IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE MUSHIR ALAM
MR. JUSTICE SARDAR TARIQ MASOOD
MR. JUSTICE YAHYA AFRIDI

CIVIL PETITIONS NO.1369-L & 1370-L OF 2019
(Against the judgment dated 19.2.2019 passed by Lahore High Court, Lahore in I.C.As. No. 1206 & 1207 of 2016)

Province of Punjab thr. Secretary Excise & Taxation Department, Lahore, etc (in both cases) ...Petitioner(s)

VERSUS

Murree Brewery Company Ltd (MBCL) (in CP 1369-L/19)
Sindh Wine Merchants Welfare Association (in CP 1369-L/19)
...Respondent(s)

For the Petitioner(s): Ch. Faisal Fareed, Addl. A.G. Punjab
MR. Rizwan Akram Sherwani, Dir. Excise & Taxation, Lahore
Mr. Nadeem Salah-ud-Din, Sr. Law Officer, Excise Taxation & Narcotics Control Dept.

For the Respondent No.1: (in both cases) Ms. Ayesha Hamid, ASC

Date of Hearing: 24.11.2020

JUDGMENT

Mushir Alam, J.- The Notification No. SO(E&M)/2-3/2011 dated 24.06.2015 was issued by Secretary Excise & Taxation, Government of the Punjab which provided a cause of action to Murree Brewery Company Ltd (MBCL) [**Respondent**] to challenge the levy of export duty on the goods manufactured by them and consumed outside of the Province of Punjab under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 [**The Constitution]**. The Constitutional Petition filed before the Honorable High Court was accepted vide judgment dated 19.02.2019 and the impugned notifications were declared ultra-vires for violating of the freedom of trade enumerated under Article 151 of the Constitution.

2. The Chief Secretary, Government of Punjab, through Secretary Excise & Taxation preferred Intra-Court Appeals which were dismissed for being non-compliant with Article 174 of the Constitution, read with S.79 of the Code of Civil Procedure, 1908 (**CPC**), whereby it is stated that the case has to be filed in the name of the Federal or Provincial Government, as the case may be, and not through any of its functionaries. The Honorable High Court could not find any plausible explanation as to why the appeals were not filed in the name of the Province of Punjab but were instead instituted in the name of 'Chief Secretary, Government of Punjab, through Secretary Excise & Taxation, Punjab Secretariat, Lahore'. The Honorable High Court also remained unconvinced by the argument that S.79 of the CPC amounted to a mere technicality.

3. Another aspect that the Court found peculiar was that the appeals were filed by the Chief Secretary, Government of Punjab through Secretary, Excise and Taxation Department, Government of Punjab but the Memorandums of Appeals were signed by Deputy Secretary, Excise and Taxation Department, Government of the Punjab. There was nothing on record to show that the Secretary, Excise and Taxation Department, Government of Punjab was the authorized authority to file appeals on behalf of the Chief Secretary, Government of Punjab, nor could anything be presented to show that the Deputy Secretary, Excise and Taxation Department, Government of Punjab was authorized to execute the documents on behalf of the Chief Secretary, Government of the Punjab. The Court, on the basis of the grounds noted above, dismissed the Intra-Court Appeals without dilating upon the merits of the case. Therefore, the Government of Punjab, through Chief Secretary has preferred an appeal to this Court against the impugned judgment dated 19.02.2019.

4. Arguments heard. Record Perused.

5. The controversy can be devolved into three fundamental questions. The first question is whether S.79 of the CPC amounts to a mandatory provision or directory provision. The second question is whether non-compliance with this provision could prove fatal to the

case. The third question is whether any circumstances exist that would act as an exception to the general rule.

i. WHETHER S.79 OF THE CPC IS A MANDATORY OR DIRECTORY PROVISION:

a. The test for Mandatory or Directory Provisions:

6. The test to determine whether a provision is directory or mandatory is by ascertaining the legislative intent behind the same. The general rule expounded by this Court is that the usage of the word *'shall'* generally carries the connotation that a provision is mandatory in nature.[1] However, other factors such as the object and purpose of the statute and inclusion of penal consequences in cases of non-compliance also serve as an instructive guide in deducing the nature of the provision.[2]

7. This Court opined in the case of *The State Through Regional Director ANF v. Imam Baksh and Others*[3] that:

> "*To distinguish where the directions of the legislature are imperative and where they are directory, the real question is whether a thing has been ordered by the legislature to be done and what is the consequence, if it is not done. Some rules are vital and go to the root of the matter, they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance. The duty of the court is to try to unravel the real intention of the legislature. This exercise entails carefully attending to the scheme of the Act and then highlighting the provisions that actually embody the real purpose and object of the Act. A provision in a statute is mandatory if the omission to follow it renders the proceedings to which it relates illegal and void, while a provision is directory if its observance is not necessary to the validity of the proceedings. Thus, some parts of a statute may be mandatory whilst others may be directory. It can even be the case that a certain portion of a provision, obligating something to be done, is mandatory in nature whilst another part of the same provision, is directory, owing to the guiding legislative intent behind it. Even parts of a single provision or rule may be mandatory or directory. "In each case one must look to the subject*

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[1] (1995) 1 SCC 133. Paragraph 5.
[2] 2017 SCMR 1427. Paragraph 6.
[3] 2018 SCMR 2039. Paragraph 11.

> *matter and consider the importance of the provision disregarded and the relation of that provision to the general object intended to be secured." Crawford opined that "as a general rule, [those provisions that] relate to the essence of the thing to be performed or to matters of substance, are mandatory, and those which do not relate to the essence and whose compliance is merely of convenience rather than of substance, are directory." In another context, whether a statute or rule be termed mandatory or directory would depend upon larger public interest, nicely balanced with the precious right of the common man. According to Maxwell, "Where the prescription of statute relates to the performance of a public duty and where the invalidation of acts done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty without promoting the essential aims of the legislature, such prescriptions seem to be generally understood as mere instructions for the guidance and government of those on whom the duty is imposed or in other words as directory only. The neglect of them may be penal indeed, but it does not affect the validity of the act done in disregard of them." Our Court has held while determining the status of a mandatory or directory provision that "perhaps the cleverest indicator is the object and purpose of the statute and the provision in question." And to see the "legislative intent as revealed by the examination of the whole Act."*

8. The Supreme Court of India has also dilated upon this issue in the case of *Lachmi Narain v Union of India*,[4] which was upheld in the case of *New India Assurance Co. Ltd. v. Hilli Multipurpose Cold Storage Pvt. Ltd.*[5], that:

> *"If the provision is couched in prohibitive or negative language, it can rarely be directory, the use of peremptory language in a negative form is per se indicative of the interest that the provision is to be mandatory".*

[4] (1976) 2 SCC 953.
[5] (2020) 5 SCC 757.

9. The Indian Supreme Court has also laid down certain non-exhaustive precepts in the case of *May George v. Special Tehsildar and Ors.*[6] that:

a) *"While determining whether a provision is mandatory or directory, somewhat on similar lines as afore-noticed, the Court has to examine the context in which the provision is used and the purpose it seeks to achieve;*

b) *To find out the intent of the legislature, it may also be necessary to examine serious general inconveniences or injustices which may be caused to persons affected by the application of such provision;*

c) *Whether the provisions are enabling the State to do some things and/or whether they prescribe the methodology or formalities for doing certain things;*

d) *As a factor to determine legislative intent, the court may also consider, inter alia, the nature and design of the statute and the consequences which would flow from construing it, one way or the other;*

e) *It is also permissible to examine the impact of other provisions in the same statute and the consequences of non-compliance of such provisions;*

f) *Physiology of the provisions is not by itself a determinative factor. The use of the words 'shall' or 'may', respectively would ordinarily indicate imperative or directory character, but not always.*

g) *The test to be applied is whether non-compliance with the provision would render the entire proceedings invalid or not.*

h) *The Court has to give due weight age to whether the interpretation intended to be given by the Court would further the purpose of law or if this purpose could be defeated by terming it mandatory or otherwise."*

10. S.79 of the CPC is reproduced below:

"79. ** * * In a suit by or against the Government) the authority to be named as plaintiff or defendants as the case may be, shall be:*

a) in the case of a suit by or against the Central Government, Pakistan];

b) in the case of a suit by or against a Provincial Government, the Province; and"

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[6] (2010) 13 SCC 98; (2011) 9 SCC 354, Paragraph 20.

11. The aforementioned Section has to be read in conjunction with Order XXVII of the CPC that reads as follows:

> ***"ORDER XXVII***
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> *SUITS BY OR AGAINST [THE [GOVERNMENT]] OR PUBLIC OFFICERS IN THEIR OFFICIAL CAPACITY:*
>
> *1) In any suit by or against [the [Government]], the plaint or written statement shall be signed by such person as [the [Government]] may, by general or special order, appoint in this behalf, and shall be verified by any person whom [the [Government]] may so appoint and who is acquainted with the facts of the case.*
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> *...*
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> 3) *In suits by or [against the [Government]] instead of inserting in the plaint the name and description and place of residence of the plaintiff or defendant, it shall be sufficient to insert [the appropriate name as provided in section 79."*

12. The terminology contained in S.79 of the CPC does, in fact, contain the usage of the word 'shall'. While this may ordinarily indicate a mandatory provision, we shall also be considering other factors.

13. The integral factor that is to be considered is the legislative intent and the purpose that was to be achieved by the application of this provision. The purpose to be achieved by S.79 of the CPC and the operation of Article 174 of the Constitution was aptly explained by the Honorable Sindh High Court in the case of *Gul Ahmed Textile Mills Ltd. v. Collector of Customs (Appraisement) and 2 others*[7] which states:

> *"In a Civil Suit after its admission, summons as prescribed are issued against all defendants to file their written statements. Now if some relief is being sought against Government without its proper impleadment as a Defendant, there would be no proper assistance or representation on its behalf, rather it would be a case of Ex-parte proceedings for all practical purposes..."*

[7] 2019 MLD Sindh 144. Paragraph 10.

14. Therefore, the legislative intent and the purpose of the operation of this provision is for the State, or the Province, to be adequately represented and defended through the impleadment of the proper department. This purpose cannot be achieved if the concerned and proper department is not made a party to the suit, nor can it be achieved if the State, or Province, are not named in the suit.

15. This Court, in previous matters before it, has held that S.79 of CPC is a mandatory provision where the State, or the Province, was either not impleaded in compliance with S.79 of the CPC, and Article 174 of the Constitution, or the concerned department was not made party to the suit. Reference can be made to the cases of *Province of the Punjab through Member Board of Revenue (Residual Properties) v. Muhammad Hussain*[8], *Haji Abdul Aziz v. Government of Balochistan through Deputy Commissioner, Khuzdar*[9], and *Government of Balochistan, CWPP&H Department and others v. Nawabzada Mir Tariq Hussain Khan Magsi*[10].

ii. THE CONSEQUENCE OF BREACH OF S.79 OF THE CODE OF CIVIL PROCEDURE, 1908:

16. The general rule regarding the mandatory nature of S.79 of the CPC and Article 174 of the Constitution was explained in the Indian Supreme Court case of *Chief Conservator of Forests, Govt. of A.P. v. The Collector*[11]:

> *"It is not merely a procedural formality but is essentially a matter of substance and considerable significance. That is why there are special provisions in the Constitution and the Code of Civil Procedure as to how the Central Government or the Government of a State may sue or be sued. So also, there are special provisions in regard to other juristic persons specifying as to how they can sue or be sued."*

This Court also held in the case of *Government of Balochistan, CWPP&H Department and others v. Nawabzada Mir Tariq*

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[8] PLD 1993 SC 147.
[9] 1999 SCMR 16, Paragraph 9.
[10] 2010 SCMR 115, Paragraph 7.
[11] AIR 2003 SC 1805. Paragraph 12.

Hussain Khan Magsi[12] that non-compliance of a mandatory provision would render the suit invalid as reproduced below:

> *"Due to non-compliance of the mandatory provisions as enumerated in section 79, C.P.C. and Article 174 of the Constitution of Islamic Republic of Pakistan, a suit against the functionary only is not maintainable as has been done in this case"*

17. In light of what has been discussed above, as a matter of general principle, S.79 of the CPC is a mandatory provision to the extent where the Government is wrongly impleaded or the concerned and proper department is not made party to the suit. Such actions will render the suit invalid. However, it does not close the right of the person filing the proceeding to file the case afresh, subject to limitation, by impleading the correct Respondents in accordance with the provisions of S.79 of the CPC.

iii. THE EXCEPTION TO THE GENERAL RULE:

b. Misdescription or Misjoinder of a Party would not prove fatal to a case:

18. In this instant case, the Intra-Court appeals were filed as 'Chief Secretary, Government of Punjab, through Secretary Excise & Taxation, Punjab Secretariat, Lahore', whereas, the appropriate title, as filed in this Court is, 'Province of Punjab through Secretary Excise & Taxation Department, Civil Secretariat, Lahore, etc'. The point of contention remained that where a suit is to be instituted against the Government, the authority in whose name the suit has to be filed is the Federal or Provincial government, and not any of its functionaries. Similarly, an appeal to the Honorable High Court should have been filed in the name of the Province through the head of the concerned functionary.

19. However, where the Government itself files the Appeal, albeit with the wrong description, the provisions of S.79 of the CPC amount to mere nomenclature, which, if not followed, do not render the suit unmaintainable. The rationale being that, as mentioned above in paragraph 13, the object and purpose of S.79 of the CPC is for the

[12] Supra Note 10. Paragraph 7.

Government to be properly represented and defended. The same purpose is still achieved where the Government themselves file an appeal, as in this case. While such misdescription is a contravention of S.79 of the CPC, it is not fatal to the case when it is indeed the Government filing the appeal themselves.

20. A similar matter was adjudicated upon by the Indian Supreme Court in the case of *Secretary, Ministry of Works & Housing Govt. of India and Ors. v. Mohinder Singh Jagdev and Ors.*[13], wherein, even though the Appeal was filed by the Secretary, on behalf of the Union, the Court held that the case was maintainable. Such action would amount to merely a misdescription that can be remedied by the powers vested in the Court. The relevant portion has been reproduced below:

> *"Having given due consideration to the contentions of the counsel and having gone through the facts and circumstances of the case, first question that arises is: whether the appeal has been competently laid? It is not disputed and cannot be disputed that the Union of India can lay the suit and be sued under Article 300 of the Constitution in relation to its affairs. Under Section 79 read with Order 27 Rule 1, Code of Civil Procedure, in a suit, by or against the Central Government, the authority to be named as plaintiff/defendant shall be Union of India. The Secretary, Ministry of Works and Housing is a limb of the Union of India transacting its functions on behalf of the Government under the concerned Department as per the business rules framed under Article 77 of the Constitution. Therefore, the appeal came to be filed by the Secretary, though wrongly described. The nomenclature given in the cause title as Secretary instead of Union of India, is not conclusive. The meat of the matter is that the Secretary representing the Government of India had filed the appeal obviously on behalf of Union of India. Accordingly, we reject the first contention.*

[13] (1996) 6 SCC 229. Paragraph 5.

21. The Indian Supreme Court, in the case of *Chief Conservator of Forests, Govt. of A.P. v. The Collector*,[14] also further clarified two distinctions for cases where the compliance of S.79 of the CPC would not prove fatal to the case as:

> *"In giving description of a party it will be useful to remember the distinction between misdescription or misnomer of a party and misjoinder or non-joinder of a party suing or being sued. In the case of misdescription of a party, the court may at any stage of the suit/proceedings permit correction of the cause title so that the party before the court is correctly described; however, a misdescription of a party will not be fatal to the maintainability of the suit/proceedings. Though Rule 9 of Order 1 of C.P.C. mandates that no suit shall be defeated by reason of the misjoinder or non-joinder of parties, it is important to notice that the proviso thereto clarifies that nothing in that Rule shall apply to non-joinder of a necessary party. Therefore, care must be taken to ensure that the necessary party is before the court, be it a plaintiff or a defendant, otherwise, the suit or the proceedings will have to fail. Rule 10 of Order 1 C.P.C. provides remedy when a suit is filed in the name of wrong plaintiff and empowers the court to strike out any party improperly joined or to implead a necessary party at any stage of the proceedings."*

22. This Court has also adjudicated on this matter in the case of *Government of Balochistan, CWPP&H Department and others v. Nawabzada Mir Tariq Hussain Khan Magsi,*[15] wherein, it has been held that S.79 of CPC cannot be made the ground for a technical knockout. The relevant portion has been reproduced below:

> *"We may mention here at this juncture that the provisions as contemplated in Section 79, C.P.C. cannot be made a ground for technical knockout and wrong description of a Secretary as functionary of the Government is always 'subject to correction'. In this regard we are fortified by the dictum laid down by this Court in case titled WAPDA v. Alam Khan*[16]."

23. Therefore, where there is a matter of misdescription of parties, the Court may, either on its own accord, exercising *suo moto* powers, or after an application being submitted to it, order that the name of any party improperly joined be struck out and the appropriate party whose presence is necessary to do complete justice be added to

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[14] Ibid.
[15] Supra Note 10. Paragraph 6.
[16] PLD 1991 SC 374.

the suit under the powers conferred on it by S.153 and Order 1, Rule 10(2) of the CPC.

24. In the case cited as *Uday Shanker Triyar Vs. Ram Kalewar Prasad Singh*[17], learned bench of the Indian Supreme court was confronted firstly whether the presentation of a Memorandum of Appeal by an counsel without any authority in the shape of a vakalatnama is a valid presentation or not. The bench also incidentally considered the question whether such defect could be permitted to be rectified or not. While attending to such question learned bench of the Supreme court with approval relied on following dictum of Bowen L.J.[18]

> *"The object of Courts is to decide the rights of parties and not to punish them for mistakes which they make in the conduct of their cases by deciding otherwise than in accordance with their rights ... Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy."*
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> *If therefore there was an inadvertent technical violation of the rule in consequence of a bona fide mistake, and the mistake is subsequently remedied the defect need not necessarily be fatal."*

The Supreme Court after comparing the provisions of Order XLI, Rule 1, CPC, Order III, Rule 4, CPC and Order VI, Rule 14, CPC, held in paragraph-16 and 17 of its decision as follows*:* -

> *"16. An analogous provision is to be found in Order VI, Rule 14, CPC, which requires that every pleading shall be signed by the party and his pleader, if any. Here again, it has always been recognised that if a plaint is not signed by the plaintiff or his duly authorised agent due to any bona fide error, the defect can be permitted to be rectified either by the Trial Court at any time before judgment, or even by the Appellate Court by permitting appropriate amendment, when such defect comes to its notice during hearing."*
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> *17. Non-compliance with any procedural requirement relating to a pleading, memorandum of appeal or application or petition for relief should not entail automatic dismissal or rejection, unless the relevant statute or rule so mandates. Procedural defects and irregularities which are curable should not be allowed to defeat substantive rights or to cause injustice. Procedure, a hand-maiden to justice, should never be made a tool to deny justice or perpetuate injustice, by any oppressive or punitive use. The well recognized exceptions to this principle are :-*

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[17] 2006 (1) SCC 75,

[18] *Cropper v Smith (1884) 26 Ch. D. 700 (CA*)

i) where the Statute prescribing the procedure, also prescribes specifically the consequence of non-compliance.

ii) where the procedural defect is not rectified, even after it is pointed out and due opportunity is given for rectifying it;

iii) where the non-compliance or violation is proved to be deliberate or mischievous;

iv) where the rectification of defect would affect the case on merits or will affect the jurisdiction of the court.

v) in case of Memorandum of Appeal, there is complete absence of authority and the appeal is presented without the knowledge, consent and authority of the appellant;

25. The courts are also encouraged to take a proactive approach to matters involving the misdescription of parties by exercising authority under S.153[19] and Order 1, Rule 10 of the CPC and Order XXVII-A C.P.C, which provision is also made applicable to appeals (see Rule (4) ibid). Such misdescription, unless shown to mala-fide, and is not remedied when directed, is not fatal to the suit and the Courts should actively remedy the mistake so made and add Federal or provincial government as a party at any stage of the proceedings

26. This dictum laid down by this Court, in the case of *Muhammad Anwar and 8 others v. Muhammad Ashraf*[20] also fortifies the principle that a misdescription of parties only amounts to a mere technicality that cannot be allowed to stand in the way of justice, which should be corrected by the Courts. The relevant extract is reproduced below:

> *"It reflects from the scrutiny of record that Mst. Japan, their guardian ad litem, had two sons with the names of Muhammad Hayat and Qamar Abbas against whom suit had been filed which aspect lends support 'to the fact that factually Umar Hayat was intended to be impleaded as a party. In our considered view non-mentioning of the correct name, at the best can be considered as a lapse or omission and amounts to misdescription of a party and is always subject to correction which can be made by invoking the provisions as contained in section 153, C.P.C. and technicalities should not be allowed to*

[19] PLD 1993 SC 363.
[20] PLD 2001 SC 209.

> *stand in the way of justice because procedure ought not to be used for purpose of defeating justice and technicalities of procedure have to be avoided. "Independent of express jurisdiction conferred on Court by section 153 of Civil P.C., the Court also possessed inherent powers for allowing an incorrect description of a party in the pleading to be corrected."*

26. The Respondent No.1 was aggrieved by the notification dated 24.6.2015, subject matter of the Writ Petition, which was issued by the Secretary Excise & Taxation. In the title in the ICA's Chief Secretary, Government of Punjab through Secretary Excise and Taxation is shown to be the appellant, instead of province of Punjab, which qualifies under the exception of misconception, as the correct name i.e Province of Punjab through Secretary, Excise & Taxation was not mentioned. Being a mere case of wrong, inaccurate, or misdescription of parties, the Court, being sanctuaries of justice, can rectify the bonafides error by exercising jurisdiction duly vested under S.153, Order 1, Rule 10 and Order XXVII-A of the Code of Civil Procedure, 1908 more particularly so when no prejudice is shown to have been caused to the Respondent, more particularly when the Secretary Excise & Taxation was the concerned Secretary competent authority to represent the Province of Punjab, in the matter in hand.

27. In conclusion, as a matter of general principle, the provision of S.79 of CPC is a mandatory provision which is applicable where the correct and appropriate department is not made party to the suit and/or the Government is wrongly impleaded. Such non-compliance will render the suit invalid for the want of necessary party.

28. In light of what has been said above, the Petitions are converted into appeal and stand allowed. The impugned judgment is set aside and the matter is remanded back to the Honorable Lahore High Court, Lahore, for decision on merits; The Appellant is directed to file amended title of the ICAs' with proper description of the Appellant in conformity with Section 79 of the CPC and Article 174 of the Constitution.

29. The above are the reasons for our short order dated 24.11.2020, which reads as follow:

> "*For the reasons to follow, these petitions are converted into appeals and allowed. The impugned judgment is set aside and the matter is remanded to the learned High Court for decision on merits in accordance with law.*"

Judge

Judge

Judge

ISLAMABAD
24th November, 2020.

"*Approved for reporting*"