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Saturday, 04 July 2026

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CONTRACT ACT 1872 S.74 — PERFORMANCE GUARANTEE FORFEITURE, JUDICIAL REVIEW OF ARBITRAL AWARDS & UPSTREAM COMMERCIAL RISK

Trading Corporation of Pakistan v. M/s Abdullah Mezroei Metal Trading Company & another (with connected M/s Abdulla Mazroei v. TCP)

TCP'S APPEAL ALLOWED; FORFEITURE OF PERFORMANCE GUARANTEE UPHELD; COMPANY'S CROSS-APPEAL DISMISSED

Civil Appeals No. 140-K and 141-K of 2016 · Bench: Yahya Afridi, CJ; Naeem Akhter Afghan, J; Shakeel Ahmad, J · Decided: 03.07.2026 · Uploaded: 03.07.2026

FACTS

TCP opened a tender for supply of 50,000 MT of urea in 2005. The Company accepted, furnished a 3% performance guarantee, and undertook to deliver in three consignments with time of the essence. TCP opened the Letter of Credit; discrepancies arose; extensions were granted (first shipment ultimately extended to 10.11.2005, second to 15.11.2005). Independently, the Company had a back-to-back contract with a foreign Supplier (Gates Transfercenter International), amended to align with the TCP contract, requiring an upfront 30% payment (US\$ 3,465,000) and 70% via LC. The Company never opened the LC in favour of the Supplier; the Supplier terminated on 04.10.2005 and forfeited the advance. Despite extensions, no shipment was made — the Company attributed non-performance to global urea price increases. On 02.01.2006 TCP cancelled the LC and encashed the performance guarantee. The Sole Arbitrator directed refund of the guarantee (AED 1,239,000) and awarded damages of US\$ 3,465,000 to the Company. The Sindh High Court Single Judge set aside the damages award but maintained refund of the guarantee; the Division Bench upheld that outcome on the reasoning that delays in operationalising the LC were attributable to TCP.

LEGAL ISSUE

(i) Whether forfeiture of the performance guarantee by TCP was justified in law under Section 74 of the Contract Act 1872 read with the contractual framework and the Form of Performance Bond; and (ii) whether the Company can recover the US\$ 3,465,000 advance forfeited by its Supplier as damages against TCP.

HOLDING

Both High Court findings on the performance-guarantee refund are set aside. Forfeiture of the entire performance guarantee by TCP was justified and reasonable under Section 74 of the Contract Act 1872. Once the contract was extended by mutual conduct, the legally operative condition was not historical attribution of fault, but whether the obligation stood performed within the subsisting contractual period — it did not. The Arbitrator's finding that TCP could not forfeit because non-supply was traceable to its own commissions and omissions rested on a legally misdirected premise that conflated fault attribution with contractual default under a performance-guarantee regime, amounting to a patent error of law apparent on the face of the award. Separately, the claim for US\$ 3,465,000 damages fails: the upstream Supplier contract was a distinct commercial arrangement entered into by the Company on its own risk, without any assumption of liability by TCP, and the Supplier's forfeiture on 04.10.2005 was itself the intervening event that broke the chain of legal causation.

LEGAL SIGNIFICANCE

This judgment (a) restates the Section 74 supervisory standard for forfeiture clauses in Pakistani commercial contracts — retention is permissible without proof of actual loss, but must not be unconscionable in the circumstances; (b) clarifies that where a Form of Performance Bond includes 'the sole judge' and 'no waiver by grant of time or indulgence' clauses, contractual extensions do not dilute the beneficiary's forfeiture right; (c) restates the scope of judicial interference with arbitral awards under the Arbitration Act 1940, holding that a misreading of material evidence or an incorrect factual premise that vitiates the application of law is a patent error of law, not mere factual appreciation; and (d) draws a clear line refusing to transmute a performance guarantee under a sale contract into a warranty against a party's upstream commercial risks.

LEGAL PROPOSITIONS (VERBATIM)

- A performance guarantee is a contractual mechanism intended to secure the due and satisfactory performance of obligations undertaken under a contract.
- Section 74 of the Contract Act does not prohibit stipulations fixing a sum payable upon breach, nor does it require proof of actual loss, as a condition precedent to enforcement. Rather, it introduces a supervisory standard of reasonableness, limiting recovery to reasonable compensation not exceeding the amount stipulated.
- Forfeiture clauses fall within the expression 'other stipulation by way of penalty' under Section 74; however, the said provision does not mandate reduction or refund in every case of forfeiture. The controlling consideration remains whether retention of the amount would be unconscionable in the facts of the case.
- It is well established that a court does not sit in appeal over an arbitral award and cannot undertake a reappraisal or re-evaluation of the evidence merely because it may have reached a different conclusion on the same material. Findings of fact recorded by an arbitrator are ordinarily final and binding.
- These principles of restraint do not preclude judicial intervention where the arbitral finding is founded upon a misreading or non-reading of material evidence, or where the conclusion reached is based on an incorrect factual premise that directly vitiates the application of law. In such cases, the error ceases to be a mere matter of factual appreciation and assumes the character of a patent error of law.
- The invocation of the principle that no party may take advantage of its own wrong cannot, in law, operate as a substitute for the contractual framework governing performance.
- Any upstream arrangements ought to remain entirely at the risk of the contracting party, who chooses to enter into them, and cannot be shifted onto the counterparty in the principal contract in the absence of any express contractual assumption of liability or indemnity.

LEGAL PRINCIPLES EXPOUNDED

Section 74 permits forfeiture of a stipulated sum without proof of actual loss but subjects it to a supervisory reasonableness test — courts intervene only where retention is unconscionable, not where a lesser amount might in hindsight appear fair.

Source: The court is required to examine whether the amount retained represents reasonable compensation in the circumstances, or whether its enforcement would operate as a penalty. The existence of a forfeiture clause or performance guarantee does not, by itself, entitle the beneficiary to retain the stipulated amount irrespective of surrounding circumstances. Courts retain the authority under Section 74 to interfere where the forfeiture is disproportionate or unconscionable, having regard to the nature of the contract, the conduct of the parties, and the context in which the breach occurred. At the same time, the jurisdiction under Section 74 is not one of routine substitution of the opinion of the court for that of the contracting parties. The enquiry is not directed at whether some lesser amount might appear fair in hindsight, but whether the forfeiture is so excessive or harsh as to attract the character of a penalty.

Authority: Section 74, Contract Act 1872; Province of West Pakistan v. Mistri Patel & Co. (PLD 1969 SC 80); Abdul Haq Khan Khattak v. WAPDA (1991 SCMR 436)

Where a Form of Performance Bond expressly makes the beneficiary the sole judge of contractual performance and provides that grants of time or indulgence do not absolve the guarantor, extensions of shipment schedules do not waive the beneficiary's right to invoke forfeiture upon subsequent non-performance.

Source: These terms make it clear that TCP was the sole judge of the contractual performance, a position not agitated by the Company before any of the forums below. The Company had, accordingly, undertaken that any grant of time or indulgence by TCP to the Company did not dilute or extinguish the enforceability of the performance guarantee. Read together with Clause 10 and Clause 11 of the Contract, the Form of Performance Bond sufficiently demonstrates that extensions or indulgences in performance did not operate as a waiver of TCP's right to invoke and forfeit the performance guarantee upon non-performance.

Authority: Contract Act 1872; Form of Performance Bond (Clauses 4 and 5)

An arbitral award founded on an incorrect legal premise as to the nature of contractual default — conflating fault attribution with contractual default under a performance-guarantee regime — is not a mere factual appreciation but a patent error of law justifying interference.

Source: More fundamentally, the impugned reasoning results in a conflation between fault attribution and 'contractual default under a performance guarantee regime'. A performance guarantee under the contract is triggered by non-performance within the governing contractual framework. Once the contract has been extended, the legally

operative condition is not whether one party bears responsibility for earlier impediments, but whether the obligation stood performed within the subsisting contractual period. By treating earlier conduct as determinative of the existence of default itself, the finding substitutes a non-contractual standard for the contractual triggering condition.

Authority: Arbitration Act 1940; Pakistan Railways v. CCRC Ziyang Co. Ltd. (PLD 2025 SC 706)

Losses arising from a party's own independent upstream procurement contract, entered into on its own risk in anticipation of a principal contract, cannot be transferred to the counterparty in the principal contract absent an express assumption of liability or indemnity.

Source: *It must be noted that, any upstream arrangements ought to remain entirely at the risk of the contracting party, who chooses to enter into them, and cannot be shifted onto the counterparty in the principal contract in the absence of any express contractual assumption of liability or indemnity. TCP neither guaranteed the procurement arrangements nor undertook any obligation to underwrite market fluctuations, supplier default, or commercial exposure arising in the supply chain of the Company. Losses arising from such upstream arrangements thus remain, in law, at the risk of the contracting party, unless expressly otherwise agreed to by the counterparty. The Supplier's termination and forfeiture of the advance amount paid by the Company constituted an intervening commercial event that breaks the chain of legal causation between the alleged conduct of TCP and the Company's claimed loss.*

Authority: General principles of privity of contract and legal causation

OPERATIVE ORDER

Accordingly, the appeal of TCP is allowed. The judgments of the learned Single Judge and the Division Bench of the Sindh High Court, insofar as they direct refund of the performance guarantee, are hereby set aside. The decision on the claim of damages is upheld. Resultantly, the appeal filed by the Company stands dismissed as a whole.

Lahore High Court

2 judgments

PUNJAB CIVIL SERVANTS RULES 1974 RULE 17-A — ACCRUED RIGHT ON MEDICAL RETIREMENT, PROSPECTIVE OPERATION OF GENERAL POST OFFICE V. MUHAMMAD JALAL, & SCOPE OF EXECUTIVE CLARIFICATIONS RESTRICTING A BENEFICIAL RULE

Board of Intermediate & Secondary Education, Rawalpindi v. Governor of Punjab & others

PETITION DISMISSED; BISE DIRECTED TO MAKE APPOINTMENT UNDER RULE 17-A WITHIN 30 DAYS

Writ Petition No. 3540 of 2024 — 2026 LHC 4459 · Bench: Tanveer Ahmad Sheikh, J · Decided: 16.06.2026 · Uploaded: 03.07.2026

FACTS

The petitioner-BISE, Rawalpindi challenged the Governor of Punjab's order dated 16.09.2024 that upheld the Provincial Ombudsman's order dated 28.12.2023 directing BISE to appoint respondent No.3 (Abdul Qavi) under Rule 17-A of the Punjab Civil Servants (Appointment and Condition of Service) Rules 1974. Respondent No.3's father, a Naib Qasid in BISE, was retired on 17.08.2009 on medical ground in category 'B'. The father applied on 05.03.2023 for recruitment of respondent No.3 under Rule 17-A. The Rule was omitted by notification dated 26.07.2024 under s.23 of the Punjab Civil Servants Act 1974. BISE argued that (i) an Ombudsman's order is recommendatory and non-binding; (ii) Rule 17-A stood struck down by the Supreme Court in General Post Office v. Muhammad Jalal (PLD 2024 SC 1276); (iii) per Province of Punjab v. Syed Muhammad Ali Raza Shah (2025 PLC (CS) 931), only cases where benefit had already been extended before the omission date would be treated as a closed chapter, not cases still in process; and (iv) children of an employee retired in category 'B' are excluded from Rule 17-A by notification SOR-III(S&GAD)2-21/2016 dated 03.03.2021.

LEGAL ISSUE

Whether respondent No.3 had an accrued right to appointment under Rule 17-A of the 1974 Rules, given that (a) his father retired on medical ground in 2009 and (b) the application was made in 2023, prior to the omission of Rule 17-A in July 2024 and prior to the Supreme Court's decision striking down the Rule; and whether an executive clarification excluding category-'B' medical retirees from the Rule can restrict its beneficial scope.

HOLDING

The right to appointment under Rule 17-A crystallised on 17.08.2009 (the date of the civil servant's medical retirement) and matured when the application was made in 2023, well before both the omission of the Rule on 24.07.2024 and the Supreme Court's General Post Office judgment. Following *General Post Office v. Muhammad Jalal* (PLD 2024 SC 1276), *Ayyaz Ali v. Federation* (2026 SCMR 42) and the FCC's decision in *Province of Sindh v. Muhammad Rizwan* (FCPLA No.508/2025), the striking down of Rule 17-A operates prospectively and does not defeat rights that had already accrued. Category-'B' invalidation clarifications by executive notification cannot restrict the scope of the beneficial rule; Rule 17-A recognises no bifurcation of categories of incapacitation, following *Muhammad Ijaz v. Government of Punjab* (2021 PLC CS 1154) and *Zahida Perveen v. KPK* (PLD 2025 SC 529). The Ombudsman's and Governor's orders are accordingly upheld.

LEGAL SIGNIFICANCE

This judgment is important for Punjab and comparable civil-service jurisdictions because it (a) fixes the accrual event for Rule 17-A recruitment as the date of the civil servant's death or medical invalidation, not the date of the application or of the eventual appointment order; (b) confirms the prospective effect of the Supreme Court's striking down of Rule 17-A in *General Post Office v. Muhammad Jalal*, protecting all rights that had accrued prior to the judgment; (c) restates the doctrine that executive clarifications cannot restrict the scope of a beneficial rule by creating sub-categories not contemplated by the rule itself; and (d) recognises the Ombudsman's enforcement powers under s.16 of the Punjab Office of the Ombudsman Act 1997.

LEGAL PROPOSITIONS (VERBATIM)

— *Right for recruitment in favour of respondent No.3 accrued on 05.03.2023 when application for his appointment was made.*

— *The Hon'ble Supreme Court of Pakistan in a case titled 'General Post Office, Islamabad and others Versus Muhammad Jalal' (PLD 2024 Supreme Court 1276) declared the said rule ultra vires to the Articles 3, 4, 5(2), 18, 25(1) and 27 of the Constitution of Islamic Republic of Pakistan, 1973, but was pleased to hold that the judgment shall not affect the appointments already made of the widow/widower, wife/husband or child of deceased or retired civil servant.*

— *Rule 17-A did not specify any deviation, distinction or bifurcation of categories of incapacitation or invalidation. Either one was incapacitated or not incapacitated likewise invalidated or not invalidated. No such thing as being partly invalidated or being semi-incapacitated exist. Rule 17-A was a beneficial rule and had to be construed liberally and departmental instructions could not be allowed to make inroads thereon.*

— *Right of appointment under the said rule in favour of respondent No.3 had already accrued, which could not be taken away by any stretch of imagination.*

LEGAL PRINCIPLES EXPOUNDED

The accrual event for a Rule 17-A recruitment right is the death or medical invalidation of the civil servant; the application and the formal appointment letter are administrative acts following upon a right that has already vested.

Source: *The nub of controversy is that at the time when the judgment of Supreme Court of Pakistan supra was handed down, had the right accrued in favour of respondents? In this regard, the relevant event, which resulted in the accrual of the right, was the death of civil servant. As and when the death of a civil servant takes place, one of this children and/or spouse acquires the right to be appointed in civil service. The process of application and/or a formal appointment letter are administrative acts. Since right has accrued in favour of private respondent, hence judgment of the Supreme Court does not come in their way for appointment on deceased employee children/spouse quota.*

Authority: *Federal Constitutional Court in Province of Sindh v. Muhammad Rizwan (FCPLA No.508/2025, dated 27.02.2026)*

The Supreme Court's declaration of Rule 17-A as ultra vires operates prospectively; rights that had accrued before the judgment continue to be enforceable.

Source: *It is trite law that judgments of the Supreme Court operate prospectively and not retrospectively.*

Authority: *Ayyaz Ali v. Federation of Pakistan (2026 SCMR 42); trite law on prospective operation*

Executive clarifications cannot narrow the scope of a beneficial recruitment rule by manufacturing sub-categories of incapacitation not recognised by the rule itself.

Source: Rule 17-A did not specify any deviation, distinction or bifurcation of categories of incapacitation or invalidation. Either one was incapacitated or not incapacitated likewise invalidated or not invalidated. No such thing as being partly invalidated or being semi-incapacitated exist. Rule 17-A was a beneficial rule and had to be construed liberally and departmental instructions could not be allowed to make inroads thereon. Administrative instruction had taken into account an absolutely irrelevant consideration of possible misuse of the facility, which rendered the notification illegal.

Authority: Muhammad Ijaz v. Government of Punjab (2021 PLC CS 1154); Zahida Perveen v. Government of KPK (PLD 2025 SC 529)

OPERATIVE ORDER

For the reasons recorded above, the present petition has no force, hence dismissed. Petitioner is directed in clear terms to make appointment of respondent No.3 (Abdul Qavi) under Rule 17-A of Punjab Civil Servants (Appointment and condition of the service) Rules, 1974, according to his qualification within thirty days under intimation to this Court through the Deputy Registrar (Judicial).

COMPANIES ACT 2017 SS.279-283 & 285 — SANCTION OF SCHEME OF ARRANGEMENT OVER DISSENT OF A SECURED CREDITOR

Arzoo Textile Mills Limited v. Securities and Exchange Commission of Pakistan

PETITION ALLOWED; SCHEME OF ARRANGEMENT SANCTIONED

C.O. No. 01/2026 — 2026 LHC 4449 · Bench: Jawad Hassan, J · Decided: 23.06.2026 · Uploaded: 03.07.2026

FACTS

Arzoo Textile Mills Ltd (a public listed textile manufacturer) issued Sukuk certificates and later faced financial constraints. The company entered discussions with creditors and finalised a Scheme of Arrangement dated 06.02.2026 through Board resolutions dated 27.08.2025. Meetings of members and secured creditors were convened under this Court's order dated 17.02.2026 in accordance with Section 279(1) of the Companies Act 2017 read with Rules 55, 57 and 61 of the Companies (Court) Rules, 1997. The Chairman submitted his report on 18.03.2026 under Rule 57 certifying that the Scheme was approved by the statutory majority prescribed under Section 279(2). The SECP submitted parawise comments on 20.06.2026 raising no procedural objection but expressing reservation because National Bank of Pakistan (NBP), one of the secured creditors, had not voted in favour of the Scheme and had not issued an NOC.

LEGAL ISSUE

Whether a Scheme of Arrangement under Sections 279-283 and 285 of the Companies Act 2017 can be sanctioned by the Court over the dissent of one secured creditor when the Scheme has been approved by the statutory majority and no procedural or legal illegality has been shown; and if so, what safeguards must accompany the sanction to protect the dissenting creditor's rights.

HOLDING

The Scheme is sanctioned. Once the statutory majority under Section 279(2) has approved the Scheme, the dissent or abstention of an individual secured creditor does not defeat sanction, provided the dissenting creditor is treated fairly and its legal rights are not unjustly prejudiced. The Scheme becomes binding upon all creditors and members of the concerned class, including those who voted against it or abstained. Appropriate safeguard: the Scheme's implementation shall extinguish or release specific creditor rights strictly in accordance with the terms of the sanctioned Scheme and applicable law; if any difficulty arises during implementation, the Petitioner may approach the Court for further orders.

LEGAL SIGNIFICANCE

This is the first LHC (Rawalpindi Bench) reasoned sanction order under the Companies Act 2017 to (a) restate the doctrine that the Court's role in a Scheme sanction is supervisory and not commercial-substitute; (b) apply the statutory-majority binding principle over a dissenting secured creditor including a public-sector bank; and (c) build in a proactive protective direction (return-to-Court mechanism) as a condition of sanction. The judgment relies on Paramount Spinning Mills (2020 CLD 1443) [Sindh]; Novatex Limited (2023 CLD 1161) [Balochistan]; and Beach Luxury Holdings (2025 CLD 1438) [Sindh].

LEGAL PROPOSITIONS (VERBATIM)

— *The jurisdiction of this Court while considering a petition for sanction of a Scheme of Arrangement is not to substitute its own commercial wisdom for that of the stakeholders, but rather to examine whether the statutory requirements prescribed by the Act and the Rules have been duly complied with; whether the meetings of the members and creditors were convened and conducted in accordance with law; whether the statutory majority has approved the Scheme; whether the Scheme is fair, reasonable and bona fide; whether it is free from fraud, coercion or illegality and whether its implementation would be contrary to any provision of law or public policy.*

— *The legislative intent underlying Section 279 of the Act is that once the prescribed statutory majority approves a Scheme of Arrangement and the same receives the sanction of the Court, the Scheme becomes binding upon all creditors or members of the concerned class, including those who voted against it or abstained from voting.*

— *The purpose of the statutory majority requirement is to ensure that the commercial decision of the class as a whole is not frustrated by the dissent of an individual creditor, provided that such creditor is treated fairly and its legal rights are not unjustly prejudiced.*

LEGAL PRINCIPLES EXPOUNDED

The Court's supervisory jurisdiction in Scheme sanction is to test procedural compliance, statutory-majority approval, fairness and legality — not to substitute its commercial judgment for that of the stakeholders.

Source: *The jurisdiction of this Court while considering a petition for sanction of a Scheme of Arrangement is not to substitute its own commercial wisdom for that of the stakeholders, but rather to examine whether the statutory requirements prescribed by the Act and the Rules have been duly complied with; whether the meetings of the members and creditors were convened and conducted in accordance with law; whether the statutory majority has approved the Scheme; whether the Scheme is fair, reasonable and bona fide; whether it is free from fraud, coercion or illegality and whether its implementation would be contrary to any provision of law or public policy. Once these conditions stand satisfied, the Court ordinarily accords sanction to the commercial arrangement approved by the overwhelming majority of stakeholders unless the Scheme is shown to be manifestly unfair or oppressive to any class of creditors or members.*

Authority: *Sections 279-283 and 285, Companies Act 2017; Rules 55, 57, 61 of the Companies (Court) Rules 1997*

A sanctioned Scheme binds all creditors and members of the affected class, including dissenting or abstaining creditors, provided each dissenter is treated fairly and its legal rights are not unjustly prejudiced.

Source: *The legislative intent underlying Section 279 of the Act is that once the prescribed statutory majority approves a Scheme of Arrangement and the same receives the sanction of the Court, the Scheme becomes binding upon all creditors or members of the concerned class, including those who voted against it or abstained from voting. The purpose of the statutory majority requirement is to ensure that the commercial decision of the class as a whole is not frustrated by the dissent of an individual creditor, provided that such creditor is treated fairly and its legal rights are not unjustly prejudiced.*

Authority: *Section 279(2), Companies Act 2017*

Sanction may be conditioned on a return-to-Court safeguard: the implementing party retains liberty to approach the Court if difficulties arise during implementation.

Source: *Consequently, while sanctioning the Scheme, it is considered appropriate to clarify that the implementation of the Scheme shall operate so as to extinguish and release any specific rights of the creditors strictly in accordance with the terms of the sanctioned Scheme and applicable law. In case any difficulty arises during implementation of the Scheme, the Petitioner may approach this Court for obtaining appropriate orders in light of the case laws/judgments already discussed above. This clarification sufficiently safeguards the legitimate interests of the dissenting secured creditor without frustrating the implementation of the Scheme approved by the requisite statutory majority.*

Authority: *Paramount Spinning Mills Ltd (2020 CLD 1443) [Sindh]; Novatex Ltd (2023 CLD 1161) [Balochistan]; Beach Luxury Holdings (2025 CLD 1438) [Sindh]*

OPERATIVE ORDER

For the foregoing reasons, this Company Petition is allowed. Resultantly, the Scheme of Arrangement dated 06.02.2026, placed on record as "Annexure-C", is hereby approved under Section 279(2) of the Companies Act, 2017 and shall be binding upon the Petitioner, its shareholders, creditors, including the dissenting secured creditor, and all other persons concerned in accordance with Sections 279 to 283 and 285 of the Act. If the Petitioner has any difficulty in implementation of the Scheme, it can approach this Court under the provisions of the applicable law. The

Petitioner shall submit a certified copy of this order with the SECP as required under Section 279(3) and 282(7) of the Act.
