall pronounce judgment in open Court, either at once or on some future day of which notice shall be given to the parties or their pleaders.'

In the cited precedent of *MFMY Industries Ltd. v Federation of Pakistan* Order XLI, rule 30 of the Code was considered and the time that an Appellate Court may take in pronouncing the judgment and it was held that:

> 'From a reading of the above, it is conspicuous that the appellate Court after hearing *(note: obviously the hearing means oral arguments)* the parties or their pleaders, as the case may be, shall pronounce the judgment at once or on some future day. This future day by no stretch of legal interpretation or on the settled rules and norms of justice can be construed to mean an indefinite period. Rather the rule of **reasonableness of time** required for the performance of a judicial act in the normal and ordinary course necessary for doing justice should be attracted and pressed into service and read into it.'

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[2] 2015 SCMR 1550.

9. This Court then (in the *MFMY Industries* case) proceeded to dilate upon the maximum time that may be taken in writing a judgment by the High Court in its appellate, revisional and constitutional jurisdiction:

> '7. I shall now turn to the hearing of the first and/or second appeals by the High Court(s), and the hearing of the cases before it in its revisional and constitutional jurisdiction. As the first appeals against decrees and mostly the constitutional cases and ICAs are heard by a Division Bench(s) of the High Courts, so as to enable the two Judges to deliberate, confabulate and compose the judgment(s), or record dissent and/or exchange draft judgments, the reasonable time for the pronouncement of judgments should be 90 days. This time period (90 days) shall also be reasonable time for the High Courts, for the reason that Article 201 of the Constitution of the Islamic Republic of Pakistan, 1973 mandates *"Subject to Article 189, any decision of a High Court shall, to the extent that it decides a question of law or is based upon or enunciates a principle of law, be binding on all courts subordinate to it"*. Thus for proper enunciation of law, considerable research, brooding and pondering may be required. 90 days time in view of said Article should, therefore, also be good and adequate for the composition of the judgments by the High Court(s) in the above matters and also in first appeal against order or second appeals, and in the cases before it in its revisional or review jurisdiction, or any of the special jurisdictions of the High Court(s) *(note: subject to the principle if the law has fixed a time for the conclusion of the proceedings and pronouncement of judgment under any special law, this has to take precedence over the 90 days).*'

10. The Supreme Court went on to consider the maximum time that the Judges of this Court may take in rendering a judgment, as under:

> '8. Now coming to the judgments to be rendered by the apex Court of the country. The cases/matters by this Court are heard in benches. Usual cases are heard by a three member bench, though two member benches also hear the matters. The rule of 90 days should also ordinarily extend to those *(cases)* heard by two member benches of this Court ...'

This was followed by a discussion of cases by larger benches where a draft may be circulated for discussion or Judges are of different opinions, which may take up more time.

11. In the *MFMY Industries* case the Supreme Court also reminded Judges of their responsibility:

> '... the judges of the superior courts cannot be said to be unaware or unmindful about their responsibility of providing speedy justice and the expediency of dispensation of the justice. And of course the mandate of Article X of the Judges Code of Conduct, which they have sworn (vide their oath) to follow and abide by in letter and spirit. And the said Article stipulates:-
>
> > *"In this* [*sic.*] *judicial work a Judge shall take all steps to decide cases within the shortest time, controlling effectively efforts made to prevent early disposal of cases and make every endeavor to minimize suffering of litigants by deciding cases expeditiously through proper written judgments. A Judge who is unmindful or indifferent towards this aspect of his duty is not faithful to his work, which is a grave fault."*

12. Attention was also drawn to another crucially important aspect:

> '9. ... if there is an inordinate delay in pronouncement of judgment after hearing of the matter, especially on account of lapse of considerable and reasonable time, such as six months and beyond, the Judges shall not be in a position to exactly recall and record with precision and exactitude as to what propositions of law and facts were argued before them. This shall have reflection upon the rule of *audi alteram partem*, which is a fundamental and salutary rule of justice and postulates that if someone has been denied appropriate opportunity of hearing in a case, any verdict/decision given against such person/party shall not be laudable.'

13. No exception can be taken to what this Court had stated, almost a decade ago, in the *MFMY Industries* case. It would be most regrettable if the Supreme Court tells other courts to decide cases within a particular time-frame but does not do so itself. Fairness and the fundamental right and equality principle embedded in Article 25(1) of the Constitution can not countenance this.

14. If I, as the Chief Justice of Pakistan, do not remind my distinguished colleagues of the aforesaid matters and implore them to decide cases expeditiously I will be shirking my responsibility.

Unlike other institutions and all those who are in the *service of Pakistan*, Judges are accountable to themselves, therefore, they must be beyond reproach in their work ethic. The credibility of an institution on which a substantial amount is spent from the public exchequer and in which hundreds are employed, must not be allowed to be undermined. We must assiduously and diligently strive to decide cases.

15. An indispensable component of dispensing justice is to deliver judgments within a reasonable time. '*To no one will we refuse or delay, right or justice*'[3] may be the first articulation of the oft quoted legal maxim – '*justice delayed is justice denied.*' This maxim has for hundreds of years been used in various forms, all of which signify the same thing. '*Swift justice is the sweetest*.'[4] '*To delay Justice is Injustice*'.[5] '*If we be just men, we should go forward in the name of truth and right, and bear this in mind, that when the case is ripe and the hour has come – justice delayed is justice denied.*'[6] '*Delay will drain even a just judgment of its value.*'[7] '*Justice too long delayed is justice denied.*'[8]

16. The guiding light of the truth of this maxim is earlier found in the Holy Qur'an[9] – '*Allah wants no injustice in the world*'[10] and '*We created a community which guides by truth and by it establishes justice.*'[11] Undoubtedly, inspired by the Holy Qur'an the Muslim world's first Chief Justice gave the following advice to judges: '*The appointed time* [of death] *comes much earlier than what you think; hence, do the work expeditiously before the appointed time comes. Those who have been given a responsibility are accountable to their Lord.*'[12] Justice delayed, being tantamount to the denial of justice, is also a hollowed principle of policy

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[3] *Magna Carta*, 1215, clause 40.
[4] Fancis Bacon, Lord Chancellor of England, 1617.
[5] William Peny, 1693, *Some Fruits of Solitude*.
[6] William Ewart Gladstone, 1868, British Parliament.
[7] Warren E. Burger, Chief Justice of the United States Supreme Court, 1970 address to the American Bar Association.
[8] Marten Luther King, 1963, *Letter from Birmingham Jail*.
[9] 610-632.
[10] *Al-Imran* (3) verse 108.
[11] *Al-Araaf* (7) verse 181.
[12] Qazi Abu Yusuf, the first Chief Justice – *Qazi al-Quzaat* in Muslim history, *Kitab al-Kharaj*, 795.

stipulated in the Constitution which requires us to provide '*expeditious justice*'.[13]

Chief Justice.

Justice Amin-ud-Din Khan, J.

Approved for Reporting

[13] Constitution of the Islamic Republic of Pakistan, Chapter 2 – *Principles of Policy*, Article 37(d).