JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
(JUDICIAL DEPARTMENT)

I.C.A. No. 978 of 2024

Mrs. Naina Syed

Versus

The Secretary Ministry of Federal Education and Professional Training *and others*

Writ Petition No. 2695 of 2023

Mst. Naureen Ahmad Tarar

Versus

Federal Board of Revenue *and others*

Appellant by	:	**Sayyid Murtaza Ali Pirzada, Advocate.** (in I.C.A. No. 978 of 2024)
Petitioner by	:	**M/s Taimoor Aslam Khan and Mudassar Abbas, Advocates.** (in W. P. No. 2695 of 2023)
Respondents by	:	**Barrister Munawar Iqbal Duggal, Additional Attorney General.** **Rana Imran Farooq and Mr. Sarfraz Rauf, Assistant Attorney Generals.** (in I.C.A. No. 978 of 2024)
		Mr. Saeed Ahmed Zaidi, Advocate (in W. P. No. 2695 of 2023)
		Mr. Talat Mahmood, AAO, Representative of Respondent No.4
Date of Decision	:	**10-02-2025.**

SAMAN RAFAT IMTIAZ, J.-

1. By way of the instant common judgment, we propose to decide both the above titled cases as similar questions of law and facts are involved.

Facts alleged in I.C.A. No. 978 of 2024

2. The instant appeal has been filed by the Appellant [Mrs. Naina Syed] to seek *inter alia* setting aside of the Judgment dated 18-9-2024

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("**Impugned Judgment**") passed by the learned Single Judge-in-Chambers dismissing Writ Petition No.2480 of 2019; direction to the Respondent No.1 [The Secretary Ministry of Federal Education and Professional Training] to notify the antedated promotion of the Appellant with effect from 19-10-2007 and direction to Respondents No.2 and 4 [The Director Federal College of Education and The Accountant General Pakistan Revenues, Government of Pakistan] to pay arrears of pay accordingly; and costs and compensation for non-implementation of the Judgment of the Supreme Court from 28-3-2018 till the date of payment.

3. The brief facts, as per the Memo of Appeal, are that the Appellant was appointed as Lecturer at the Federal College of Education, Islamabad with effect from 11-5-1993. She retired on 22-9-2024 after 31 years of service. During service, she was promoted vide Notification dated 4-6-2012 as Assistant Professor with effect from 15-5-2012. The Petitioner was aggrieved by the Notification of promotion being given effect from 15-5-2012 instead of the date of vacancy therefore the Appellant preferred an appeal before the Federal Service Tribunal **("Federal Tribunal")** seeking her promotion to be antedated. The learned Federal Tribunal allowed the appeal of the Appellant vide Judgment dated 2-3-2017 and directed the Respondents to consider the Appellant for antedated promotion with effect from 19-10-2007 or the date when the post of Associate Professor (BS-18) had fallen vacant. The Respondent No.2 filed Civil Petition No. 1483 of 2017 before the Supreme Court which was dismissed and leave was refused vide Order dated 28-3-2018. Despite the foregoing, no action was taken by the Respondents.

4. The Appellant filed Writ Petition No. 2480 of 2019 before this Court in terms of Article 187(2) of the Constitution of the Islamic Republic of Pakistan, 1973 ("**Constitution**"). The said petition has been dismissed vide the Impugned Judgment as not maintainable in view of the alternate remedy available under Section 5(3) of the Service Tribunals Act, 1973 ("**Service Tribunals Act**") inserted vide the Service Tribunals (Amendment) Act, 2014 whereby the Federal Tribunal can execute its own decisions. Hence the Appellant filed the instant ICA.

<u>Facts alleged in Writ Petition No. 2695 of 2023</u>

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5. The instant petition has been filed by the Petitioner [Ms. Naureen Ahmad Tarar] to seek *inter alia* the implementation of the Judgment dated 11-12-2019 passed by the Supreme Court in Civil Appeals No. 248 to 251 of 2018; declaration that the seniority of the Petitioner cannot be altered or revised post issuance of Gradation List; restoration of the seniority of the Petitioner to her original position as determined under the Central Superior Services Examination ("**CSS**") and notified on 13-08-2003; setting aside of the Final Seniority List issued in violation of the aforesaid Judgment of the Supreme Court on 14-06-2022; and direction to the Respondent No.1 and 2 [Federal Board of Revenue through Chairman and Secretary (HRMC-II) Revenue Division, Administration and Human Resources] to issue the Final Seniority List.

6. The brief facts, as per the Memo of Petition and its annexures, are that the Petitioner is an officer of the Customs and Excise Group who appeared for the CSS Exam held in 1996 and was appointed as Assistant Collector in July, 1998. She belongs to the 25th Common Training Program ("**CTP**"). The Petitioner successfully completed the CTP in July, 1998 and the Specialized Training program in February, 1999 and the Final Passing out Examination ("**FPOE**") in her second attempt. Her probation period ended on 23-5-2001. The Respondents No. 1 and 2 determined the seniority of the Petitioner's batch in terms of Section 8(4) of the Civil Servants Act, 1973 in light of the merit list of the CSS Examination and on the basis of such Seniority List promoted the Petitioner along with her colleagues on 13-8-2003.

7. Thereafter, the Respondents No. 1 and 2 changed the seniority of the 25th CTP on its own and issued a revised Provisional Seniority List in the year 2008 and Final Seniority List dated 21-12-2012 whereby the Petitioner was relegated to a lower position by applying Rule 7(4) of the Occupational Groups and Services (Probation, Training and Seniority) Rules, 1990 **("OGS Rules, 1990")**. The Petitioner and another challenged the said Seniority List before the Federal Tribunal. The Respondents No. 1 and 2 submitted that seniority has to be determined under Rule 7(4) of the OGS Rules, 1990 but admitted that the OGS Rules, 1990 were applied to the Petitioner and her batch mates for the first time in 2008. The Petitioner and co-appellant argued

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that the said Rules could not be applied to them with retrospectively given that they were not made applicable at the time they joined service.

8. The Federal Tribunal accepted the appeals filed by the Petitioner and the co-appellant vide the Judgment dated 30-7-2015. The Judgment held that the OGS Rules, 1990 could not have been made applicable to the officers after they have already been promoted. It was held that such officers cannot be relegated to a lower position in the Seniority List of the promoted grade as upon promotion seniority should be determined in the promoted cadre without reference to the seniority in the lower cadre during probation. The Federal Tribunal also observed that while relegating the Petitioner and the co-appellant to a lower level in the Seniority List the Respondents No. 1 and 2 retrospectively applied sub-rule (2) of Rule 6 of the OGS Rules, 1990 which was substituted by amendment long after their appointment as Assistant Collectors in July, 1998 through SRO 258(I)/2001 dated 03-05-2001 and which was not applied to many earlier batches. The Federal Tribunal also held that the OGS Rules, 1990 are ambiguous and self-contradictory and incapable of being applied as a coherent law. Therefore, the Federal Tribunal set aside the Provisional Seniority List issued on 2008 and Final Seniority List issued on 21-12-2012 and restored the Petitioner's seniority as notified on 13-8-2003.

9. In parallel, four officers from the 24th CTP also approached the Federal Tribunal to challenge the Seniority List finalized by the Respondents No. 1 and 2 in 2012. The Federal Tribunal allowed their appeal vide Judgment dated 5-1-2017 while relying upon its Judgment dated 30-7-2015 passed in the Petitioner's appeal.

10. The Petitioner filed Writ Petition No. 4545 of 2016 seeking *inter alia* implementation of the Judgment dated 30-7-2015 passed by the Federal Tribunal in the Petitioner and co-appellant's case. On the other hand, the Respondent No. 1 challenged the Judgment dated 30-7-2015 before the Supreme Court of Pakistan by way of Civil Appeals No.1219 & 1222 of 2015 and the Judgment dated 05-01-2017 by way of Civil Appeals No. 248 & 251 of 2018. On 14-12-2016, this Court was apprised in W.P. No. 4545 of 2016 that leave to appeal has been granted by the Supreme Court but that no stay order had been passed. It was submitted that the case of the Petitioner would

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be forwarded for consideration for promotion in the next CSB meeting in view of the relevant provisions of the Esta Code whereby in the absence of an injunctive order the department is required to proceed subject to the final decision in appeal and as such the writ was disposed of. The seniority of the Petitioner was therefore restored on the basis of her CSS result and the Petitioner was also promoted to BS-20.

11. Thereafter, the Supreme Court passed Order dated 20-2-2019 whereby the Civil Appeals No.1219 & 1222 of 2015 (pertaining to the Petitioner and her co-appellant before the Federal Tribunal) were decided noting therein that leave was granted vide Order dated 23-11-2015 whereas Civil Appeals No. 248 & 251 of 2018 (pertaining to the four officers from the 24th CTP) were adjourned to be heard separately while noting that distinct questions of law and facts are involved therein. The Order dated 20-2-2019 partially allowed Civil Appeals No.1219 & 1222 of 2015 and modified the Judgment dated 30-7-2015 passed by the Federal Tribunal. The Respondent No. 1 filed a civil review petition against the Order dated 20-02-2019 which was dismissed on 20-09-2019.

12. The Civil Appeals No. 248 & 251 of 2018 filed by the Respondent No. 1 against the Federal Tribunal Judgment dated 05-01-2017 passed in the case of the other civil servants were dismissed by the Supreme Court vide Order dated 11-12-2019 as well as the civil review petition filed by the Respondent No. 1 against the same on 7-7-2020.

13. The Petitioner filed applications and representations with the Respondents No. 1 and 2 for restoration of her original seniority in line with the Judgment of the Supreme Court but instead of following the same, the revised Seniority List dated 14-6-2022 of 25th CTP has been issued in which the Petitioner has been relegated to 17th number. In contrast, the seniority of the 24th CTP was restored to the original CSS merit list. Hence, the instant petition whereby the Petitioner seeks implementation of the Supreme Court Order dated 11-12-2019 pursuant to Article 187(2) of the Constitution and consequential reliefs.

<u>Arguments in I.C.A. No. 978 of 2024</u>

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14. The learned counsel for the Appellant contended that the learned Single Judge-in-Chambers failed to appreciate that the Judgment dated 2-3-2017 passed by the Federal Tribunal merged with the Order dated 28-3-2018 passed by the Supreme Court with the result that it is only the order of the Supreme Court that is now in the field for execution/implementation. He argued that as such the writ petition was maintainable since it is the High Court that executes the judgments of the Supreme Court in terms of Article 187(2) of the Constitution. On merits, he pleaded that the Appellant is aggrieved as her case was not placed before the two meetings of the DPC that have been held on 3-5-2018 and 29-5-2019 since the passage of the Order dated 28-3-2018 by the Supreme Court for appropriate amendment in the Notification to grant antedated promotion to the Appellant. The learned counsel submitted that the Respondent No.1 has violated the fundamental rights of the Appellant as guaranteed under Articles 3, 4, 5, 9, 10A, 14, 18, and 25 of the Constitution. He relied upon *Bahadar Hilal Vs. Shaukat Hayat*, 2022 CLC 959 and *Bashir Ahmed Badini, D&SJ, Dera Allah Yar Vs. Hon'ble Chairman and Member of Administration Committee and Promotion Committee of Hon'ble High Court of Balochistan*, 2022 SCMR 448.

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15. The learned counsel for the Petitioner too relied upon Article 187(2) of the Constitution to submit as a general proposition that the High Court is duty bound to implement any decision or order of the Supreme Court and in this regard relied upon *Government of Khyber Pakhtunkhwa through Chief Secretary, Peshawar Vs. Maqsad Hayat*, 2023 SCMR 8; *Bahadar Hilal Vs. Anwar Hayat through Legal Heirs*, PLD 2022 Peshawar 39; *Roshan Ali Lakhan Vs. The D.G. Petroleum*, 2022 CLC 284; *Bahadar Hilal Vs. Shaukat Hayat*, 2022 CLC 959; *Qurban Ali Shah Vs. Federation of Pakistan through Federal Secretary*, PLD 2020 Sindh 242; *Kainat Soomro Vs. Province of Sindh through Chief Secretary*, PLD 2020 Sindh 611; *Contempt Proceedings against Syed Yousaf Raza Gillani, The Prime Minister of Pakistan regarding non-compliance of this Court's Order dated 16-12-2009*, PLD 2012 SC 553; *Mrs. Iram Adnan Vs. Federation of Pakistan*, 2012 PLC (C.S.) 1355; *Amanullah Khan Yousafzai Vs. Federation of Pakistan through Law Secretary*, PLD 2011 Karachi 451; *Muhammad Amin Bhatti Vs. Inspector-General of Punjab Police*, 2011 PLC (C.S.) 535; *Mehar Muhammad Nawaz*

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Vs. Managing Director, Small Business Finance, Corporation, 2009 SCMR 187; *Saad Amanullah Khan Vs. IVth -Senior Civil Judge, (South), Karachi*, PLD 2008 Karachi 499; *Umer Gul Vs. Government of Sindh through Secretary, Transport, Karachi*, 2007 YLR 3191; *Ghulam Sarwar Vs. Habib Bank Limited*, 2001 PLC (C.S.) 198; *Hameed Akhtar Niazi Vs. The Secretary, Establishment Division, Government of Pakistan*, 1996 SCMR 1185; *ICT Pakistan Ltd./Soda Ash Works, Khewra, District Jehlum Vs. Zila Council, Jehlum through Chairman*, 1994 MLD 235; and *Sugar Mills & Distillery Ltd., Mardan Vs. Tee Frontier Sugar Mills & Distillery Ltd.*, PLD 1978 Peshawar 128.

16. On the other hand, in case leave is declined by the Supreme Court he relied upon *Sahibzadi Maharunnisa Vs. Mst. Ghulam Sughran*, PLD 2016 SC 358 whereby it has been categorically held that in such case the judgment of the lower *fora* remains intact and does not merge into the leave refusing order. He, therefore, argued that where the Supreme Court has dismissed leave to appeal against an order passed by the Federal Tribunal the rule of merger does not apply and it is the Federal Tribunal order that is to be implemented and as such the matter will not come within the ambit of Article 187(2) of the Constitution. Instead the matter would lie before the Federal Tribunal in view of Section 5(3) of the Service Tribunals Act added vide the Finance Act, 2014 whereby the Federal Tribunal now has the power to execute its own decisions. He submitted that in case the Supreme Court modifies the judgment of the Services Tribunals such order of the Supreme Court would fall within the ambit of Article 187(2) of the Constitution to be implemented by the High Court.

17. The learned counsel for the Petitioner highlighted that the Supreme Court Order dated 20-2-2019 whereby the Respondent No.1's civil appeals were partially allowed held that the un-amended OGS Rules, 1990 as at the commencement of the probationary period in July, 1998 shall remain applicable for reckoning of seniority on the completion of probation in grade 17 and that the judgment of the Federal Tribunal stands modified accordingly. He argued that that means that the Petitioner's seniority shall not be disturbed or amended on account of amendments to the OGS Rules 1990 in 2001. He also emphasized that the Supreme Court of Pakistan has not set aside the findings of the Federal Tribunal Judgment dated 30-7-2015 whereby the

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revised Seniority List of the Petitioner was set aside and Seniority List as notified on 13-8-2003 restored.

18. The learned counsel for the Petitioner explained that by way of Order dated 11-12-2019 the Supreme Court held that those officers who had already been promoted could not be relegated to a lower position given that the Gradation List on the basis of which the promotion was granted was prepared when Rule 7(4) of the OGS Rules, 1990 was in existence and yet such Gradation List was never challenged nor the promotion. According to the learned counsel for the Petitioner the said Order has cleared all ambiguities, if any, on the matter in issue as the Order dated 11-12-2019 passed by the Supreme Court of Pakistan has clearly held that seniority of the civil servants as determined at the time of their induction in service cannot be changed especially when they have been promoted to the next grade in the light of the said Seniority List. The learned counsel argued that the Petitioner falls within the category of officers who had already been promoted and as such the Respondent No.1 has no basis to refuse to implement the Supreme Court's directions.

19. The Petitioner was admittedly not a party before the Supreme Court in the Civil Appeal No. 248 to 251 of 2018 in which the Order dated 11-12-2019 was passed of which the Petitioner is seeking implementation from this Court. However, the learned counsel for the Petitioner argued that it is a judgment passed in *rem* which as such is applicable across the board and the Petitioner cannot be treated differently than all other officers of the Respondent No. 1 by erroneously differentiating the Order dated 20-2-2019 of the Supreme Court of Pakistan passed in respect of the Petitioner. The learned counsel for the Petitioner submitted that even if it is assumed hypothetically for the sake of argument that Petitioner had not in fact initiated any litigation even then she would be entitled to be accorded the same benefit as has been extended pursuant to the Supreme Court of Pakistan's Judgment dated 11-12-2019 to like officers which cannot be withheld from her on the touchstone of Article 25 of the Constitution.

20. He also highlighted that Respondent No. 1 sought advice from the Establishment Division as well as the Law and Justice Division and both have advised Respondent No. 1 that the Judgments passed by the Tribunal and

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Supreme Court of Pakistan resolving the seniority dispute of Pakistan Customs Service Officers are required to be implemented without discrimination amongst the officers whether litigants or not and seniority of such employees cannot be disturbed or altered by any subsequent Seniority List on the principle of legitimate expectation. In support of his contentions the learned counsel for the Petitioner relied upon *Faraz Ahmed vs. FOP through Secretary Ministry of Communication, Government of Pakistan, Islamabad*, 2022 PLC (CS) 198; *Dera Allah Yar and others vs. Honourable Chairmen and Member Administration Committee and Promotion Committee of Honourable High Court of Balochistan and others,* 2022 SCMR 448; *Mrs. Imran Adnan and others vs. Federation of Pakistan and others,* 2012 PLC (C.S.) 1355; *Muhammad Amin Bhatti vs. Inspector General of Punjab Police,* 2011 PLC (C.S.) 535; *ICI Pakistan Ltd./Dosa Ash Works, Khewra, District Jhelum vs. Zila Council, Jhelum through Chairman and another,* 1994 MLD 235.

Arguments of the Respondents

21. On the other hand, the learned counsel for the Respondents No. 1 and 2 argued that the Petitioner was not a party to Civil Appeals No.248 to 251 of 2018 wherein the Supreme Court passed the Order dated 11-12-2019 of which the Petitioner is seeking implementation by this Court. He further argued that the Order dated 11-12-2019 cannot be treated in *rem* in view of the Order dated 20-2-2019 passed by the Supreme Court specifically in the Petitioner's Civil Appeal No. 1219 of 2015 which has modified the Federal Tribunal Judgment dated 30-7-2015 to the extent that the OGS Rules, 1990 are to apply to the Petitioner in their un-amended form. He submitted that the Respondent No. 1 is duty bound to implement the Supreme Court's orders and as such the Seniority List dated 14-06-2022 has been issued in implementation of the Supreme Court Order dated 20-02-2019 whereby the Petitioner's seniority stands altered as a result of applying the un-amended OGS Rules, 1990.

22. Vide the Order dated 4-11-2024 passed in the instant I.C.A., notice under Order XXVII-A, C.P.C. was also issued to the Attorney General for Pakistan. The learned Assistant Attorney General **("AAG")** argued that provisions of Article 187(1) are subject to and controlled by Article 175(2) of

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the Constitution and as such Article 187(2) cannot be invoked to approach the High Court for implementation of Supreme Court's directions, orders or decrees passed in relation to Tribunal Judgments in view of the bar contained in Article 212(2) of the Constitution. He also relied upon Section 23A of the Civil Servants Act, 1973 to challenge the maintainability of the instant ICA and Petition. He submitted that essentially the Appellant and the Petitioner are seeking implementation of the Federal Tribunal Judgments for which purpose the Federal Tribunal has powers pursuant to Section 5(3) of the Service Tribunals Act and as such writ petitions are not maintainable and the ICA is liable to be dismissed.

23. The instant writ petition was initially heard by a Single Judge-in-Chambers of this High Court comprising of one of us (Justice Saman Rafat Imtiaz) wherein the Respondents objected to the maintainability on account of Section 5(3) of the Service Tribunals Act which in turn was countered by the Petitioner in reliance upon Article 187(2) of the Constitution. Since similar question pertaining to Section 5(3) of the Service Tribunals Act and Article 187(2) of the Constitution was also at issue in the instant ICA, the matter was referred to the Chief Justice for appropriate orders vide Order dated 7-11-2024 where after the matter was fixed before this Division Bench pursuant to an administrative order.

24. We have heard the learned counsels for the parties and have also perused the record.

25. In a nutshell, the learned counsel for the Appellant as well as that of the Petitioner contended that the High Court implements Supreme Court directions, orders, and decrees pursuant to Article 187(2) of the Constitution, which provides as follows:

> *"187. (1)* ***Subject to clause (2) of Article 175, the Supreme Court shall have power to issue such directions, orders or decrees*** *as may be necessary for doing complete justice* ***in any case or matter pending before it,*** *including an order for the purpose of securing the attendance of any person or the discovery or production of any document.*
>
> *(2)* ***Any such direction, order or decree*** *shall be enforceable throughout Pakistan and shall, where it is to be executed in a Province, or a territory or an area not forming part of a Province but within the jurisdiction of the High Court of the Province,* ***be executed as if it had been issued by the High Court of that Province.***

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> *(3) If a question arises as to which High Court shall give effect to a direction, order or decree of the Supreme Court, the decision of the Supreme Court on the question shall be final."* [Emphasis added].

26. As rightly pointed out by the learned AAG, the directions, orders or decrees mentioned in Article 187(2) are such which are issued under Article 187(1) of the Constitution, which in turn is subject to and controlled by Article 175(2) and as such may only be invoked in a case or matter competently filed before the Supreme Court under any Article of the Constitution or provision of some other law conferring jurisdiction[1]. In the case at hand, we are concerned with Orders issued pursuant to the Supreme Court's jurisdiction under Article 212(3) of the Constitution whereby an appeal to the Supreme Court *inter alia* from a judgment, decree or order of a tribunal shall lie only if the Supreme Court grants leave to appeal on being satisfied that the case involves a substantial question of law of public importance.

27. In other words, the Appellant and the Petitioner have invoked Article 187(2) of the Constitution to seek implementation of the Orders passed by the Supreme Court in exercise of its jurisdiction under Article 212(3) of the Constitution in respect of judgments of the Federal Tribunal. It bears emphasis though that the Supreme Court clarified in the *Contempt Proceedings against Syed Yousaf Raza Gillani, The Prime Minister of Pakistan*, PLD 2012 SC 553 that clause (2) of Article 187 of the Constitution only mandates that when the orders of the Supreme Court are to be enforced within a Province they shall be executed *as if* passed by the High Court of that Province not that the execution is to be carried out *by* the High Court.

28. The words *"as if passed by the High Court of that Province"* in Article 187(2) create a fiction whereby execution of a Supreme Court direction, order, or decree is to be carried out in the manner that governs execution of the High Court's own decree[2]. It enables the application of the procedure applicable upon execution of a High Court decree to be employed for purposes of execution of Supreme Court directions, orders or decrees.

29. The High Court can pass judgments and decrees while exercising its original jurisdiction, for example under the Companies Act, 2017 or the

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[1] *Khalid Mehmood Vs. Chaklala Cantonment Board*, 2023 SCMR 1843
[2] *Abdul Malik Badruddin Vs. Grosvenor Casino Limited*, PLD 1993 Sindh 449

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Financial Institutions (Recovery of Finances) Ordinance, 2001 or as in the case of the Karachi Bench of the Sindh High Court in exercise of its original civil jurisdiction in which case the High Court is also the executing Court. In case such judgments and decrees are challenged before the Supreme Court the directions, orders or decrees passed by the Supreme Court, if any, which fall within the ambit of Article 187(2) of the Constitution would therefore naturally be executed by the High Court.

30. However, the High Court also passes judgments and decrees in its appellate, revision, and writ jurisdiction. With regard to the manner of execution of directions, orders or decrees that are issued pursuant to the Supreme Court's jurisdiction under Article 185 of the Constitution in respect of judgments of the High Court passed in its appellate/revision/writ jurisdiction, the counsel submitted that such orders and decrees are executed by the Court of first instance by virtue of Section 37, CPC.

31. The matter of execution of a judgment and decree passed by the Sindh High Court in revision affirmed by the Supreme Court by dismissal of the civil appeal filed before it came up before the Sindh High Court in *Muhammad Asar Hussain Vs. Karachi Development Authority, Karachi*, 1999 CLC 1121. The Sindh High Court considered whether such decree can be executed by the High Court. The Sindh High Court relied upon *Ardeshir Cowasjee Vs. Byram D. Avari*, 1984 CLC 2494 in which a similar question arose i.e. whether the High Court is empowered to execute its order which was passed in exercise of appellate jurisdiction. It was observed that a decree holder is competent to seek execution of a decree in accordance with Order XXI, Rule 10 of the Civil Procedure Code **("CPC")**, which, to the extent that it is relevant for our purposes, provides that where a holder of a decree desires to execute it, he shall apply to the *Court which passed the decree* or to the officer (if any) appointed in this behalf. This provision is clarified by Section 37(a), CPC which has defined the expression *"Court which passed a decree"* to include the Court of first instance where the decree to be executed has been passed in the exercise of appellate jurisdiction. In view thereof the Sindh High Court held that it is the Court of first instance which is competent to execute the final orders/decrees of an appellate Court and as such rejected the proposition that the High Court has concurrent jurisdiction with the Court of

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first instance in respect of implementation or execution of orders or decrees passed by the appellate Court in appellate jurisdiction.

32. Since appellate decrees of the High Court are executed by the Court of first instance in accordance with Order XXI, Rule 10, CPC read with Section 37, CPC, the directions, orders, and decrees of the Supreme Court passed in civil appeals filed against such decrees are also executed by the Court of first instance pursuant to Article 187(2) which requires any directions, orders, and decrees issued by the Supreme Court to be executed *as if* it had been passed by the High Court.

33. This is further clarified by *Lingam Krishna Bhoopathi Deo Garu Vs. Raja of Vijayanagaram*, AIR 1914 Madras 222, wherein the Madras High Court held that words similar to the expression "Court which passed a decree" used in Section 37, CPC have been used in Order XLV, Rule 15, CPC which provides that the Court from which an appeal to His Majesty has been preferred shall transmit the order of His Majesty in Council to the Court which passed the first decree appealed from. The Court held that the act of the High Court in receiving and filing an order of the Privy Council is purely a ministerial function. It was further explained that the High Court acts as an intermediary for carrying out the orders of His Majesty in Council because the Privy Council does not deal directly with subordinate courts. The same approach has been taken in a recent judgment reported as *Bahadar Hilal Vs. Anwar Hayat through Legal Heirs*, PLD 2022 Peshawar 39.

34. The case at hand involves Orders passed by the Supreme Court in respect of Judgments of the Federal Tribunal arguably to be implemented under 187(2) of the Constitution. The said Orders, at best, are to be implemented *as if* passed by the High Court by virtue of Article 187(2) of the Constitution. Therefore the question arises as to whether such Orders are to be executed as orders passed by the High Court as a Court of first instance or as orders passed by the High Court in its appellate jurisdiction. The counsel before this Court contended that no provision such as Section 37, CPC or Order XLV, Rule 15, CPC exists in the Services Tribunals Act. The counsel for the Petitioner highlighted Section 19(2) of the Financial Institutions (Recovery of Finances) Ordinance, 2001; Section 23 of the Islamabad Rent Restriction Ordinance, 2001; and Section 13(4) of the Family Courts Act,

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1964 as examples of special laws whereby provisions of CPC are employed for purposes of execution of decrees passed thereunder. The counsel argued that the Court cannot read into the statute what has not been provided for by the Legislature on the principle of *casus omissus*[3] therefore the Federal Tribunal Judgments affirmed, varied or modified by the Supreme Court are to be implemented by the High Court pursuant to Article 187(2) of the Constitution.

35. In this regard, the learned counsel for the Petitioner relied upon *Muhammad Amin Bhatti Vs. Inspector-General of Punjab Police*, 2011 PLC (C.S.) 535 and *Ghulam Sarwar Vs. Habib Bank Limited*, 2001 PLC (C.S.) 198 and submitted that they squarely apply to the instant petition as in both such cases the Lahore High Court entertained writ petitions for implementation of judgments of the Punjab Service Tribunal.

36. I have carefully reviewed both the said judgments. Interestingly however, although the writs were allowed and directions were given for the implementation of the Punjab Service Tribunal judgments, neither of the two said judgments was passed in exercise of powers under Article 187(2) of the Constitution. In fact, Article 187(2) was not even referred to in *Muhammad Amin Bhatti (Supra)* though the judgment of the Punjab Service Tribunal in question had been maintained by the apex Court.

37. In the case of *Ghulam Sarwar (Supra)*, the judgment passed by the Punjab Service Tribunal of which implementation was sought had never been challenged before the Supreme Court at all therefore the question of implementation under Article 187(2) of the Constitution did not arise. In fact, Article 187(2) of the Constitution was pressed into service to argue that the High Court can only implement the judgments of the Supreme Court but the Constitutional jurisdiction cannot be exercised to direct implementation of the judgment of the Tribunal. Such proposition was rejected by the Lahore High Court and the writ was allowed by holding that the judicial system would be reduced to a clap trap if the departmental authorities are left free to implement or not to implement a judgment of the Service Tribunal. Be that as it may, what is noteworthy for the issue at hand is that the Lahore High Court did not

[3] *Deputy Director Finance and Administration FATA Vs. Dr. Lal Marjan*, 2022 SCMR 566

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give directions for the implementation of the Punjab Service Tribunal judgments pursuant to Article 187(2) of the Constitution.

38. Similarly, judgments reported as *Muhammad Siddique Detho Vs. State Life Insurance Corporation*, 2005 PLC (C.S.) 946; *Miss Naghma Sehar Khan Vs. Pakistan International Airlines Corporation*, 2009 PLC (C.S.) 291; *Mrs. Imran Adnan vs. Federation of Pakistan*, 2012 PLC (C.S) 1355; and *Dr. Abdul Aziz Vs. Federation of Pakistan*,2010 PLC (C.S) 88 whereby writ petitions under Article 199 of the Constitution have been allowed by the High Courts including this Court do not make any reference to Article 187(2) of the Constitution in spite of the fact that directions were given for the implementation of judgments of the Federal Tribunal which had attained finality following dismissal of civil petitions for leave to appeal by the Supreme Court.

39. In fact the High Courts in *Qazi Muhammad Anwar Barlas Vs. Federation of Pakistan*, 2000 PLC (C.S.) 1165; *Fazal Elahi Vs. Pakistan Telecommunication Company Ltd.*, 2004 PLC (C.S.) 655; and *Aziz-ur-Rehman Chaudhry Vs. Federation of Pakistan*, 2009 PLC (C.S.) 914 implemented the Federal Tribunal judgments despite the fact that they were either never challenged before the Supreme Court or the civil appeals were still pending.

40. These judgments are a blow to the proposition that the High Court implemented Tribunal judgments upheld by the Supreme Court in pursuance of Article 187(2) of the Constitution. Some of the judgments have relied upon Article 4 and 190 of the Constitution to justify jurisdiction to implement judgments of the Tribunals. While none of the judgments expressly say so but the discussion contained therein suggests that the High Courts implemented the Tribunal judgments on account of lack of an alternate adequate remedy as the judgments pertaining to the Federal Tribunal are from prior to the insertion of Section 5(3) to the Service Tribunals Act in 2014 whereas the laws pertaining to the provincial service tribunals remain un-amended till date in respect of the power of execution.

41. Having said that for the sake of completeness it is important to acknowledge that while the Sindh High Court in *Aziz-ur-Rehman Chaudhry Vs. Federation of Pakistan*, 2009 PLC (C.S.) 914 was of the view that the

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Federal Service Tribunal does not have the power to execute its decisions, a number of judgments from the Lahore High Court and the Baluchistan High Court have held otherwise while examining the provisions pertaining to the powers of the Punjab Service Tribunal and the Baluchistan Service Tribunal under their respective laws which are virtually the same as the Federal Service Tribunals Act prior to the amendment in Section 5 of the Service Tribunals Act. The rationale given is that since the tribunals have the same powers as a Civil Court for the purpose of deciding an appeal it includes the power to ensure implementation[4].

42. In any event, insertion of sub-section (3) in Section 5 of the Service Tribunals Act has ended the debate, if any, insofar as the Federal Service Tribunals is concerned which is expressly empowered to implement its own decisions. The question that therefore arises is whether under Article 187(2) it is the High Court or the Federal Tribunal that will be the executing/implementing authority in respect of Federal Tribunal Judgments affirmed or modified by the Supreme Court.

43. The Appellant and the Petitioner argued in favour of implementation by the High Court under Article 187(2) of the Constitution on the basis of the *doctrine of merger*. The *doctrine of merger* according to the Peshawar High Court in *Rabnawaz Vs. Mst. Sabu Bibi*, PLD 2023 Peshawar 19 is based on the principles of propriety in the hierarchy of the justice delivery system and postulates that that there cannot be more than one operative decree governing the same subject matter at a given point of time. Thus by virtue of the *doctrine of merger* the original order stands merged in the order that is passed by the higher forum and the operative order is the order of the higher forum as explained by the Sindh High Court in *Syed Mumtaz Ali Vs. Mst. Khatoon Begum,* 2017 CLC Note 147.

44. The Peshawar High Court in the case of *Director General (Headquarters) Civil Works Organization Vs. Muhammad Afsar,* 2021 CLC 909 clarified that the *doctrine of merger* does not make a distinction between an order of acceptance, affirmation, reversal or modification passed on merits as follows:

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[4] *Asma Hafeez Vs. City Police Officer, Gujranwala*, 2012 PLC (C.S) 1025; *Niaz Muhammad Khoso Vs. Government of Balochistan*, 2012 PLC (C.S) 106; and *Mian Khan Vs. Inspector General Police Balochistan*, 2017 PLC (C.S.)1102;

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> *6. It is evident from the record that matter was finally decided by this court vide judgment dated 22.10.2014 on merits after providing the parties an opportunity of hearing whereafter, execution petitions were filed on 10.09.2015. Admittedly, all these execution petitions were filed by the decree holders within three years under Article 181 of the Limitation Act.* ***It is by now settled that the judgment / decree / order, which has been accepted or modified or reversed or affirmed by the higher forum on merits both on points of facts and the law involved therein, attains the status of final decree and it is to be executed and that doctrine of merger fully applies to the reversal and modification and also to all those cases in which the judgment of a lower forum has been affirmed in appeal or revision by a higher forum.*** *In this context reference may be made to the cases reported as Kinhayammoed and others v. State of Kerala and another (AIR 2000 page 2887, Commissioner of Income Tax, Bombay v Messrs Amritlal Bhogilal & Co. (AIR 1958 SC 868) and Abdul Qayyum v. Ali Asghar Shah (1992 SCMR 241)." [Emphasis added].*

45. Likewise in *Muhammad Shahid Khan Vs. Faysal Bank Limited*,2023 CLD 928 the Lahore High Court held as follows:

> *"13.* ***It is settled law that when in an appeal/revision/writ, judgment of lower forum is reversed, varied, modified or affirmed, after recording reasons on the consideration of the issues of law and/or fact, the judgment/order of the subordinate Court/forum would merge into the decision of appellate Court, irrespective of the fact that such judgment had reversed, varied or affirmed the decision of subordinate Court/ forum. Decision of appellate Court would be operative and capable of enforcement in such case on the principle of merger.*** *Application for modification (if any maintainable), in such circumstances, could only be moved before the appellate Court. The impugned order, thus, is not sustainable on the doctrine of merger as well. Reliance in this regard is placed on Sahabzadi Maharunisa and another v. Mst. Ghulam Sughran and another (PLD 2016 SC 358)." [Emphasis added].*

46. The Supreme Court in *Nasrullah Khan Vs. Mukhtar-ul-Hassan*, PLD 2013 SC 478 explained the wisdom behind the *doctrine of merger* as follows:

> *"2. ...****It is well settled on the basis of merger principle, that when a judgment and decree of a Court below is assailed in appeal or revision before the higher forum and it is affirmed by that (higher) forum, for all intents and purposes, the decree/order of the forum below merges into the decree of the higher forum, meaning thereby, that it is integrated, implanted, inculcated, infixed and instilled into the decree of the higher forum and becomes the decree/order of the later forum for all legal intents and implications.*** *It is on account of this established principle (of merger), that in the case reported as Maulvi Abdul Qayyum v. Syed Ali Asghar Shah and 5 others (1992 SCMR 241) it has been held "It appears that in holding that the period of limitation for execution of the decree commenced from the date of the decision by the Appellate Court, the rule that the decree of the Court of first instance, merged into the decree of Appellate Court, which alone can be executed, was not present to the mind of the learned Judge. It is to be remembered that till such time, an appeal or revision from a decree is not filed, or such proceedings are pending but no stay order has been issued, such decree remains capable of execution but when the Court of last instance passes the decree only that decree can*

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> *be executed, irrespective of the fact, that the decree of the lower Court is affirmed, reversed or modified." This is the crux of the matter.* ***From the above it is clear that for all legal purposes, it is the final decree/order of the last Court in the series, even if such decree etc. be of affirmation, which has to be executed*** *and should be considered and treated to be the final judgment/decree/order in terms of Section 12(2) CPC for approaching the forum.* ***Thus, notwithstanding the reversal or modification of the decree/order, if the decree/order of a forum below, which has been affirmed by the higher forum on merits, both on the points of the facts and the law involved therein, it shall be that decree/order, which attains the status of the final decree/order etc.*** *within the purview of section 12(2), C.P.C.* ***It is so because the higher forum has not only-endorsed the point(s) of fact and law and has agreed with the reasoning and conclusion of the lower forum, but may be, has upheld the decision(s) challenged before it, by substituting and supplying its own reasons and by substantially doing away with the reasoning of the decision(s) challenged before it.*** *Thus, it would be ludicrous to conceive and hold that the questions of facts and law which have been finally approved, endorsed, affirmed and settled by the higher forum should be allowed to be examined, annulled and obliterated by a forum below, whose decision stands affirmed in the above manner…"* [Emphasis added].

47. The seminal judgment of the Supreme Court with regard to the *doctrine of merger* relied upon in most of the judgments discussed hereinabove is *Maulvi Abdul Qayyum Vs. Syed Ali Asghar Shah*, 1992 SCMR 241 wherein it was held in no uncertain terms that when the Court of last instance passes the decree only that decree can be executed irrespective of the fact that the decree of the lower Court is affirmed, reversed, or modified. The judgment holds that the said rule finds support from the judgment of the Full Bench of the High Court of Bengal *Ram Churn Bysak and another v. Luckhee Kant Barnick and others*, 16 SWR 1 wherein it was held that whether the decree of the appellate Court is for reversing or for affirming the decree against which the appeal was preferred, in either case it is the final decree which is the only decree capable of enforcement. The Supreme Court also quoted *FA. Khan v. Government of Pakistan*, PLD 1964 SC 520 whereby it was held that when the appellate authority passes an order, the order of the original authority disappears and merges in the order of the appellate authority so that there remains in existence only the appellate order.

48. The Supreme Court in *Maulvi Abdul Qayyum* also remarked that there are some exceptions to the rule of merger for instance in case of the rejection of the appeal under Order XLI, Rule 10, CPC or dismissal in default under Order XLI, Rule, 17, CPC or when appeal is withdrawn or abates which instances are when the appeal is not disposed of on merits.

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49. While following the said principles the Lahore High Court refused to apply the *doctrine of merger* in the case of *Pakistan Burma Shell Company Now Shell Pakistan Ltd. Vs. Messrs Nawaz and Sons and another*, 2016 MLD 1779 where the appeal had been withdrawn. Similarly the Sindh High Court refused to apply the *doctrine of merger* in *Zeba Ilyas Vs. Karachi Metropolitan Corporation* 2024 MLD 408 where the revision had been dismissed for non-prosecution.

50. More importantly for present purposes, it may be noted that the Supreme Court in *Nasruallah Khan (Supra)* explained that an exception has been taken to the rule of merger particularly in relation to the apex Court as follows:

> *"Therefore, we are of the considered view that the impugned judgment in this case has been rightly founded on the principle of merger; however before parting it may be observed that in the case Khawaja Muhammad Yousaf (supra),* ***an exception has been taken to the rule of merger in relation to the apex Court, particularly in respect of those judgments/orders which are affirmed by this Court in the sense that leave has been refused".*** [Emphasis added].

51. In the case of *Mahboob Pictures Vs. Government of Pakistan*, 1997 SCMR 1973 the consent order was passed by the High Court which was not given effect. The High Court in another writ petition gave directions for compliance with the consent order. Such order was challenged by the Federal Government before the Supreme Court through a petition for special leave to appeal which was dismissed. Contempt proceedings were initiated before the Supreme Court but the Supreme Court was not persuaded under the circumstances that the application for contempt had been properly filed before it by holding that in substance the application was for enforcement of the order made by the High Court with which the Supreme Court had declined to interfere by refusing to grant Leave to Appeal and that if there had been any violation, it is that of the order of the High Court.

52. Similarly, the Supreme Court in *Bakhtiar Ahmed Vs. Mst. Shamim Akhtar*, 2013 SCMR 5 with reference to the contention that the decree passed by the High Court merged with the judgment of the Supreme Court which was in fact a leave refusal order highlighted that the Supreme Court is not a court of appeal but a Constitutional Court therefore the order of the High Court would merge with the order of the Supreme Court only where relief is

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granted by the Supreme Court after allowing the appeal with leave of the Court.

53. This important distinction figured into the analysis of the Supreme Court of India in *Kunhayammed Vs. State of Kerala*, AIR 2000 SC 2587 while discussing the legal implications and the impact of an order rejecting a petition seeking grant of special leave to appeal under the Constitution of India as follows:

> *"7. The* ***doctrine of merger*** *is neither a doctrine of constitutional law nor a doctrine statutorily recognized. It* ***is a common law doctrine founded on principles of propriety in the hierarchy of justice delivery system.*** *On more occasions than one this Court had an opportunity of dealing with the doctrine of merger. It would be advisable to trace and set out the judicial opinion of this Court as it has progressed through the times.*
>
> *……*
>
> *12. The logic underlying the doctrine of merger is that there cannot be more than one decree or operative orders governing the same subject-matter at a given point of time.* ***When decree or order passed by inferior Court, tribunal or authority was subjected to a remedy available under the law before a superior forum then,*** *though the decree or order under challenge continues to be effective and binding, nevertheless* ***its finality is put in jeopardy.*** *Once the superior Court has disposed of the lis before it either way whether the decree or order under appeal is set aside or modified or simply confirmed, it is the decree or order of the superior Court, tribunal or authority which is the final, binding and operative decree or order wherein merges the decree or order passed by the Court, tribunal or the authority below.* ***However, the doctrine is not of universal or unlimited application. The nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or which could have been laid shall have to be kept in view.***
>
> ***Stage of SLP and post-leave stage.***
>
> *13.* ***The appellate jurisdiction exercised by the Supreme Court is conferred by*** *Articles 132 to 136 of* ***the Constitution.*** *Articles 132, 133 and 134 provide when an appeal thereunder would lie and when not. Article 136 of the Constitution is a special jurisdiction conferred on the Supreme Court which is sweeping in its nature.* ***It is a residuary power in the sense that it confers an appellate jurisdiction on the Supreme Court subject to the special leave being granted*** *in such matters as may not be covered by the preceding articles. It is an overriding provision conferring a special jurisdiction providing for invoking of the appellate jurisdiction of Supreme Court not fettered by the sweep of preceding articles. Article 136 opens with a non-obstante clause and conveys a message that even in the field covered by the preceding articles, jurisdiction conferred by Article 136 is available to be exercised in an appropriate case. It is an untrammeled reservoir of power incapable of being confined to definitional bounds; the discretion conferred on the Supreme Court being subjected to only one limitation, that is, the wisdom and good sense or sense of justice of the Judges.* ***No right of appeal is conferred upon any party, only a discretion is vested in Supreme Court to interfere by granting leave to an applicant to enter in its appellate jurisdiction not open otherwise and as of right.***
>
> *14.* ***The exercise of jurisdiction conferred on this Court by Article 136 of the Constitution consists of two steps: (i) granting special leave to appeal; and (ii) hearing the appeal.*** *This distinction is clearly demonstrated by the provisions of Order XVI of the Supreme Court Rules framed in exercise of the power conferred by Article 145 of the Constitution. Under Rule 4, the petition seeking special leave to appeal filed before the Supreme Court under Article 136 of the Constitution*

shall be in form No. 28. No separate application for interim relief need be fled, which can be incorporated in the petition itself. If notice is ordered on the special leave petition, the petitioner should take steps to serve the notice on the respondent. The petition shall be accompanied by a certified copy of the judgment or order appealed from and an affidavit in support of the statement of facts contained in the petition. Under Rule 10 the petition for grant of special leave shall be put up for hearing ex-parte unless there be a caveat. The Court if it thinks fit, may direct issue of notice to the respondent and adjourn the hearing of the petition. Under Rule 13, the respondent to whom a notice in special leave petition is issued or who had filed a caveat, shall be entitled to oppose the grant of leave of interim orders without filing any written objections. He shall also be at liberty to file his objections only by setting out the grounds in opposition to the questions of law or grounds set out in the S.L.P.. On hearing the Court may refuse the leave and dismiss the petition for seeking special leave to appeal either ex-parte or after issuing notice to the opposite party. Under Rule 11, on the grant of special leave, the petition for special leave shall, subject to the payment of additional Court fee, if any, be treated as the petition of appeal and it shall be registered and numbered as such. The appeal shall then be set down for hearing in accordance with the procedure laid down thereafter. Thus, a petition seeking grant of special leave to appeal and the appeal itself, though both dealt with by Article 136 of the Constitution, are two clearly distinct stages. In our opinion, the legal position which emerges is as under :—

> *1.* ***While hearing the petition for special leave to appeal, the Court is called upon to see whether the petitioner should be granted such leave or not. <u>While hearing such petition, the Court is not exercising its appellate jurisdiction</u>; <u>it is merely exercising its discretionary jurisdiction to grant or not to grant leave to appeal</u>. <u>The petitioner is still outside the gate of entry</u> though aspiring to enter the appellate arena of Supreme Court. Whether he enters or not would depend on the fate of his petition for special leave;***
>
> ***2. If the petition seeking grant of leave to appeal is dismissed, it is an expression of opinion by the Court that a case for invoking appellate jurisdiction of the Court was not made out;***
>
> *3. If leave to appeal is granted the appellate jurisdiction of the Court stands invoked; the gate for entry in appellate arena is opened. The petitioner is in and the respondent may also be called upon to face him, though in an appropriate case, in spite of having granted leave to appeal, the Court may dismiss the appeal without nothing the respondent.*
>
> *4. In spite of a petition for special leave to appeal having been filed, the judgment, decree or order against which leave to appeal has been sought for, continues to be final, effective and binding as between the parties.* ***<u>Once leave to appeal has been granted, the finality of the judgment, decree or order appealed against is put in jeopardy</u>*** *though it continues to be binding and effective between the parties unless it is a nullity or unless the Court may pass a specific order staying or suspending the operation or execution of the judgment, decree or order under challenge.*
>
> *……*

27. ***A petition for leave to appeal to this Court may be dismissed by a non-speaking order or by a speaking order.*** *Whatever be the phraseology employed in the order of dismissal,* ***<u>if it is non-speaking order, i.e. it does not assign reasons for dismissing the special leave petition, it would neither attract the doctrine of merger</u> so as to stand substituted in place of the order put in issue before it*** *nor would it be a declaration of law by the Supreme Court under Article 141 of the Constitution for there is no law which has been declared.* ***<u>If the order of dismissal be supported by reasons then also the doctrine of merger would not be attracted because the jurisdiction exercised was not an appellate jurisdiction but merely a discretionary jurisdiction refusing to grant leave to appeal</u>.*** *We have already dealt with this aspect earlier. Still the reasons stated by the Court would attract applicability of Article 141 of the Constitution if there is a law declared by*

the Supreme Court which obviously would be binding on all the courts and tribunals in India and certainly the parties thereto…

.....

34. The doctrine of merger and the right of review are concepts which are closely inter-linked. ***If the judgment of the High Court has come up to this Court by way of a special leave, and special leave is granted and the appeal is disposed of with or without reasons, by affirmance or otherwise, the judgment of the High Court merges with that of this Court.*** *In that event, it is not permissible to move the High Court by review because the judgment of the High Court has merged with the judgment of this Court.* ***But where the special leave petition is dismissed there being no merger****, the aggrieved party is not deprived of any statutory right of review, if it was available and he can pursue it. It may be that the review Court may interfere, or it may not interfere depending upon the law and principles applicable to interference it in the review. But the High Court, if it exercise a power of review or deals with a review application on merits in a case where the High Court's order had not merged with an order passed by this Court after grant of special leave the High Court could not, in law, be said to be wrong in exercising statutory jurisdiction or power vested in it.*

……

40. A petition seeking grant of special leave to appeal may be rejected for several reasons. For example, it may be rejected (i) as barred by time, or (ii) being a defective presentation, (iii) the petitioner having no locus standi to file the petition, (iv) the conduct of the petitioner disentitling him to any indulgence by the Court, (iv) the question raised by the petitioner for consideration by this Court being not fit for consideration or deserving being dealt with by the Apex Court of the country and so on. The expression often employed by this Court while disposing of such petitions are "heard and dismissed", "dismissed", "dismissed as barred by time" and so on. May be that at the admission stage itself the opposite party appears on caveat or on notice and offers contest of the maintainability of the petition. The Court may apply its mind to the meritworthiness of the petitioner's prayer seeking leave to file an appeal and having formed an opinion may say "dismissed on merits". Such an order may be passed even ex parte, that is, in the absence of the opposite party. ***In any case, the dismissal would remain a dismissal by a non-speaking order where no reasons have been assigned and no law has been declared by the Supreme Court. The dismissal is not of the appeal but of the special leave petition. Even if the merits have been gone into, they are the merits of the special leave petition only. In our opinion neither doctrine of merger*** *nor Article 141 of the Constitution* ***is attracted to such an order.*** *Grounds entitling exercise of review jurisdiction conferred by Order 47. Rule 1 of the C.P.C. or any other statutory provision or allowing review of an order passed in exercise of writ or supervisory jurisdiction of the High Court (where also the principles underlying or emerging from Order 47, Rule 1 of the C.P.C. act as guide-lines) are not necessarily the same on which this Court exercises discretion to grant or not to grant special leave to appeal while disposing of a petition for the purpose.* ***Mere rejection of special leave petition does not take away the jurisdiction of the Court, tribunal or forum whose order forms the subject-matter of petition for special leave to review its own order*** *if grounds for exercise of review jurisdiction are shown to exist.* ***Where the order rejecting an SLP is a speaking order, that is, where reasons have been assigned by this Court for rejecting the petition for special leave and are stated in the order still the order remains the one rejecting prayer for the grant of leave to appeal. The petitioner has been turned away at the threshold without having been allowed to enter in the appellate jurisdiction of this Court. Here also the doctrine of merger would not apply.*** *But the law stated or declared by this Court in its order shall attract applicability of Article 141 of the Constitution. The reasons assigned by this Court in its order expressing its adjudication (expressly or by necessary implication) on point of fact or law shall take away the jurisdiction of any other Court, tribunal or authority to express any opinion in conflict with or in departure from the view taken by this Court because permitting*

to do so would be subversive of judicial discipline and an affront to the order of this Court. However this would be so not by reference to the doctrine of merger.

41. ***Once a special leave petition has been granted, the doors for the exercise of appellate jurisdiction of this Court have been let open. The order impugned before the Supreme Court becomes an order appealed against. Any order passed thereafter would be an appellate order and would attract the applicability of doctrine of merger. It would not make a difference whether the order is one of reversal or of modification or of dismissal affirming the order appealed against. It would also not make any difference if the order is a speaking or non-speaking one.*** *Whenever this Court has felt inclined to apply its mind to the merits of the order put in issue before it though it may be inclined to affirm the same, it is customary with this Court to grant leave to appeal and thereafter dismiss the appeal itself (and not merely the petition for special leave) though at times the orders granting leave to appeal and dismissing the appeal are contained in the same order and at times the orders are quite brief. Nevertheless, the order shows the exercise of appellate jurisdiction and therein the merits of the order impugned having been subjected to judicial scrutiny of this Court.*

42. "To merge" means to sink or disappear in something else; to become absorbed or extinguished; to be combined or be swallowed up. Merger in law is defined as the absorption of a thing of lesser importance by a greater, whereby the lesser ceases to exist, but the greater is not increased; an absorption or swallowing up so as to involve a loss of identity and individuality. (See Corpus Juris Secundum, Vol. LVII, pp. 1067-1068).

43. We may look at the issue from another angle. <u>The Supreme Court cannot and does not reverse or modify the decree or order appealed against while deciding a petition for special leave to appeal</u>. What is impugned before the Supreme Court can be reversed or modified only after granting leave to appeal and then assuming appellate jurisdiction over it. <u>If the order impugned before the Supreme Court cannot be reversed or modified at the SLP stage obviously that order cannot also be affirmed at the SLP stage</u>.

To sum up our conclusions are :—

(i) Where an appeal or revision is provided against an order passed by a Court, tribunal or any other authority before superior forum and such superior forum modifies, reverses or affirms the decision put in issue before it, the decision by the sub-ordinate forum merges in the decision by the superior forum and it is the latter which subsists, remains operative and is capable of enforcement in the eye of law.

(ii) The jurisdiction conferred by Article 136 of the Constitution is divisible into two stages. First stage is up to the disposal of prayer for special leave to file an appeal. The second stage commences if and when the leave to appeal is granted and special leave petition is converted into an appeal.

(iii) Doctrine of merger is not a doctrine of universal or unlimited application. It will depend on the nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or capable of being laid shall be determinative of the applicability or merger. The superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it. Under Article 136 of the Constitution the Supreme Court may reverse, modify or affirm the judgment-decree or order appealed against while exercising its appellate jurisdiction and not while exercising the discretionary jurisdiction disposing of petition for special leave to appeal. The doctrine of merger can therefore be applied to the former and not to the latter.

(iv) An order refusing special leave to appeal may be a non-speaking order or a speaking one. In either case it does not attract the doctrine of merger. *An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed.*

(v) If the order refusing leave to appeal is a speaking order, i.e. gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the Court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the Apex Court of the country. But, this does not amount to saying that the order of the Court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting special leave petition or that the order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties.

(vi) Once leave to appeal has been granted and appellate jurisdiction of Supreme Court has been invoked the order passed in appeal would attract the doctrine of merger; the order may be of reversal, modification or merely affirmation.

(vii) On an appeal having been preferred or a petition seeking leave to appeal having been converted into an appeal before Supreme Court the jurisdiction of High Court to entertain a review petition is lost thereafter as provided by sub-rule (1) of Rule (1) of Order 47 of the C.P.C." [Emphases added].

54. The judgment passed in *Kunhayammed (Supra)* was relied upon by the Supreme Court in *Sahibzadi Maharunnisa Vs. Mst. Ghulam Sughran*, PLD 2016 SC 358. From the ratio of the case law considered by the Supreme Court from both Indian as well as Pakistani jurisdiction it has been held in *Maharunnisa (Supra)* that *doctrine of merger* is duly applied to the reversal and modification cases and also to all those cases in which judgment of a lower forum has been affirmed in appeal or revision by a higher forum subject to certain exceptions. The Supreme Court added that the rule of merger shall also extend to the writ jurisdiction of the learned High Courts where the decisions of the lower *fora* such as Tribunals when challenged have been affirmed by the Court in exercising its Constitutional jurisdiction. However, the Supreme Court concluded that where leave is declined by the Supreme Court the judgment of the lower *fora* remains intact and final and does not merge into the leave refusing order if the matter has come to this court directly for leave from Tribunal/Special Court.

55. The foregoing case law leaves no doubt that the *doctrine of merger* is not attracted in case of an order refusing leave to appeal, whether speaking or a non-speaking. Therefore in case of leave refusal against a judgment passed by the Federal Tribunal, it is only the latter judgment that remains in the field and which is capable of execution. As such there is no merit in the argument that the High Court is mandated under Article 187(2) of the

Constitution to implement a Tribunal Judgment if affirmed by the Supreme Court by way of refusal to grant leave to appeal against the same as the judgment of the Tribunal remains intact in such case.

56. Now that the Federal Tribunal has the power to execute its own decisions pursuant to the inclusion of sub-section (3) to Section 5 of the Service Tribunals Act, there is no ground available for the Appellant to seek implementation thereof by this Court by way of writ.

I.C.A. No. 978 of 2024

57. Perusal of the Impugned Judgment dated 18-9-2024 passed in Writ Petition No.2480 of 2019 and challenged before us in I.C.A. No. 978 of 2024 shows that the learned Single Judge-in-Chambers was cognizant of the *doctrine of merger* and that it does not apply in case of refusal of the grant of leave to appeal. This is evident as he has specifically observed that the Supreme Court vide Order dated 28-3-2018 in exercise of its appellate jurisdiction merely upheld the Judgment dated 2-3-2017 of the Federal Tribunal and that by virtue of the insertion of Section 5(3) of the Service Tribunals Act vide the Service Tribunals (Amendment) Act, 2014 Federal Tribunal has the power to execute its decisions.

58. In view of the foregoing, there can be no manner of doubt that the leave refusing Order dated 28-3-2018 passed by the Supreme Court of which the Appellant is seeking implementation by this High Court is not a direction or order or decree which is to be executed by this Court in terms of Article 187(2) of the Constitution as the *doctrine of merger* is not attracted in case of leave refusal order and the Judgment dated 2-3-2017 of the Federal Tribunal remains intact. Therefore the learned counsel for the Appellant was unable to point out any illegality or infirmity in the Impugned Judgment.

Writ Petition No. 2695 of 2023

59. The Petitioner by way of the instant Writ Petition is seeking implementation of the Supreme Court Order dated 11-12-2019. The Supreme Court vide the said Order upheld the Federal Tribunal Judgment dated 05-01-2017. Such order of the Supreme Court is not an order refusing leave to appeal. It is an order passed on merits after leave to appeal had been granted. Any order passed by the Supreme Court after leave to appeal has been

uncertified

granted, whether speaking or non-speaking, would be an appellate order that attracts the applicability of the *doctrine of merger* irrespective of whether the order is one of reversal or modification or affirmation.

60. The Supreme Court has already held in *Maharunnisa (Supra)* while discussing the *rule of merger* that in cases where direct appeals or those after the grant of leave are allowed or dismissed and the judgment of the High Courts, Tribunals or Special Courts has been varied, altered, reversed, modified or affirmed the judgment of the Supreme Court shall be deemed to be final unless the matter falls within the exceptions stipulated in such judgment as follows:

> *"(ii) In the situation mentioned at serial No.(ii) above, there are certain exceptions to the rule of merger which (rule) shall not apply, where an appeal etc. has been dismissed:- (i) for non-prosecution; (ii) for lack of jurisdiction; (iii) for lack of competence/maintainability; (iv) as barred by law; (v) as barred by time; (vi) withdrawal of the matter by the party; (vii) for lack of locus standi; (viii) decided on the basis of a compromise, if the very basis of the compromise by the party to the lis or even a stranger showing prejudice to his rights is not under challenge on the ground of fraud; (ix) is rendered infructuous or disposed of as having borne fruit; (x) abatement; (xi) where the writ is dismissed on the ground of availability of alternate remedy; (xii) where the writ is dismissed on the point of laches.* ***It may be mentioned that such exceptions shall also be attracted to the decision(s) of the Supreme Court, where applicable.*** *However where the case falls within the noted exceptions the forum for an application under Section 12(2) of the C.P.C. is the one against whose decision the matter has come and been disposed of in the above manner by the higher forum*." [Emphases added].

In short the exceptions include dismissal on grounds other than on merit whereas the Order dated 11-12-2019 was passed on merits.

61. We have therefore reached the irresistible conclusion that the Federal Tribunal Judgment dated 05-01-2017 merged with the Supreme Court Order dated 11-12-2019 given that the said Tribunal Judgment was upheld on merits as the appeal filed by the Respondent No. 1 assailing the same was dismissed after leave to appeal had been granted. Thus the Federal Tribunal Judgment dated 05-01-2017 has disappeared and the only order capable of execution is the Supreme Court Order dated 11-12-2019. As such the order falls within the ambit of Article 187(2) of the Constitution.

62. As noted herein above, Article 187(2) of the Constitution requires orders of the Supreme Court to be executed *as if* passed by the High Court of the Province where they are to be enforced. Admittedly, the decrees and

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orders of the Supreme Court affirming, reversing, varying, modifying the civil appellate decrees of the High Court are executed by the Court of first instance under the CPC. The Federal Tribunal is not only deemed to be a Civil Court for purposes of deciding an appeal having the same powers as are vested in such Court under the CPC by virtue of sub-section (2) of Section 5 of the Service Tribunal Act but now with the addition of sub-section (3) thereto it specifically and expressly has the power to execute its decisions. Therefore, if decrees and orders of the Supreme Court affirming, reversing, varying, modifying the Federal Tribunal Judgments are to be enforced in a Province *as if* issued by the High Court of that Province they would be executed by the Federal Tribunal as the Court of first instance in accordance with sub-section (3) of Section 5 of the Service Tribunal Act and Section 37, CPC read with Order XXI, Rule 10, CPC and Order XLV, Rule 15, CPC.

63. The Petitioner's reliance upon *Salahuddin Khan, Chief Executive Frontier Vs. Tee Frontier Sugar Mills & Distillery, Mardan*, PLD 1978 Peshawar 128 is misconceived as in such case the Supreme Court had specifically given direction to the Company Judge of the Peshawar High Court for its implementation of the mutual settlement between the parties as embodied in its earlier order. In contrast, no direction has been given to this Court by the Supreme Court vide its Order dated 11-12-2019 for implementation.

64. The learned counsel for the Petitioner argued that sub-section (3) of Section 5 of the Services Tribunals Act provides for execution of decisions to be carried out by the Federal Tribunal in accordance with the procedure as may be prescribed but no rules have been framed till date with regard thereto. Non-availability of rules certainly does not take away the power of the Federal Tribunal to execute its decisions. Till such time that rules are framed the execution would be carried out under the provisions of the CPC so far as practicable.

65. Be that as it may, the learned counsel for the Respondents No. 1and 2 has pointed out that the Order dated 11-12-2019 was passed by the Supreme Court in Civil Appeals No. 248 to 251 of 2018 in which the Petitioner was not a party. The learned counsel for the Petitioner argued that even though the Petitioner was not a party to the said Civil Appeal nevertheless the Order

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dated 11-12-2019 can be applied to her as it constitutes a judgment in *rem* and she cannot be treated differently than other officers. The learned counsel for the Respondents No. 1 and 2 on the other hand argued that the Supreme Court vide the Order dated 20-2-2019 passed in the Petitioner's case has not upheld the Federal Tribunal Judgment dated 30-7-2015 which was in favour of the Petitioner but has modified it by applying the un-amended OGS Rules, 1990 which does not have the effect of restoring the Petitioner's seniority as determined vide Seniority List dated 13-8-2003. The Petitioner argued that Respondent No. 1 is misinterpreting the judgment of the Supreme Court dated 20-2-2019.

66. Section 47, CPC provides that all questions arising between the parties and relating to the execution, discharge or satisfaction of the decree shall be determined by the executing Court. Therefore, all such submissions may be raised before the learned Federal Tribunal who shall determine them after due consideration.

67. In view of the foregoing, instant I.C.A. No. 978 of 2024 is hereby dismissed whereas the instant W.P. No. 2695 of 2023 is converted into a petition for enforcement of orders of the Supreme Court, which as such is allowed with the result that the Supreme Court Order dated 11-12-2019 is hereby transmitted to the learned Federal Service Tribunal under Order XLV, Rule 15, CPC.

CHIEF JUSTICE **(SAMAN RAFAT IMTIAZ)**
JUDGE

JUNAID

Approved for Reporting
Blue Slip added.

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