SUPREME COURT OF AZAD JAMMU AND KASHMIR

[Shariat Appellate Jurisdiction]

PRESENT:

Ch. Muhammad Ibrahim Zia, C.J.
Raja Saeed Akram Khan, J.
Ghulam Mustafa Mughal, J.

In Re:-

1. Civil Appeal No. 135 of 2018
(PLA filed on 18.04.2018)

Muhammad Ajmal Qureshi

…. APPELLANT

VERSUS

Nazia Bibi & others

….. RESPONDENTS

(On appeal from the judgment and decree of the Shariat Appellant Bench of the High Court dated 19.02.2018 in Family Appeals No.211, 212 and 213 of 2017)

FOR THE APPELLANT: Mr. Shehzad Shafi Awan, Advocate.

FOR THE RESPONDENTS: Ch. Muhammad Mumtaz, Advocate.

2. Civil Appeal No. 200 of 2018
(PLA filed on 11.06.2018)

Babar Taj & another

…. APPELLANTS

VERSUS

Tahira Aziz & others

….. RESPONDENTS

(On appeal from the judgment and decree of the Shariat Appellant Bench of the High Court dated 12.04.2018 in Family Appeals No. 176, 177, 179, 180, 181, 182 and 183 of 2017)

FOR THE APPELLANT: Mr. Shehzad Shafi Awan, Advocate.

FOR THE RESPONDENTS: Mr. Sakhawat Hussain Awan, Advocate.

3. Civil Appeal No. 201 of 2018
(PLA filed on 11.06.2018)

Tahira Aziz

…. APPELLANT

VERSUS

Babar Taj & another

….. RESPONDENTS

(On appeal from the judgment and decree of the Shariat Appellant Bench of the High Court dated 12.04.2018 in Family Appeals No. 176, 177, 179, 180, 181, 182 and 183 of 2017)

FOR THE APPELLANT: Mr. Sakhawat Hussain Awan, Advocate.

FOR THE RESPONDENTS: Mr. Shahzad Shafi Awan, Advocate.

4. Civil Appeal No. 201 of 2018
(PLA filed on 11.06.2018)

Khush'hal Qureshi

…. APPELLANT

VERSUS

1. Abida & others

….. RESPONDENTS

(On appeal from the judgment and decree of the Shariat Appellate Bench of High Court dated 10.02.2018 in Family Appeals No. 75 of 2017)

FOR THE APPELLANT: Mr. Muhammad Noorullah Qureshi, Advocate.

FOR THE RESPONDENTS: Ch. Shoukat Aziz, Advocate.

AS AMICUS CUREIE: Sardar Karam Dad Khan, Advocate-General, Raja Muhammad Hanif Khan, Raja Abrar Hussain and Miss Bilqees Rasheed

Minhas, Advocates,

Date of hearing: 04.12.2018

JUDGMENT:

Ghulam Mustafa Mughal, J— The captioned appeals by leave of the Court arise out of the different consolidated judgments passed by the Shariat Appellant Bench of the High Court. As the common question regarding the maintainability of the captioned appeals has been raised in these cases on the strength of section 8 of the Azad Jammu & Kashmir Constitution of Shariat Appellate Bench of the High Court Act, 2017 (hereinafter, to be referred as Act, 2017), therefore, all the appeals were heard together on this point and are decided as such.

2. While hearing the captioned appeals by leave of the Court, filed under section 14(5) of the AJ&K Family Courts Act, 1993 (hereinafter to be referred as Act, 1993), a very crucial proposition (quoted below) was noticed regarding the

maintainability of the appeals:-

> "While hearing the learned counsel for the parties, an important proposition of legal importance has been noticed. Under section 3 of the Shariat Appellate Bench of the High Court Act 2017 (Act No. XL of 2017) the Act has been given overriding effect on other laws. Under provision of section 8 of this Act against the judgment of the Shariat Appellate Bench, an appeal before the Supreme Court is provided, whereas, under provision of section 14 of the Azad Jammu & Kashmir Family Courts Act, 1993 no right of appeal is provided, rather, the remedy of petition for leave to appeal that too, if any question of law of public importance is involved, is provided. The proposition emerged requires authoritative judgment and comprehensive interpretation."

Besides the learned Advocates for the parties, we have sought assistance from the legal fraternity and in pursuance of the notice issued by this Court, Sardar Karam Dad Khan, Advocate-General, Raja Muhammad Hanif Khan, Raja Ibrar Hussain and Miss Bilqees Rasheed Minhas, Advocates, has addressed the Court on the formulated points.

3. Raja Muhammad Hanif Khan, Advocate, who appeared on Courts notice, contended that as the Act, 2017, is a latest legislation and has an overriding effect in view of section 3 of the said Act, therefore, section 14(5) of the Act, 1993, which grants right of appeal by leave before this Court, would be deemed to have been repealed impliedly.

In this regard, the learned Advocate placed reliance on the cases reported as *Maj. Mehtab Khan vs. The rehabilitation Authority and another* [PLD 1973 SC 451], *Tanveer Hussain vs. Divisional Superintendent, Pakistan Railways and 2 others* [PLD 2006 SC 249] and *Ahmad Khan Niazi vs. Town Municipal Administration, Lahore through Town Municipal Officer and 2 others* [PLD 2009 Lahore 657]. The learned Advocate further argued that the parties have instituted the PLAs under the genuine impression that sub-sections 4 and 5 of Section 14 have not been repealed and PLA is still competent. Moreover, leave has been granted by this

Court in the cases without considering the impact of repeal of law, therefore, the same can be taken up and considered while exercising inherent powers or converting appeals into the revision petitions because this Court besides having appellate jurisdiction under the Act, 2017, is also vested with the revisional jurisdiction.

In Major *Mehtab Khan's* case, referred to and relied upon by Raja Muhammad Hanif Khan, Advocate, at page 463 of the report, it was observed as under:-

> "Another Aspect of the matter is that even if the overriding clause embodied in section 5 of the Act has reference not only to laws subsisting at the time of its enactment but also to future legislation, it is an accepted principle of interpretation of statues that subsequent legislation on the same subject would, by necessary implication, repeal the earlier law to the extent of their mutual inconsistency or repugnancy. As observed in *Goodwin v. Phillips* (2), 'the latest expression of the will of Parliament must always prevail'. The court naturally leans against implying a repeal, and unless the two Acts are so plainly repugnant to each other that effect cannot be given to

> both at the same time, a repeal will not be implied (see *Kutner v. Philips* (3)), The prior statute would be repealed by implication if its provisions were wholly incompatible with a subsequent one, or if the two statutes together would lead to wholly absurd consequences; or if the entire subject-matter were taken away by the subsequent statute.

In *Tanveer Hussain's* case (supra), in paras 8 and 9 of the report, it was observed as under:-

> "8. This Court in the case of Neimat Ali Goraya and 7 others v. Jaffar Abbas, Inspector/sergeant Traffic through S.P. Traffic and others 1996 SCMR 826 pronounced that where a general Law as well as special Law was applicable to a particular case then to the extent of application of special law, provisions of general Law would stand displaced. A similar observation was made by this Court in the case of *Dur Muhammad v. Abdul Sattar* PLD 2003 SC 828 reiterating that special provisions would prevail over general provisions and the same was to be applied strictly. The above observation was made while dealing with the special and general provisions of a stature and by ways of analogy this principle can be applied to hold that to the provisions(s) of the special statute will prevail over the

> provision(s) of a general statute dealing with the same subject-matter.
> 9. It may also be pointed out that the Ordinance is a special law which has been promulgated in public interest and for good governance to provide for measures, inter alia, dismissal, removal etc. of certain person from Government service and corporation service and to provide speedy disposal of cases and further that the provisions of the Ordnance have been given overriding effect notwithstanding anything to the contrary contained in any other law for the time being in force dealing with subject matter falling within the scope of Ordinance. In this view of the matter also, the provisions of section 10 of the Ordinance will have overriding effect over proviso (a) to sub section (1) of section 4 of the Act, which stands impliedly repealed."

In *Ahmed Khan Niazi's* case (supra), at 673 of the report, it was observed as under:-

> "22. Having stated the legislative history on the subject and its legal effect, it is thus, to be adjudged and determined if upon the enforcement of the 2003 Rules, 1969 Rules have survived or not. In this behalf, it may be held that the rules framed under any statute are its progeny and upon the repeal of the parent law shall automatically extinguish (repealed),

until and unless are adopted and/or saved by another law. All the three enactments mentioned above in my view kept 1969 rules intact, but primarily on the touchstone of consistency, in other words that those were not inconsistent. It may be pertinent to mention here that such rule of consistency shall not be restricted to the provision of the statue itself, rather even to the rules framed thereunder (e.g. the 2003 Rules), because the rules framed under the specific law have to take precedence over the rules of some previous law.

Therefore, on account of the above, it should now be evaluated whether the two sets of the rules are inconsistent or otherwise."

4. Sardar Karam Dad, the learned AdvocateGeneral, while adopting the arguments of Raja Muhammad Hanif Khan, Advocate, submitted that though the Act, 1993, is a special law and the procedure for exercising right of appeal is also restricted within the ambit of sub-sections 4 and 5 of Section 14 of the said Act but even then an unqualified right of

appeal is given to the litigant public through Act, 2017, therefore, sub-sections 4 and 5 of section 14 of the Act, 1993, would be deemed to have been repealed impliedly. The learned Advocate-General has placed reliance on Maxwell Interpretation of Statutes page 345 and the case reported as *Nanni Sultana vs. Tanveer Ahmad & another* [2007 SCR 317].

In the above cited case, at page 323 of the report it was observed as under:-

> "8. It is also pertinent to note that the situation in Azad Jammu & Kashmir is different from Pakistan. In Azad Jammu & Kashmir, section 28 of Islami Tazirati Qawanin Nifaz Act clearly contains that if the Court wants, then it can record the statement of the accused on oath. This power has been given to the court under a special law. It is well celebrated principle of law that the special law shall prevail on the general law……."

5. Raja Ibrar Hussain and Miss Bilqees Rasheed Minhas, Advocates, have also

adopted the arguments advanced by Raja Muhammad Hanif Khan, Advocate.

6. Mr. Muhammad Noorullah Qureshi,

Advocate, argued that the Act, 2017, is a general law which cannot override the provisions of a special law, therefore, notwithstanding the enactments of section 8 of the Act, 2017, and the procedure provided in the special law for filing appeals by leave of the Court would remain in field.

The learned Advocate placed reliance on the case reported as *Malick Hussain Shah vs. Superintendent of Police Rangers* [2014 SCR 1120].

In the referred case, at page 1140 of the report, it was observed as under:-

> "If there are two statutes on the subject in general terms and only a part of the same subject matter in a statute is in minute manner, then two acts have to be read together and harmonized. There is a general Act in existence and legislature after wards makes a special law, the provision of which are in conflict, it shall be presumed that legislature has in its

> mind the general Act and the special provision has been enacted in exception of the general Act and if any remedy is provided in the special Act, then remedy in general law is excluded."

7. Mr. Shahzad Shafi Awan, the learned Advocate appearing for Tahira Aziz, appellant, herein, besides adopting the arguments advanced by Raja Muhammad Hanif Khan, Advocate, has placed reliance on the case reported as *Muhamad Sabir vs. Muhammad Zaman & 2 others* [PLD 1996 SC AJK 1].

In this case referred by the learned Advocate, at page 6 of the report, it was observed as under:-

> "The next question which falls for determination is as to whether the right of appeal is a substantive right or it is merely procedural one. It may be stated that there is consensus of judicial authorities on the point that right of appeal is a substantive right and it cannot be deemed to have lost, unless and until there are specific provisions to that effect in the repealing law or the law which superseded the previous legislation or it is manifest by necessary implications. A reference may be made to a case reported as Idrees

> Ahmed v. Hajji Fida Ahmad Khan PLD 1985 SC 376, wherein it has been held that the right of appeal given under a repealed enactment is such a right which survives the repeal unless repealing enactment either expressly or by necessary implication curtails it. It has been further observed that all the rights or remedy by way of appeal or otherwise under an enactment stand vested and accrued in the litigating party on the date of commencement of the lis and are not open to challenge unless the repealing enactment either expressly or by necessary implication curtails such rights in any manner."

Again at page 7 of the report, it was observed as under:-

> "From the authorities reproduced above, the following principles relevant to the present appeals are deducible:-
>
> (a) that in case of repeal, etc. the appeal or other remedy provided in the repealed enactment would not affect the pending cases whether suits or appeals, unless such intention has been clearly expressed or is present by necessary implication;
>
> (b) that right of appeal is a substantive right and it could only be taken away by specific provision or by any provision which is

incompatible with the rule contained in section 6 of the General Clauses Act. Thus, the pending suits or appeal etc. at the time of repeal of relevant statute would not be adversely affected and same would be followed according to the provisions contained in the repealed statute unless, of course, the change is merely of a procedural nature;

(c) that a repeal can take place without a statutory provision to that effect; a 'repeal' would be presumed in certain eventualities, such as substitution or supersession of previous law or where earlier and subsequent law are so inconsistent that the former
is rendered ineffective by latter; and

(d) that change of forum of appeal falls within the ambit of procedural law and one cannot insist to peruse his cause in a particular forum but right of appeal is a substantive right which can be taken away only by specific statutory provisions or by necessary implication."

8. Ch. Shoukat Aziz, the learned Advocate appearing for Abida Bibi & others, appellants, herein, submitted that old procedure provided by the special law

shall remain in force because in case of conflict between general law and special law, the provisions of special law would prevail, therefore, no appeal is competent until and unless this Court grants leave being satisfied regarding the question of public importance. In support of his submission, the learned Advocate placed reliance on the cases reported as *Azad Govt. & 3 others vs. Genuine Rights Coimmission AJK & 7 others* [1999 SCR 1] and *Muhammad Khurshid Khan vs. Muhammad Basharat & another* [2007 SCR 1]. In both these cases, it was observed by this Court that when a particular situation is covered by a special enactment, the provisions contained in a general statute stand ousted.

9. To resolve the controversy in its true

perspective, it would be in the interest of justice to go into the legislative changes brought in Azad Jammu & Kashmir in respect of the Family Courts,

Azad Jammu & Kashmir Shariat Court and the Shariat Appellant Bench of the High Court. Prior to the enforcement of the Act, 1993, the matrimonial disputes had been tried and resolved by the ordinary civil Courts. A material change was brought by the enforcement of the Act, 1993, with a view to establish the Family Courts for expeditious disposal of the suits relating to the family disputed and the matters connected therewith. Under section 3 of the said Act, special procedure was provided for institution and disposal of the suits relating to the family disputes and the provisions of Qanoon-eShahadat and the Code of Civil Procedure were made non-applicable to the proceedings before the Family Court. The right of appeal was regulated by section 14 of the Act, 1993 and appeal before this Court was to be filed under section 14(5) only in the cases where leave is granted

by this Court. All these steps were taken for expeditious settlement of the family disputes. Through Ordinance No. VII of 2017, dated 22.05.2017, the Act, 1993, was amended and in section 14, wherever, the words “Shariat Court” were occurring, the same were substituted by the words “High Court” and while amending section 21-A of the Act, 1993, all the appeals in respect of the family matters pending before the Shariat Court were transferred to the High Court. Later on, The Azad Jammu & Kashmir Shariat Court (Amendment) Ordinance, 2017 was promulgated on 23.06.2017, wherein, the

constitution of Shariat Court was provided in light of the judgment of this Court. Subsequently, the Act, 2017, was enacted by the Legislative Assembly of the AJ&K on 19.09.2017 and vide Act No. XLVI of 2017, dated 19.09.2017, the Act, 1993, was amended and in section 14, for the words “Azad Jammu & Kashmir High Court” wherever occurring, were

substituted by the words “Shariat Appellate Bench of the High Court”. Section 3 of the said Act provides that the Act shall have overriding effect notwithstanding anything in any other law for the time being in force. Under section 4 of the Act, a Bench in the High Court to be called as Shariat Appellant Bench of the High Court consisting of Chief Justice and all the Muslim Judges of the High Court, was provided. Under sub-sections 4, 5 and 6 of section 5 of the said Act, the Shariat Appellate Bench was given appellate and revisional

jurisdiction against final judgments and orders of the District Criminal Courts, whereas, under sub-section 7, the Shariat Appellate Bench of the High Court was vested with the appellate jurisdiction against the final judgment of the Family Court. The right of appeal to the Supreme Court was provided under section 8 of the Act against the judgment of the Shariat Appellate Bench of the High Court, wherein, it was provided that anybody to any proceeding before the Shariat

Appellate Bench aggrieved by any final decision of the Shariat Appellate Bench in such proceedings may, within sixty days of such decision, prefer an appeal to the Supreme Court. The powers of revision were also conferred upon this Court against the order passed by the Shariat Appellate Bench of the High Court. As the captioned appeals by leave of the Court have been filed under section 14 (5) of the Act, 1993, after enforcement of the Act, 2017, therefore, the moot point is, as to whether, under section 14 (5) of the Act, 1993, which has not been expressly repealed, will remain in field and procedure for filing of appeal before this Court will remain the same as provided by the said provision notwithstanding section 8 of the Act, 2017, or not. The argument that after promulgation of the Act, 2017, in presence of sections 3 and 8 of the Act, 2017, section 14(5) of the Act, 1993, shall be deemed to have been repealed impliedly, is not tenable because as stated hereinabove that the purpose of establishment of the

Family Court was to achieve the expeditious settlement of the family disputes. Under section 14(5), appeal to this Court was provided if this Court grants leave on the substantial question of law of public importance. If the provisions of section 14(5) of the Act, 1993, are ignored then under section 8 of the Act, 2017, every litigant shall file appeal as a matter of right because the provisions of the said section provide that any party to any proceedings before the Shariat Appellate Bench of the High Court, aggrieved by any final decision, may prefer an appeal to the Supreme Court and by doing so, the very purpose of the Act, 1993, i.e. expeditious disposal of the matrimonial disputes would be defeated. It is pertinent to mention here that on promulgation of the Act, 2017, the Act, 1993, was amended accordingly and under section 14, for the purpose of appeal by leave before this Court, the words “Shariat Appellate Bench of the High Court” were inserted, meaning thereby, that the

legislature did not intend to repeal the Act, 1993. It is important to note that the right of appeal under section 14 of the Act, 1993, is not unqualified rather is subjected to a reasonable restriction. Under subsection 2 of section 14, it is provided that an appeal shall lie from the decree passed by the Family Court; (A) for dower not exceeding Rs.1000/-; (B) for maintenance of Rs.75 or less per month.

Similarly, in order to achieve the objects of the Act, 1993, under sub-section 5 of section 14, appeal before this Court is provided only when the Court is satisfied that the case involves substantial question of public importance for grant of leave to appeal.

These restrictions are in the public interest and have been imposed in order to save women and children from agony of frivolous and fruitless litigation. It may be stated that though the right of appeal under section 8 of the Act, 2017, is provided without any condition but special procedure for filing appeal against the judgments of the Shariat Appellate Bench of the High

Court arising out of the family matters envisaged under section 14 of the Act, 1993, has not been repealed expressly. It is correct that where two enactments on identical point/subject are holding the field then the court will try to harmonize the both but if the same cannot be done then the Act which is earlier in time would be deemed to have been repealed by later on the doctrine of 'implied repeal'. The same view has been taken in the judgments referred to and relied upon by Raja Muhammad Hanif Khan, Advocate. However, there

is an exception to this rule i.e. where a general statute provide a different procedure for doing a thing then procedure provided by the special law has to prevail. Reference may be made to the case reported as *Neimat Ali Goraya and 7 others vs. Jaffar Abbas, Inspector/Sergeant Traffic through S.P., Traffic, Lahore and others* [1996 SCMR 826], wherein, at page 833 of the report, it was observed as under:-

> "It is well-settled principle of interpretation that whereas general law as well as special law applied to a particular case then to the extent of application of special law in that case the provisions of general law stand displaced. Rule 8 of the Rules of 1974, referred by the learned counsel for the respondents, is a general provision of law applicable to all directly recruited civil servants in Punjab for determining their seniority inter se while rule 12.2(3) of the Rule, which also deal with the same subject, is applicable only to a specific category of civil servants, namely, members of police force. Rule 12.2(3) of the Rules, therefore, is a special provision of law while rule 8 of the Rules of 1974 is a general provision of law, both dealing with the same subject. The former being applicable to a specific category of civil servants while the latter is applied to the whole body of the civil servants in Punjab, therefore, if the provisions of rule 12.2 (3) of the Rules applied to a case, to that extent rule 8 of the Rules of 1974 will be inapplicable."

In *Dur Muhammad's* case [PLD 2003 Supreme Court 828], the same view was reiterated and at page 835, para 7 of the report, it was observed as under:-

> "7. Thus in view of the above noticed two provisions of the Rules, 1980,

> one can conclude that Order X, Rule 1 relates to announcement of the judgments other than the judgments in the appeal, being a general provision, whereas Order XIX, Rule 6 of the Rules, 1980 deals specifically with the announcement of the reserved judgments in appeals as it has been incorporated in the chapter which deals with the subject of 'Hearing of Appeals'. Therefore, it would be deemed to be special provision, as it deals with a particular subject. It is a known principle of interpretation of statutes that special provisions will prevail upon general provisions and it is to be applied strictly."

In order to clarify the ambiguity, we would like to direct the Government to amend section 8 of the Act, 2017, in the manner that despite enactment of section 8, the procedure for filing appeals in the family matters against the judgments of the Shariat Appellate Bench of the High Court shall remain the same as is provided by section 14 (5) of the Act, 1993. It may be stated that various direct appeals and PLAs have been filed after enforcement of the Act, 2017, therefore, while exercising inherent powers conferred

upon this Court under Article 42A (1) of the Azad Jammu & Kashmir Interim
Constitution, 1974, read with Order XLIII of the Supreme Court Rules, 1978, we hold that all those appeals and PLAs, as the case may be, would be deemed to have been filed validly and further filing of the appeals and PLAs would be valid for a period of 2 weeks from the date of this judgment. The Registrar is directed to send a copy of the judgment to the Chairman, Vice Chairman Bar Councils, Presidents Supreme Court, High Court and District Bar Associations of AJ&K for information.

In view of the above, we hold that the provisions of section 14 (5) of the Act, 1993, have not been repealed expressly or impliedly and are still holding the field, therefore, filing of PLA in the family matters in light of section 14 (5) of the Act, 1993, will remain continued. The objection, therefore, stands overruled. All the captioned appeals

by leave are held maintainable. To come up for arguments on merits on _____.

JUDGE CHIEF JUSTICE JUDGE
Muzaffarabad