

HCJD/C-121  
**JUDGMENT SHEET**

**ISLAMABAD HIGH COURT**  
**ISLAMABAD**

**WRIT PETITION NO. 3414/2011**

**PAKISTAN OIL FIELDS LTD,**  
through its duly authorized attorney and General Manager

*VERSUS*

**FEDERATION OF PAKISTAN**  
through the Secretary Revenue, Revenue Division & 2 others

Petitioners by : **Mr. Makhdoom Ali Khan, Sr. ASC.**  
**Mr. Shahid Hamid, Sr. ASC.**  
**Mr. Muhammad Raheel Kamran Sheikh, ASC.**  
**Sardar Ahmed Jamal Sukhera ASC**  
**Mr. Ali Sabtain Fazli, ASC.**  
**Mr. Ayyaz Shaukat, ASC.**  
**Malik Sardar Khan Awan, AHC.**  
**Mr. Saad M. Hashmi, AHC.**

Respondents b : **Mr. Afnan Karim Kundi, Additional Attorney General.**  
**Malik Zahoor Awan, Standing Counsel.**  
**Mr. Saeed Ahmed Zaidi, ASC.**  
**Sh. Anwar-ul-Haq, ASC.**  
**Mst. Dr. Farhat Zafar, ASC.**

Date of Hearing : **25-11-2015**

**ATHAR MINALLAH, J.-** Through this consolidated judgment, I shall decide the instant petition along with the petitions listed below as common questions of law are involved.-

- i) W.P. No.3235/2012, Pakistan Mobile Communications Limited, Islamabad v. Federation of Pakistan through Secretary Ministry of Law & Justice Division, & 3 others.
- ii) W.P. No.2966/2011, PKP Exploration Limited v. Federation of Pakistan through Secretary Ministry of Law & Justice Division & 3 others.
- iii) W.P. No.4810/2014, Pakistan Oilfields Limited v. Federation of Pakistan through Ministry of Law and Parliamentary Affairs & 2 others.

- iv) W.P. No.3015/2011, M/s MND Exploration & Production Ltd. v. Federation of Pakistan through the Secretary Ministry of Finance & 2 others.
- v) W.P. No.3215/2012, Attock Oil Company. Vs. Federation of Pakistan through Secretary Law and Justice Division & 4 others.

2. The petitioners are juridical persons and, *inter alia*, engaged in the business of exploration of oil and gas. It is asserted that each contributes substantially to the exchequer by paying various taxes, fees, cess and other charges, charged and levied under various laws. All the petitioners claim that they strictly comply with the laws relating to income tax, particularly the Income Tax Ordinance, 2001 (*hereinafter referred to as the 'Ordinance of 2001'*), Sales Tax Act 1990 (*hereinafter referred to as the "Act of 1990"*) the Federal Excise Act 2005 (*hereinafter referred to as the "Act of 2005"*) and the rules/regulations made there under. It is the case of the petitioners that being scrupulous taxpayers they legitimately expect the revenue collecting authorities to be fair, transparent and just in implementing the provisions of the above referred laws. However, if there is a dispute then it is a vested right that the same should be resolved and decided by an impartial and independent forum. The grievance of the petitioners relates to the manner in which the Appellate Tribunal has been established through the appointment of its Chairman and members in violation of the law laid down by the august Supreme Court. In a nutshell, the grievance of the petitioners concerns the independence of the Appellate Tribunal established under section 130 of the Ordinance of 2001. The appeals of the petitioners, arising from the orders passed by the respective authorities of the Income Tax Department, are pending before the Appellate Tribunal. It is alleged that the lack of independence of the Appellate Tribunal and its separation from the Executive inevitably

leads to the denial of access to justice and violation of fundamental rights guaranteed under Article 199 of the Constitution of the Islamic Republic of Pakistan 1973 (*hereinafter referred to as the 'Constitution'*). The petitioner in W.P. No.3015/2011 asserts that at the time of filing the petition four appeals were heard by the learned Tribunal on **22-06-2015**, and the judgment was reserved; however, despite a lapse of eight months, the same was not announced. It is the case of the petitioners that the learned Appellate Tribunal is not, therefore, properly constituted and neither are its Chairman or members appointed as mandated under the law, hence the instant petitions. Notice was issued to the learned Attorney General of Pakistan under Order XXVIA of the Code of Civil Procedure, 1908.

3. Mr. Shahid Hamid, Sr. ASC has contended that; there cannot be any dispute to the proposition that the Tribunal is a judicial forum for the simple reason that it determines the rights and liabilities of the parties; the order passed by the Tribunal are judicial orders; section 224 of the Ordinance of 2001 specifically affirms that the proceedings before a Tribunal are judicial proceedings; section 227 of the Ordinance of 2001 ousts the jurisdiction of the Civil Courts in matters before the Tribunal; Article 203 of the Constitution mandates that a judicial tribunal has to be under the supervision and control of the High Court; Article 175(3) of the Constitution mandates that the judicial tribunal has to be separated from the Executive; Article 2-A mandates that the independence of the judiciary shall be fully secured; reliance has been placed on the cases of '*Govt. of Balochistan v. Azizullah Memot*' [PLD 1993 SC 341], '*Govt. of Sindh v. Sharaf Faridi*' [PLD 1994 SC 105], '*Imran v. Presiding Officer Punjab Special Court No.VI, Multan*' [PLD 1996 Lah. 542], '*Mehram Ali v.*



*Federation of Pakistan* [PLD 1998 SC 1445], *Liaquat Hussain v. Federation of Pakistan* [PLD 1999 SC 504], *Ziaullah v. Najeebullah* [PLD 2003 SC 656], *Raj Mohd Khan v. Mohd Farooq Khan* [1998 SCMR 669];

the appointment of members to a judicial tribunal has to be in consultation with the Chief Justice of the respective High Courts; the appointment of a member to a judicial tribunal must have a reasonable fixed tenure; the judicial tribunal must be under the effective control and superintendence of the High Court; the proceedings, procedures and working of the judicial tribunal must be totally independent of the influence or control of the Executive; section 130 of the Ordinance of 2001 does not fulfil the constitutional requirements relating to the appointment of the Chairman or members of the tribunal; the appointment of a member is made by the Federal Government without consultation with the Chief Justice; there is no provision in section 130 for a fixed tenure; the amendment made through clause (c) of sub-section (3) of section 130 through the Finance Act 2013 i.e. appointment of an officer of the Inland Revenue Services in BS-20 to be appointed as Judicial Member; sub-section (7) permits a Bench with a majority of the Accountant Members while the Judicial Members are required to be in majority; the Federal Government's power under sub-section (8) are contrary to the principle of the independence of the judiciary; sub-section (8A) which gives the power to the Federal Government to specify the cases to be heard by a single member is also a negation of the independence of the judiciary; the tribunal has to be under the effective control and superintendence of the High Court, and entirely independent of the Executive.

4. Mr. Makhdoom Ali Khan, Sr. ASC, besides adopting the arguments advanced by Mr. Shahid Hamid Sr. ASC, has argued that; the Appellate Tribunal ought to be an independent forum so as to exercise judicial functions; a Chairperson or a Member of the Appellate Tribunal beholden to the Federal Government for their appointment or posting undermines their independence and casts a shadow over their impartiality; it is a travesty of justice to have any member of a tribunal exercising judicial functions to be dependent on the Federal Government for their current and future assignments; the tribunal performs judicial functions and is a 'Court' for the purpose of Article 175 of the Constitution; it is a settled principle that the Chairperson or members of the tribunal performing judicial functions must be appointed after meaningful consultation with the Chief Justices of the respective High Courts or the Chief Justice of Pakistan; any appointment made without such consultation is void; section 130 of the ordinance of 2001 does not provide for consultation with the Chief Justice of the respective High Courts and/or the Chief Justice of Pakistan; the provisions of section 130 of the Ordinance of 2001 as such are in violation of Articles 175 and 203 of the Constitution; reliance has been placed on the cases of '*Sh. Riaz-ul-Haq & others v. Federation of Pakistan & others*' [PLD 2013 SC 501], '*Ranyal Textiles v. Sindh Labour Court*' [PLD 2010 Karachi 27], '*Imran v. Presiding Officer, Punjab Special Court, Multan*' [PLD 1996 Lahore 542].

5. Mr. Ali Sibtain Fazli ASC has adopted the above arguments and in addition has argued that; the appeal provided under the Ordinance of 2001 remains illusory and ineffective on account of the manner in which the tribunal is constituted and its Chairperson and members

appointed; the learned tribunal, as the first independent forum outside the departmental hierarchy, can only function independently if it is not under the influence and control of the executive; the Constitution visualizes two tribunals i.e. in Article 212 and 225 respectively, other than Courts under Article 175 of the Constitution; the said two provisions have been held by the Apex Court to fall within the meaning of a Court in terms of Article 175(1).

6. Mr. Ahmed Jamal Sukhera, ASC, Mr. Raheel Kamran Sheikh, ASC, and Mr. Ayyaz Shaukat, ASC have adopted the above arguments.

7. Mr. Afnan Karim Kundi, learned Additional Attorney General has argued that; the judgment of the august Supreme Court in Sheikh Riaz ul Haq case supra and the observations made therein cannot be read in isolation, and have to be considered in totality with the other related findings of the august Supreme Court; in the case of '*Shahid Orakzai v. Pakistan*' [PLD 2011 SC 365] the observations made by the august Supreme Court at page 404 of the said judgment unambiguously shows that the consultation with the Chief Justice of Pakistan were in the nature of recommendations; a similar issue was subsequently considered in the case of '*Ch. Nisar Ali Khan v. Federation of Pakistan*' [PLD 2013 SC 568], and the Bench, consisting of five Hon'ble Judges of the august Supreme Court, after considering observations made in the Shahid Orakzai case supra, held that a suggestion or recommendation made by the Supreme Court in a judgment, though entitled to due respect and deference, but consultation process cannot assume the status of a law; it has, therefore, been stressed that the observations in the case of Sheikh Riaz



ul Haq supra, are suggestions and cannot be given the status of law; the consultation with the Chief Justice related to the appointment of judicial officers, where no provision is made in the relevant statute, is not mandated by law or the Constitution; where no provision is made in the governing statute requiring consultation with the Chief Justice, the imposition of such a requirement by the Courts would amount to usurpation of the legislative function by the Courts; reliance has been placed on the cases of *'Magor and St. Mellons Rural District Council v. Newport Corporation'* [(1951) 2 All ER 839], *'State v. Zia ur Rehman'* [PLD 1973 SC 49], *'Executive District Officer (Revenue), District Khushab At Jauharabad v. Ijaz Hussain'* [2012 PLC (C.S.) 917]; Article 203 may give the High Court a certain supervisory function, but this Article cannot be interpreted to imply a mandatory requirement of consultation with the Chief Justice of the High Court; the Constitution must be read in conjunction with the statutory provisions; Article 240 of the Constitution, which provides that the appointments to, and the conditions of service of persons in the service of Pakistan shall be determined by or under an Act of the Parliament; drawing analogy from the case of *'Air Marshal (Retd.) Muhammad Asghar Khan v. General (Retd.) Mirza Aslam Baig, Former Chief of Army Staff'* [PLD 2013 SC 1] and *'Shahid Nabi Malik v. Chief Election Commissioner'* [PLD 1997 SC 32], the members of a tribunal performing judicial functions are in the service of Pakistan and, therefore, their appointment and conditions are to be determined by the relevant Act of the Parliament.

8. The learned counsels appearing on behalf of the petitioners and the learned Additional Attorney General have been heard and the record perused with their able assistance.

9. The questions which emerge from the above arguments advanced by the counsels are.- (i) Whether meaningful consultation with the Chief Justice of Pakistan and/or Chief Justice of the respective High Courts is mandatory in the case of the appointment of a Chairman and Members of the learned Appellate Tribunal; (ii) Whether the Appellate Tribunal performs judicial functions and, therefore, falls within the meaning of a Court and, if so, whether the appointment of the Chairman and Members can be made without the consultation of the Chief Justice of Pakistan; (iii) Whether the judgment of the august Supreme Court in the Sheikh Riaz ul Haq case supra has decided a question of law or is based upon on or enunciates a principle of law to be binding on all other Courts, as well as the Executive, pursuant to the command of the Constitution under Article 189 *ibid*.

10. In order to answer the questions, it would be beneficial to first examine the scheme of the Ordinance of 2001 in the context of the composition, functions and powers of the Appellate Tribunal, and then to determine its status in the light of the principles enunciated and laid down by the august Supreme Court in the Sheikh Riaz ul Haq case supra.

11. Clause (2) of section 2 of the Ordinance of 2001 defines an "Appellate Tribunal" as meaning Appellate Tribunal Inland Revenue established under section 130. Section 130 provides that there shall be established an Appellate Tribunal to exercise functions conferred on the



Tribunal by the Ordinance of 2001. The composition of the Appellate Tribunal has been explained in sub-section (2) of section 130 as consisting of a Chairperson and such other judicial and accountant members as are appointed by the Federal Government having regard to the needs of the Tribunal. The qualifications for a person to be appointed as a judicial member of the Appellate Tribunal have been enumerated in clauses (a) (b) and (c) of section 31, while those of an accountant member are in sub-section (4). For the appointment of a judicial member he or she may either have exercised the powers of a District Judge and is qualified to be a Judge of the High Court, or is or has been an advocate of the High Court and is qualified to be a Judge of the High Court or fulfils the criterion prescribed in clause (c). Likewise, a person can be appointed as an accountant member if he is either an officer of the Inland Revenue Service, equivalent to the rank of Regional Commissioner or Commissioner Inland Revenue, or Commissioner Inland Revenue (Appeals), having at least three years experience as Commissioner or Collector. Sub-section (5) of section 130 empowers the Federal Government to appoint a member of the Tribunal as Chairperson of the Tribunal.

12. The powers and functions of the Appellate Tribunal are exercised and discharged by the Benches constituted from among the members of the Tribunal by the Chairperson. Sub-section (8) vests the power in the Federal Government to direct that all or any of the powers of the Appellate Tribunal are exercised by any one member or more than one member, jointly or severally. Section 131 recognizes the right of appeal by a taxpayer or a Commissioner against an order passed by the Commissioner (Appeals). It is important to note that sub-section (5) vests

the power to grant an injunctive order and stay the recovery of the adjudged amount. Section 132 contemplates the manner in which the appeals are disposed of by the Appellate Tribunal and the powers of the latter. Sub-section (2A), inserted vide the Finance Act 2005, specifies the time during which the Appellate Tribunal shall decide an appeal. Sub-section (3) enumerates the powers of the Tribunal i.e. to make an order to affirm, modify or annul the assessment order or to remand the case. Sub-section (4) and sub-section (5) of section 132 empowers the Appellate Tribunal to modify the assessment order, having the effect of an increase in the amount of the assessment or penalty. Section 224 explicitly declares the proceedings before the Appellate Tribunal to be treated as judicial proceedings within the meaning of sections 193, 196 and 228 of the Pakistan Penal Code, 1860. It is pertinent to mention that appeals under section 46 of the Sales Tax Act 1990 (*hereinafter referred to as the 'Act of 1990'*) are also heard by the Appellate Tribunal constituted under section 130 of the Ordinance of 2001, as is evident from sub-section (2) read with sub-section (2A) of section 46 *ibid*. Likewise, for the purposes of appeal under the Federal Excise Act 2005 (*hereinafter referred to as the 'Act of 2005'*) the same are also within the jurisdiction of the Appellate Tribunal established under the Ordinance of 2001, pursuant to the definition of an Appellate Tribunal in sub-section (3) of section 2 of the Act of 2005. The Appellate Tribunal established under section 130, therefore, not only exercises powers and jurisdiction in matters relating to the Ordinance of 2001, but also to those under the Act of 1990 and the Act of 2005. The Appellate Tribunal has expansive powers and jurisdiction. The question as to whether the Appellate Tribunal is a Court or not and whether the principles and law laid down by the august

Supreme Court in the Sheikh Riaz Ul Haq case supra are attracted in making appointments of the Chairperson and members of the learned Appellate Tribunal shall be adverted to later.

13. When the Ordinance of 2001 is read as whole it becomes obvious that the Appellate Tribunal is the first independent forum outside the Department to decide the rights and liabilities of a taxpayer, as well as safeguarding the interests of the exchequer. The legislature has expressly declared the proceedings before the Appellate Tribunal as judicial proceedings. It has the power to stay the recovery of tax under the relevant statute or increase the burden of liability. The bar of statutory duty is high on the Appellate Tribunal under the Federal Excises Act 2005, the Sales Tax Act 1990, or the Income Tax Ordinance, 2001. The learned Appellate Tribunal, being the last forum for the determination of questions of fact, undoubtedly carries a heavy burden of discharging its functions in a fair, just and transparent manner, particularly in observing the requirements of due process, and deciding appeals as provided under the relevant provisions. The levy, charge or payment of a tax or duty imposes a financial burden and, therefore, the role of the Tribunal as the last statutory forum assumes greater importance. The jurisdiction of the High Court under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 is barred when the statute provides an adequate remedy. The role of the Appellate Tribunal Inland Revenue, which exclusively hears and decides appeals under the Income Tax Ordinance, 2001, Sales Tax Act 1990 and the Federal Excises Act 2005 becomes even more crucial in ensuring that the interests and rights of the tax payers are safeguarded and that they remain protected from being saddled with illegal, arbitrary



or unwarranted imposition of financial burden. It is for this reason that there is a higher duty of care to be exercised by the adjudicating officers and the statutory appellate forums, particularly the Appellate Tribunal, inter alia, in taking into consideration all the matters before it, whether relating to the facts or law, and after thorough deliberation, manifesting application of mind, deciding the appeal by delivering reasoned judgment/order. The independence of the Appellate Tribunal as a judicial forum and the appointments of the Chairman and Members to be made according to the principles and law laid down in this regard indeed assumes utmost importance.

14. Next is the question of the scope of the principles and law laid down by the august Supreme Court in Sheikh Riaz ul Haq case supra, particularly whether they are attracted in the case of the appointment of the Chairperson and Members of the Appellate Tribunal established under section 130 of the Ordinance of 2001. There is no cavil to the proposition that the judgment of the august Supreme Court in Sheikh Riaz ul Haq case supra was in the context of the Federal and Provincial Service Tribunals and the respective statutes. The decision in the said case was regarding appointment of the Chairpersons and Members of the Service Tribunal, but what is more crucial for the adjudication of the present petitions is the ratio decidendi or in other words the reason, rationale i.e. the principles and law enunciated in this regard. In reaching the conclusion as to whether a meaningful consultation with the Chief Justice of Pakistan or the Chief Justices of the respective High Courts was mandatory before appointing a person as Chairperson or Member, the august Supreme Court elaborately examined the nature and functions of

the Service Tribunals and laid down the test for determining as to whether they could be treated as a Court or not. The august Supreme Court examined whether the Service Tribunals fell within the definition of a 'Court' within the meaning of the said expression under Article 175 of the Constitution. In doing so, the apex Court took the dictionary meanings of a 'Court' and examined the precedent law. On the basis of the dictionary meanings, it was held that three elements were essential for the conception of a Court i.e. (i) Time when judicial functions may be exercised. (ii) A place for the exercise of judicial functions, and (iii) A person or persons exercising judicial functions.

15. The august Supreme Court then proceeded to interpret the expression 'judicial functions' and, *inter alia*, referred to the definition given by Griffith C.J. in the Huddart Parkers case and quoted with approval in *'Shell Co. of Australia Limited v. Federal Commissioner of Taxation'* ((1930) All ER 367) and the same is reproduced as follows.-

*"The words 'Judicial power' as used in section 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subject, or between itself and its subjects, whether the rights relate to life, liberty, or property. The exercise of this power does not come into being until some tribunal which has power to give binding and authoritative decision (whether subject to appeal or not) is called upon to take action".*

16. It was therefore, held as follows;

*"From the detailed analysis of above case-law it is clear that the exercise of Judicial power is considered to be an essential feature of a Court, and it distinguishes a Court from an administrative tribunal".*

17. Further re-affirming the principles laid down in the earlier cases of *'Imran Raza Zaidi v. Government of Punjab'* [1996 SCMR 645] and *'Tariq Transport Company v. The Sargodha-Bhera Bus Service'* [PLD 1958 SC 437] it was observed as follows.-

*"The character of the action taken in a given case and the nature of the right on which it operates must determine whether that action is judicial, ministerial or legislative or whether it is simply the act of a public agent. A tribunal acts judicially in the full sense of the term if it has to determine a dispute; the dispute relates to a right or liability which, whatever its immediate aspect, is ultimately referable to some right or liability, recognized by the Constitution or statute or by custom or equity which by the domestic law is declared to be the rule of decision; since every right or liability depends upon facts, the tribunal is under an obligation to discover the relevant facts; the ascertainment of the facts is in the presence of the parties either of whom is entitled to produce evidence in support of its respective case and to question the truth of the evidence produced by his opponent; and after an investigation of the facts and hearing legal arguments the tribunal renders a judgment which so far as the tribunal is concerned terminates the dispute. In the case of an administrative tribunal, however, the emphasis is on policy, expediency and discretion to enable it to achieve the object with which it was set up."*



18. After examining the definitions of a 'Court' as well as 'judicial functions and the precedent law, the august Supreme Court laid down a test to determine whether a forum would fall within the definition of a 'Court' or not, and the same is as follows.-

*"The perusal of above case-law makes it abundantly clear that a tribunal is not always function as a 'Court', nor its action is always judicial; however, the determining factor is the nature of the dispute to be resolved by the Tribunal. If the Tribunal has to determine a dispute relating to a right or liability, recognised by the Constitution or law and is under an obligation to discover the relevant facts, in the presence of the parties, in the light of the evidence produced by them, it acts judicially. Besides, whenever judicial power is vested in a forum, be it called a Court or Tribunal, for all legal intents and purposes it is a Court. Further, such Tribunals have to be manned, controlled and regulated in accordance with the established judicial principles."*

It has been further observed and held as follows.-

*"As such, these Tribunals are to be manned, controlled and regulated in accordance with the law relating to management, regulation and control of Courts in Pakistan."*

19. The august Supreme Court also examined the significance of the Service Tribunals performing functions and exercising powers as a judicial forum in the context of the separation of powers from the Executive and it has been thus held as follows.-

*"As it has been held that Service Tribunal discharges judicial functions, thus falls within the definition of a 'Court' in view of the above discussion, therefore, the Tribunals have to be separated*

*from Executive following the principle of independence of judiciary in view of Article 175(3) of the Constitution."*

20. Having enunciated the principles and law, as explained above, the august Supreme Court held that though the respective statutes relating to the service tribunals did not provide for consultation with the respective Chief Justice, yet having been declared that they fall within the contemplation of Article 175(3) of the Constitution, it was inevitable to have meaningful consultation with the respective Chief Justices before making the appointments of the Chairman and members. The question was also examined by the august Supreme Court in the context of the command of the Constitution in upholding the independence of judiciary. It was held on the basis of the *ratio decidendi* explained above that meaningful consultation with the Chief Justice of Pakistan was a *sine qua non* for the appointment of persons as Chairperson and Members of the Federal Service Tribunal and the respective Chief Justices in case of the Provincial Service Tribunals. The said *ratio decidendi* was affirmed by the august Supreme Court in the case of the appointment of the Chairman, Drug Court as is evident from the order dated 09.06.2014 passed in Civil Appeal No. 1042 of 2013.

21. It is, therefore, obvious that the *ratio decidendi*, as propounded by the august Supreme Court in the judgment of Sheikh Riaz ul Haq case, *supra*, would apply in the case of a forum which would qualify the test laid down in paragraph 40 thereof. The powers and functions of the Appellate Tribunal, described in section 131 and read with the other provisions of the Ordinance of 2001, unambiguously shows that the ingredients prescribed for qualifying the test for the determination as

to whether it would fall within the ambit of the definition of a 'Court' are fulfilled in every sense. The Appellate Tribunal is indeed the first independent forum for determining the rights and liabilities of a citizen, recognised as such by the law, and it has the statutory duty to discover relevant facts in the presence of the parties and then to pronounce the decisions based on the evidence and material before it. The Appellate Tribunal, therefore, for all intents and purposes exercises judicial functions and falls within the expression 'Court' as contemplated by the august Supreme Court in Sheikh Riaz ul Haq case supra. It is, therefore, held that meaningful consultation with the Chief Justice of Pakistan is a pre condition for appointing a person as a Chairperson or Member of the Appellate Tribunal. An appointment made in violation of the said established judicial principle will be void and the holder of the office will be treated as having exercised powers and functions in a defacto capacity.

22. The judgments rendered by the august Supreme Court in the Shahid Orakzai case supra and Ch. Nisar Ali Khan case supra were in the context of the appointment of the Chairman of the National Accountability Bureau. Moreover, the *ratio decidendi* of the judgment in Sheikh Riaz ul Haq case supra was not considered by the august Supreme Court. The learned Additional Attorney General was not able to persuade this Court that the *ratio decidendi* expounded by the august Supreme Court in Sheikh Riaz ul Haq case supra is not binding on this Court under Article 189 of the Constitution. By no stretch of the imagination can the principles of law laid down by the august Supreme Court in Sheikh Riaz Ul Haq case supra be construed as mere suggestions, as argued by the learned Additional Attorney General; rather, the principles and law laid



down therein are binding under Article 189 read with Article 190 of the Constitution. It is settled law and an express command of the Constitution that the law enunciated by the august Supreme Court becomes binding precedent for all forums of the country. All the executive and judicial authorities and forums are constitutionally obliged to implement the orders of and the principles and law laid down by the Supreme Court. Even if a review is pending against a judgment the same shall be binding unless it has been reviewed and a different conclusion is reached by the august Supreme Court. A judgment of the apex Court would have due effect and deference if it decides a question of law or is passed on the basis of law and/or enunciates a principle of law. Reliance is placed on "*Khan Gul Khan and others versus Daraz Khan*" [2010 SCMR 539], "*Muhammad Tariq Badr and another versus National Bank of Pakistan and others*" [2013 SCMR 314], "*Sindh High Court Bar Association through its Secretary and others versus FOP through M/O Law and Justice, Islamabad and others*" [PLD 2009 SC 879], "*Commissioner Income Tax versus Habib Bank Ltd. ANZ and Grind lays Bank*" [2015 PTD 619], "*Pakistan Telecommunication Employees Trust (PTET) through M.D. Islamabad and others versus Mohammad Arif and others*" [2015 SCMR 1472] and "*Nazir Ahmed and others versus The State and others*" [PLD 2014 SC 241].

23. During the course of arguments a question was posed by the learned Additional Attorney General as to whether the same principles and law would also be attracted in the case of appointment of adjudication authorities or the departmental appellate forum. The learned counsels appearing on behalf of the petitioners have rightly pointed out that the adjudicating authorities or the first appellate forum within the

department do not fulfil the requirements or pre requisites of the touchstone of the test prescribed by the Supreme Court for determining whether for all intent and purposes they are to be treated as a 'Court'. There is force in the argument of the learned counsels that the principles and law laid down in the Sh Riaz ul Haq case supra will not be attracted in the case of transfer and posting within the departmental hierarchy. The legislature in its wisdom has established the Appellate Tribunal as the first independent forum outside the Departmental scrutiny and, therefore, it is distinct and separate.

24. The learned counsels have also raised the question of *vires* of clause (c) of sub-section (3) of section 130 of the Ordinance of 2001. The august Supreme Court in the case of '*Lahore Development Authority through D.G. and others Versus Ms. Imrana Tiwana and others*' [2015 SCMR 1739], after elaborately examining the precedent law, has encapsulated and summarized the principles as follows.-

- i) There was a presumption in favour of constitutionality and a law must not be declared unconstitutional unless the statute was placed next to the Constitution and no way could be found in reconciling the two;
- ii) Where more than one interpretation was possible, one of which would make the law valid and the other void, the Court must prefer the interpretation which favoured validity;

- iii) A statute must never be declared unconstitutional unless its invalidity was beyond reasonable doubt. A reasonable doubt must be resolved in favour of the status being valid;
- iv) Court should abstain from deciding a Constitutional question, if a case could be decided on other or narrower grounds;
- v) Court should not decide a larger Constitutional question than was necessary for the determination of the case;
- vi) Court should not declare a statute unconstitutional on the ground that it violated the spirit of the Constitution unless it also violated the letter of the Constitution;
- vii) Court was not concerned with the wisdom or prudence of the legislation but only with its Constitutionality;
- viii) Court should not strike down statutes on principles of republican or democratic government unless those principles were placed beyond legislative encroachment by the Constitution; and
- ix) Mala fides should not be attributed to the Legislature.



25. Keeping in view the above principles, this Court is not inclined to declare the provisions as *ultra vires* or to strike it down, as no persuasive argument has been advanced in this regard. The edifice of the arguments raised by the learned counsels are based on the provision being in violation of the independence of judiciary and the separation of powers from the Executive. This Court, however, is of the view that a meaningful consultation with the Chief Justice of Pakistan, before making the appointments, would obviously safeguard the independence of the judiciary. Moreover, it would be through such meaningful consultation that it would be determined whether a person falling in clause (c) of sub section 3 is to be appointed as a judicial member. It is also pertinent to note that clauses (a) to (c) prescribe three categories of persons who may be appointed as a judicial member, and in the light of the established principles and obviously with regard to the nature of such appointment preference would be given to such category as would be in the best interest of the independence of the Appellate Tribunal as a forum exercising judicial functions. This object can be achieved through meaningful consultations with the Chief Justice of Pakistan.

26. In the light of the above discussion, the petitions are allowed. It is admitted that the Chairman of the Appellate Tribunal and its Members were appointed without the consultation of the Chief Justice of Pakistan in violation of the principles and law enunciated by the august Supreme Court and discussed herein. The appointments are, therefore, declared as illegal, void and without lawful authority. The Chairman and Members so appointed are to be treated as de facto holders of their respective offices. The acts done and orders or judgments passed,

including any and all proceedings, shall remain protected under the *de facto doctrine*. Reference in this regard may be made to "*Mehram Ali and others versus FOP and others*" [PLD 1998 SC 1445], "*Malik Asad Ali and others versus FOP, through Secretary Law & Justice & Parliamentary Affairs, Islamabad and others*" [PLD 1998 SC 161], "*Manzoor Hussain versus The State*" [PLD 1998 Lah 239] and "*Abdus Sattar versus The State*" [PLD 1997 Lah 683].

27. The Federal Government shall forthwith take appropriate measures and initiate the process for making fresh appointments of the Chairman and Members of the Appellate Tribunal after meaningful consultations with the Hon'ble Chief Justice of Pakistan. The Federal Government shall endeavour to complete the process, preferably within 45 days from the date of receipt of this judgment. The incumbent Chairperson and members of the Appellate Tribunal shall cease to function with effect from the date of notification of appointments made pursuant to this judgment.

**(ATHAR MINALLAH)**  
**JUDGE**

Announced in open Court on 24-02-2016.

**JUDGE**

Approved for reporting.