ORDER SHEET

IN THE HIGH COURT OF SINDH, KARACHI.

Date	Order with signature of Judge

Present:
Mr. Justice Muhammad Iqbal Kalhoro J.
Mr. Justice Shamsuddin Abbasi, J.

Petitioners:

Mirpurkhas Sugar Mills & others	C.P.No.D-110 of 2010
Pakistan Sugar Mills Association	C.P.No.D-149 of 2010
M/s Al Abbas Sugar Mills Ltd.	C.P.No.D-164 of 2010
M/s Pangrio Sugar Mills Ltd.	C.P.No.D-196 of 2010
Sakrand Sugar Mills Ltd.	C.P.No.D-360 of 2010

Respondents:

Federation of Pakistan & others

M/s Abdul Sattar Pirzada and Mamoon N. Chaudhry, Advocates for petitioner in C.Ps. No. D-110 and 149 of 2010.

Mr. Ali Ahmed Turabi Advocate holding brief for Mr. Moin Azhar Siddiqui, Advocate for petitioner in C.Ps. No. D-196 & 360 of 2010.

M/s Shahan Karimi and Rashid Mahar, Advocates for petitioner in C.P. No. D-2642 of 2012.

M/s. Amel Khan Kasi and Waqar Ahmed, Advocate for respondent No. 3 in C.Ps. No. D-149, 164, 196, 360 of 2010.

Mr. Munir A. Malik, Advocate for respondent No. 2 in C.P. No. D-2642 of 2012.

Mr. Khalid Javed Khan, Attorney General for Pakistan alongwith Mr. Kashif Sarwar Paracha, D.A.G. and Mr. Hussain Bohra, Assistant Attorney General.

Date of hearing: **07.10.2021, 12.10.2021, 30.10.2021 and 08.11.2021**.
Date of order: **17.01.2022.**

O R D E R

MUHAMMAD IQBAL KALHORO J: In hand are five petitions filed by Pakistan Sugar Mills Association, and different Sugar Mills Ltd. located in province of Sindh questioning competency of the Competition Ordinance, 2007 **(the 2007 Ordinance)**, the Competition Ordinance, 2009 **(the 2009 Ordinance)**, the Competition Ordinance, 2010 **(the 2010 Ordinance)**, and the Competition Act, 2010 **(the 2010 Act)** on the grounds, among others detailed herein under, of being ultra vires the Constitution, in contravention of a

judgment in the case of **Sindh High Court Bar Association Vs. Federation of Pakistan (PLD 2009 SC 879)** passed by Honorable Supreme Court of Pakistan, and contrary to the letter and spirit of Article 89 of the Constitution of Pakistan 1973.

2. During hearing of the case, learned defense counsel and learned Attorney General of Pakistan forwarded submissions in an elaborative manner for and against constitutionality of the impugned laws. They vociferously stuck to their respective points of view, and supported it with precedents set out by the Honorable Apex Court in different cases. Learned defense counsel were of the view that impugned laws lack constitutional sanction and are void *ab initio*, while leaned Attorney General maintained that the laws have been promulgated as per scheme of the Constitution and there in no illegality. We have attempted in following paragraphs to reflect their respective opinions as exactly as possible and answer them.

3. Briefly, the case of petitioners, reiterated by learned defense counsel, in arguments and in written synopsis, is that the impugned Ordinances promulgated in the year 2007, in the year 2009 and lastly in the year 2010 are against scheme, object and spirit of Article 89 of the Constitution in addition to being violative of the directives passed by the Supreme Court in the case of **Sindh High Court Bar Association** (*supra*). Parliament was in regular session where a Bill pertaining to the same subject matter had already been tabled, yet the 2009 Ordinance was conceived and promulgated. That the President does not have the power under Article 89 to promulgate an Ordinance for regulating free competition and consumer protection as these subjects fall outside of the purview and scope of any entry in the Federal Legislative List and the Concurrent Legislative List (as it was then) in the Fourth Schedule to the Constitution. The 2009 Ordinance is void *ab initio* and liable to be declared as such being in excess of the legislative competence of the President. This subject will perforce come within the residual legislative powers of the provincial assemblies. An Ordinance promulgated under Article 89 of the Constitution is subject to the same restrictions as are applicable to Parliament in exercise of its legislative power in terms of entries in the aforesaid Legislative Lists. Therefore, an Ordinance would be valid only when it is made in respect of a subject itemized in an entry in either of the legislative list by the President. Article 18 of the Constitution confers a fundamental right upon every citizen to conduct any lawful trade or business and also envisages the regulation of trade,

commerce or industry in the interest of free competition. However, the regulation of free competition does not fall within and is not otherwise covered by any entry in either of aforesaid list. Hence, neither Parliament nor the President has the legislative authority to legislate on matters relating to regulation of free competition and/or consumer protection, the avowed object of the impugned Ordinance reflected in its preamble.

4. That as per Article 142(c) of the Constitution, the provincial assembly and not Parliament has the exclusive power to make laws with respect to matters pertaining to regulation of free competition and consumer protection. This position is further clear from the fact that the provincial assemblies have already enacted consumer protection legislation, identical to some extent in scope and object of the 2009 Ordinance. For instance, **the Balochistan Consumer Protection Act, 2003; the Punjab Consumer Protection Act, 2005; the North West Frontier Consumer Protection Act, 1997 and the Sindh Consumer Protection Ordinance, 2007**. Promulgation of the impugned Ordinances, therefore, is tantamount to usurping the legislative power of the provincial assemblies and contravenes Article 142(c). Hence, the impugned Ordinances are liable to be struck down being void *ab initio* and consequently, any purported action taken thereunder by the Commission including but not limited to issuance of the impugned Show Cause Notices **(SCNs)** is also liable to be declared to be without any lawful authority and of no legal effect whatsoever.

5. The 2009 Ordinance promulgated on 26.11.2009 takes effect from 2.10.2007 is violative of fundamental right of petitioners to protection against retrospective punishment under Article 12 of the Constitution. Not only it authorizes punishment of persons for an act or omission not punishable by law at the time of the alleged act or omission but also sanctions the punishment for an offence by a penalty greater and different than the penalty prescribed by law at the time of commission of such act. SCNs are premised on documents which were procured in violation of the provisions of applicable law and the Constitution. These documents were first used for issuing a SCN to the Pakistan Sugar Mills Association **(PSMA)** under the 2007 Ordinance. Now, the same documents and Enquiry Report prepared thereunder without due application of mind and specific and separate grounds and allegations have been used for issuing SCNs against petitioners albeit each one of them is an individual sugar mill.

6. Even otherwise, the 2009 Ordinance being identical in substance to the 2007 Ordinance is also liable to be struck down on the ground that the re-promulgation of an Ordinance on the identical subject matter covered by an earlier Ordinance is not permitted by Article 89 of the Constitution which restricts and circumscribes the power of the President to promulgate an Ordinance in such circumstances. The Supreme Court has held that if the National Assembly does not stand dissolved, the President cannot usurp the legislative power of the National Assembly by repeating the same Ordinance. It is also the view of the Apex Court that repeated re-promulgation of Ordinances runs counter to the spirit and scheme of the Constitution. That since a Bill on the subject matter of the impugned Ordinance was pending before Parliament and Parliament was not dissolved and meeting regularly; the President did not have the authority and power to promulgate the 2009 Ordinance.

7. Further, the Enquiry Report dated 21.10.2009 was expressly commissioned under Section 37 of the 2007 Ordinance, which stood expired on 1.2.2008 in terms of Article 89(2)(a)(1) of the Constitution. Therefore, both SCNs and Enquiry Report are a nullity in the eyes of law. There was no valid law in force at the time of preparation of Enquiry Report to authorize the same. The 2009 Ordinance does not cure this fundamental defect as it makes absolutely no reference whatsoever to the 2007 Ordinance repealed on 1.2.2008. That as proceedings before the Commission under the 2009 Ordinance are quasi criminal in nature, proof beyond a reasonable doubt must be present against each individual undertaking for taking action and issuing them a SCN. But there is evidently no proof available poised to produce a possibility of a valid and lawful finding of contravention of the 2009 Ordinance by the individual sugar mill. Hence, SCNs are liable to be quashed and declared to be null and void. That the 2009 Ordinance is also liable to be struck down on account of excessive and impermissible delegation and abdication of authority by the legislature and the executive as extremely broad and pervasive powers have been vested in the Competition Commission of Pakistan **(the Commission)** without the approval of the federal government and in this respect too it is also *ultra vires* the Constitution. The powers of search and entry and forcible entry vested in the Commission also suffer from excessive delegation and are *ex facie* even broader and more unilateral than the search and entry powers available to the police under the Criminal Procedure Code.

8. That sections 3, 4 and 38 of 2007 Ordinance created various new offences/punishments/penalties/fines which were not provided for or contemplated in the Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance, 1970 **(the 1970 Ordinance)**. Moreover, in terms of Section 38(6) of the 2007 Ordinance failure to comply with an order of the Commission was declared to constitute a criminal offence punishable with imprisonment for a term which may extend to one year or a with fine which may extend to twenty-five million rupees, which offence was also not provided for in the 1970 Ordinance. That Sections 3, 4 and 38 of the 2009 Ordinance are in *pari materia* and stipulate same punishments. The proceedings against the petitioner sugar mills have been initiated under Section 30 of the 2009 Ordinance which has been given retroactive effect from 2.10.2007 *mala fide* only to make the back dated material, basis of SCNs and Enquiry Report, relevant. This has resulted into making an act or omission carried out in the past when it was not an offence and punishable, as an offence and punishable. Moreover, the punishments, etc. under section 38 of the 2009 Ordinance are greater and different than those stipulated in, *inter alia*, Section 19 of the 1970 Ordinance.

9. The petitioners are Companies established and operating under the laws of Pakistan. They are owners and operators of mills engaged in production, manufacture and sale of refined sugar. Each one of the petitioner sugar mills has received a SCN dated 31.12.2009 under Section 30 of the 2009 Ordinance which are identical in content and substance. The Enquiry Report, an integral part of each of SCN, prepared under the 2007 Ordinance, was employed earlier by the Commission to PSMA which is a separate and distinct legal entity. It is evident from a bare perusal of the said Enquiry Report that the allegations therein are focused on and attributed to PSMA and not to the petitioners who are individual shareholders.

10. The Enquiry Report is premised on erroneous assumption that all undertakings as defined in section 2(1) (p) of the 2009 Ordinance have the ability, opportunity, power and legal authority to operate in a totally free market economy where market prices, terms of production etc. for each undertaking is an independent business decision driven by market forces and there is essentially free competition. However, many industries and sectors in Pakistan including sugar mills are heavily regulated, directly and indirectly, by the federal and provincial governments. The impugned Ordinance does not differentiate such industries and sectors, and assumes circumstances and a state of free

competition which is patently inconsistent with the applicable and prevailing legal, regulatory and practical circumstances. There is a major and material absence of nexus between the underlying basis of the impugned Ordinance and the ground realities within which the petitioner sugar mills actually operate under the direct dictates of the federal and provincial governments.

11. The sugar manufacturing industry has historically been and continues to be heavily and comprehensively regulated by the federal government and relevant provincial government. There are a raft of statutes and statutory rules empowering the provincial governments in particular to regulate and also to take coercive measures against sugar mills to fix price of sugar cane, the ex-factory price of refined sugar and to make territorial allocations etc. These, *inter ilia,* include: **Sugar Factories Control Act, 1950 (the 1950 Act); Sugar Factories Control Rules, 1950; Sugarcane Act, 1934 (the 1934 Act); Industries (Control on Establishment & Enlargement) Ordinance, 1963; Price Control and Prevention of Profiteering and Hoarding Act, 1977; and Foodstuffs (Control) Act, 1958.** That any provincial government in most cases in consultation with the federal government notifies and determines minimum purchase price for sugar cane (the support price) pursuant to Section 16 of the Sugar Factories Control Act,1950.

12. That in the report submitted by the Chairman of the Commission to the Supreme Court it has been accepted that the cost of sugar cane accounts for roughly 70 to 80% of the total cost of production of refined sugar. The federal government itself is also actively involved in deciding, determining, regulating and enforcing directly and indirectly the ex-factory and retail price of refined sugar. The sugar manufacturers face two key price regulations: the predominant input cost; and the end sale price on account of intervention by the federal and provincial governments. Therefore, the sugar manufacturers who operate in the private sector are entitled to a reasonable return on their investment and efforts. Particularly when they do not and are not permitted to actually operate in a free market and determine purchase price of its inputs as well as the sale price for its end product. That it is clear that the ability of individual sugar mill to collectively fix price or to indulge in any other practice which can or has the object or effect of preventing, restricting or reducing competition is illusory at most as there is no room for sugar mills to influence or affect competition.

Moreover, the impugned Ordinance does not define the scope and ambit of the expression competition employed therein.

13. It was contended next that the alleged actions attributed to the petitioner sugar mills in SCNs need to be read and examined in the context in which both the input cost and the sale price for the end product are decided, regulated and controlled by the federal and provincial governments. Even the establishment, enlargement and location of sugar manufacturing facilities are within the discretion and prerogative of the provincial governments. Given the level of direct and indirect meddling and control by both the governments on the price of input (sugar cane) and end product, the sugar manufacturers, essentially established to earn a return on shareholders' equity, have no choice but to conduct business in an environment where the minimum price (floor price) of sugar cane is determined by government, but there is no ceiling on such price. Further, the federal and provincial governments do not take any steps to keep a check on the maximum price of sugar cane, and there is concerted effort to ensure that the ex-factory and retail price of refined sugar is maintained within a band considered acceptable both by the federal and provincial governments.

14. It has also been impressed that all key activities of the sugar manufacturers are regulated by the antiquated scheme of Statues such as the 1950 Act and the 1934 Act, which is removed totally from a free and open market and that is the underlying basis of the 2009 Ordinance. Therefore, it would be inequitable and contrary to Articles 4, 5(2), 9, 12, 14, 18, 23, 24 and 25 of the Constitution to test the alleged actions of the petitioner sugar mills on the threshold of Section 4 of the said Ordinance contemplating free choice and ability of the undertaking to determine its own price for acquisition of raw material and the price of its end product.

15. Learned defense counsel did not accept allegations leveled in SCNs against the petitioner sugar mills i.e. operating a cartel in the purchase of the raw material (sugar cane), and in the sale of the end product (refined sugar); territorial allocations in the purchase of sugar cane and the terms of production and supply of refined sugar; and collusive bidding to offer a uniform price for refined sugar to Trading Corporation of Pakistan. And maintained that such allegations do not justify charging the petitioner sugar mills with violation of sections

4(1), 4(2) (a), 4(2) (b), 4(2)(c) and 4(2)(e) of the 2009 Ordinance. The allegations i.e. contravention of said provisions forming the subject matter of SCNs and the Enquiry Report are not sustainable in law and are without any merit.

16. In order to establish maintainability of the petitions in view of alternate remedy in the form of appeal available to the petitioners u/s 41 of the 2010 Act, it was stated, petitioners' fundamental rights under Articles 9, 12, 1.4 18, 23, 24 and 25 read with Articles 2A, 4, 5(2), 8 of the Constitution are involved. Issuance of SCNs by the Commission, itself a creation of a void Ordinance, pursuant to an Ordinance already expired is illegal and highly objectionable. Where serious questions of interpretation of law or the Constitution are involved, only the Superior Courts of Pakistan viz. the High Courts and the Supreme Court have the jurisdiction and there is no need or occasion for availing of any sub-constitutional remedy. Interpretation of statutory and constitutional provisions, even officials need guidance on, is the constitutional prerogative of the Superior Courts only. SCNs have been issued in a mechanical manner without a lawful authority and are of no legal effect on the ground of illegal and unlawful assumption of jurisdiction by the Commission as no valid and constitutionally compliant law was in force on the date of issuance of SCNs. That the 2009 Ordinance, promulgated and notified in the official gazette on 26.11.2009 with retrospective effect from 02.10.2007 is without lawful authority and of no legal effect being ultra vires the Constitution. In support of their case the petitioners have relied upon the case law reported in **2007 PTD 2356 SC, PLD 2000 SC 26, 1998 SCMR 1729, PLD 213 SC 501, PLD 2020 SC 1, PLD 1998 SC 1445, 2003 P Cr. LJ 277, PLD 1963 SC 486, PLD 2012 SC 923, 1993 SCMR 1589 1601, PLD 1998 Lahore 203, 1978 SCMR 292, PLD 2007 Peshwar 179, 1989 CLC 2103, PLD 2010 SC 265, PLD 2006 SC 697, PLD 2009 Supreme Court 879.**

17. It is mainly in this backdrop, the petitioner sugar mills have sought following reliefs.

> A. Hold and declare that the impugned Ordinance (Competition Ordinance, 2009 (Ordinance No.XLVI of 2009) is ultra vires the Constitution, in contravention of the judgment of the Supreme Court of Pakistan dated July 31,2009 reported as PLD 2009 SC 879, without lawful authority and of no legal effect; and hence strike down the same by declaring it void *ab initio*.
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> B. Hold and declare, without prejudice to the foregoing, that the Impugned Show Cause Notices dated December 31,2009 and the related Enquiry Report dated October 21, 2009 are without

jurisdiction, void *ab initio*, without lawful authority and of no legal effect and hence set aside the same;

C. Hold and declare that the Competition Ordinance, 2007 (No.LII of 2007) and all actions and steps taken thereunder and all orders and decisions issued pursuant thereto by or on behalf of or under the direction of the Commission (including but not limited to the purported decision to raid the premises of PSMA and the preparation of the Enquiry Report which has now also been employed as the basis for the Show Cause Notices) be declared to be ultra vires the Constitution; without lawful authority and of no legal effect; and hence strike down the same by declaring it void *ab initio*;

D. Grant a permanent injunction, prohibiting and restraining the Respondents by themselves and or through any or all of their agents, servants, officers, representatives, subordinates, agencies and instrumentalities from enforcing and or giving effect to any provision of the impugned Ordinance, the Impugned Show Cause Notices dated December 31, 2009 and the related Enquiry Report dated October 21, 2009.

E. Grant the costs of this petition.

F. Any other relief.

18. Learned Attorney General Mr. Khalid Jawed Khan led the arguments from the side of respondents. He raised strong objection to maintainability of the petitions and submitted that the petitioner sugar mills cannot assail SCNs in constitutional jurisdiction. The 2010 Act provides for a complete hierarchy of forums with final appeal to the Honorable Supreme Court which the petitioners can resort to in the face of any adversity arising out of SCNs. He next stated that departmental proceedings entail adjudication on facts of the cases which exercise cannot be undertaken in writ jurisdiction as it would require recording of the evidence. He also spoke at length over merit of the case. His opinion on the issue is recapped in following paragraphs. Lastly in order to support his case, he relied upon the following case law.

2019 PTD 1774, 2019 SCMR 924, 1993 SCMR 29, PLD 1992 SC 847, PLD 2011 SC 44 at 107, PLD 2019 Sindh 516, PLD 2006 SC 230 at 241 (Para 41), 2021 CLD 214 at 277 (Para 51), PLD 2018 Lah 762 at 777 (Para 23), 2019 CLC 1761 at 1771 (Para 20), 2019 CLD 626 at 631 (Para 9), 2018 PTD 1966 T 1986 (Para 19), 2018 PTD 2026 at Para 11, 2018 SCMR 802 at Para 16, AIR 2003 SC, 1044, 1046 (Paras 6 to 8), PLD 2017 Lah 230 at 248, 2018 SCMR 802 at 829, PLD 1998 Lah 296 at 303, 1998 SCMR 1729 at 1735, 2018 SCMR 1956 at 1987, PLD 2009 SC 879 at 957, PLD 1998 SC 161, PLD 1997 SC 426 at 517, PLD 2000 SC 26, 2018 SCMR 1856, PLD 2000 SC 26, and 2005 PTD 122 at 131.

19. We have considered submissions of the parties and perused the record and the case law cited at bar. This discussion proceeds to encompass an effort to fist determine legislative competence of Parliament, if any, which is the core question here, to enact the law(s) on the subject of free competition in trade with a view to achieve purported objective of curtailing cartelization by business entities for the benefit of general public, and second to examine very intent the

competition law(s) has been enacted for in the light of doubts expressed by learned defense counsel over its competence plus legality or otherwise of SCNs. A bare perusal of the law(s), aside from question to its constitutionality, is enough to demonstrate that the reason needed by Parliament for its enactment was not less than sacrosanct: to curb anticompetitive practices and to ensure free competition in the market to safeguard consumers' interest throughout Pakistan. Constitutional goal over the subject of business encoded in its several provisions, discussed herein under, is also free trade, commerce and intercourse in the whole country. For realizing such goal, and since the geographic stretch of the market surpasses territorial limits of any particular area or a province, the law on competition has to be national in character. At the very onset, we want to clarify that expression of 'Free Trade' etc. used in the Constitution as an idea would not imply absolute freedom from all obligations or regulations, etc. necessary to discipline such freedom. Absolute freedom in any sphere has never been the scheme of any Constitution the world over. This is the reason primarily, why our Constitution stipulates imposing of certain restrictions as may be required in the public interest upon freedom of a business activity, etc. The underlying purpose is to seek evolution of an egalitarian society based on a concept of fair play and social justice. Free from a regulatory regime, freedom would tend to beget chaos and discrimination in the society which is the last thing a democratic people governed by the Constitution would want in their life.

20. It seems that framers of our Constitution had such ideas in mind when they thought out of Article 18 (Freedom of Trade, etc.) and made it a part of Chapter 1 of Part II of the Constitution catering to fundamental rights of the citizens. Entering upon any lawful profession, trade, business or occupation by a citizen was recognized as his fundamental right. But under the same provision this right was made subject to certain regulations in the interest of free competition. It is quite clear therefore that regulating trade and business is not mere a formality but a requirement arising out of the Constitution itself. Once it is realized, it would be easy to understand that there has to be some regime with a mandate to supervise a business activity for such purpose. For a province to have such regime and execute it in respect of a business activity carried out by a trans-provincial set up is next to impossible mainly because of its territorial constraints. Obviously, therefore, a national law enacted by Parliament, applicable in the entire country, would be needed to do the trick.

21. Notwithstanding, since multiple points qua domain, territorial bounds, legislative authority, and jurisdiction of the federal and provincial legislature over the subject in terms of entries in the Federal and Concurrent

Legislative List and various provisions of the Constitution have been raised, a deeper look is required to comprehend the issue. First, we tend to look at the contention that the 1973 Constitution does not have any provision similar to the 1956 Constitution or the 1962 Constitution which authorized Parliament to legislate on the subject of free competition. That subject is expressly missing in both the aforesaid Legislative Lists meaning thereby it cannot even be implicitly interpreted or read to be in the domain of Parliament. Any such attempt or interpretation will take away fundamental character of the Constitution, especially after the 18th Amendment which has given greater authority to the provinces. Historically, there were entries and provisions in the constitutions which have been deliberately omitted from the 1973 Constitution is reflective of intention of the framers of the Constitution to exclude the subject of free competition in the trade from the legislative domain of Parliament.

22. We may recall that under the Government of India Act, 1935, the provincial legislature had no power to make a law restricting entry into or export from its boundaries of goods of any description, or impose any tax etc. discriminatory in nature in respect of goods manufactured within its boundaries and the goods not so manufactured. The same rule followed in the 1956 and the 1962 Constitutions. It was this rule that mainly governed relationship between the provinces and the federation qua interprovincial trade and commerce. In the 1956 Constitution, entry 10 covering the subject of commercial and industrial monopolies, combines and trust was introduced in the Concurrent List. Although, the 1962 Constitution did not have such entry, but Article 131(2) was there which admitted authority of the Central legislature to make laws on economic and financial matters to bring about uniformity throughout Pakistan. This resulted into enactment of the 1970 Ordinance. For the first time through this federal law concept of competition in trade and commerce in Pakistan was introduced to promote economic welfare, financial stability and to prevent the concentration of economic power in the hands of a few. Its preamble clearly called for taking steps against undue concentration of economic power, growth of unreasonable monopoly, power and restrictive trade practices in the interest of better economy. Therefore, it is not right to say that commerce and/or competition within commerce has never been the subject of federal legislative authority. On the contrary, ensuring a free market and arresting monopolistic behavior has from the advent been a federal subject.

23. Further, at the time of the 1973 Constitution, a serious debate to define relationship between the federation and the provinces over management of commerce and matters ancillary thereto took place. It was realized that there should be one economic system in the country. Article 151, conceptualizing national economy, was deliberated and introduced in the Constitution making trade, commerce and intercourse free throughout Pakistan, and giving Parliament authority to impose restrictions on free trade and commerce between provinces or within any part of Pakistan in the public interest. Its sub-clauses 1 and 2 are an addition to the rule enshrined in previous Constitutions restraining provinces from making any discriminatory law about goods not manufactured by it or stopping entry or export of goods in or from its borders. This same rule however has got incorporated in sub-clause 3 of Article 151. In terms of sub-clause 4 thereof, a province, irrespective of barriers over its legislative authority, can make a law but only with consent of the President and when such law relates to public interest, protecting animals or plants from diseases, etc.

24. It is also necessary to recall here that under the Government of India Act, 1935 there was threefold distribution of legislative power between the federation and federating units (States), which scheme was retained in the Constitution of India adopted in 1949. The 1956 Constitution of Pakistan had identical three fold distribution of legislative power. The 1962 Constitution envisaged only one legislative List. But the 1973 Constitution introduced twofold distribution of legislative power between the federations and the provinces through the Federal Legislative List and Concurrent Legislative List appended to the Fourth Schedule. The subjects in entries enumerated in Federal Legislative List fell within exclusive domain of the federation to legislate on. While in respect of the subjects in Concurrent List both Parliament and Provincial Assemblies had concurrent legislative authority to make laws. The authority and manner to exercise the authority to legislate on any given subject was conferred on both the forums under Article 142. It was under this article both the legislatures had been exercising jurisdiction to legislate on various subjects, fields, topics or activities in terms of aforesaid Legislative Lists. Nevertheless, when the subject did not fall either in the Federal or Concurrent Legislative List, the Province was deemed to have power, termed as residuary, to legislate on it. This was known as an unwritten list understood in constitutional parlance as Residuary List which embraced all subjects, fields, topics and activities foreign to both the Federal and Concurrent Legislative List. There has been left since only Federal Legislative List thanks to 18th Amendment and under Article 142 Parliament has

exclusive power to make laws with respect to any matter in that List and the Provinces in respect of subjects not part of the said List. Under no constitutional scheme, the entries enumerated in the Legislate Lists have been understood to confer power of legislation on any of the legislatures. They are only taken for setting out broader outlines of the subjects, topics or nature of activities the federal or provincial legislature can frame laws on.

25. In the 1973 Constitution, as it stands, the scheme to govern relationship between the federation and the provinces is set out in Part V **(Relations between Federation and Provinces)** from Article 141 to Article 159. Article 141 explains jurisdictional extent to which Parliament or a Provincial Assembly can make a law in respect of subjects falling within their respective domains. When the law is made by Parliament will be enforceable in the whole country, while the law framed by a Provincial Assembly will have applicability confined to its territorial limits only. Article 142 distinguishes the subject matters falling within either the federal or the provincial legislative competence. As Parliament can legislate on subjects enumerated in the Federal Legislative List only and the word competition is nowhere mentioned as an exclusive subject in such List. The question is whether or not Parliament can make a law on this subject. The reply of learned defense counsel expectedly is in negative. But, our view, founded on an endeavor detailed herein below, differs with theirs. We at the this stage would like to reproduce Article 142 of the Constitution to see the outlines drawn thereunder segregating for legislation the subjects between the federation and the provinces.

> 142. **Subject matter of Federal and Provincial Laws.**--Subject to the Constitution: -
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> (a) Majlis-e-Shoora (Parliament) shall have exclusive power to make laws with respect to any matter in the Federal Legislative List.
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> (b) Majlis-e-Shoora (Parliament) and a Provincial Assembly shall have power to make laws with respect to criminal law, criminal procedure and evidence.
>
> (c) Subject to paragraph (b), a Provincial Assembly shall, and Majlis-e-Shoora, (Parliament) shall not, have power to make laws with respect to any matter not enumerated in the Federal Legislative List.
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> (d) Majlis-e-Shoora (Parliament) shall have exclusive power to make laws with respect to all matters pertaining to such areas in the Federation as are not included in any Province.

26. It is notable that this article starts with words 'Subject to the Constitution' which, simply construed, would mean that exercise of jurisdiction thereunder is not independent of other provisions of the Constitution. Yet, this would not imply that this provision in terms of its position or import is subordinate or subservient to the remaining provisions of the Constitution. These words only signify that where the Constitution itself would create a specific bar to a legislative authority or lay out a manner for exercise of such authority different than being employed, then such authority must be exercised in the manner as prescribed and permitted or not at all. In other words, unless the Constitution itself creates a specific bar over exercise of such authority, the authority exercised as such under this provision would be construed unhindered and absolute. These very words have been explained by the Honourable Supreme Court in the case of **Lahore Development Authority through D.G. and others v. Ms. Imrana Tiwana and others (2015 SCMR 1739)** in the following manner.

> 52. The words "Subject to the Constitution" in Articles 142 and 137 of the Constitution simply mean that where the Constitution itself places a bar on the exercise of legislative or executive authority by the Province such authority cannot be exercised in spite of its conferment by these Articles. For instance, while the Province has executive authority under Article 137, this authority must be so exercised so as to secure compliance with federal laws, which apply in that Province [Article 148(1)]. It must also be so exercised so as not to impede or prejudice the executive authority of the Federation [Article 149(1)]. Likewise, the legislative authority of the Province under Article 142 of the Constitution can be conferred on the Federation under Article 144. Further, neither the executive nor the legislative authority of a Province can be exercised in a manner which violates Fundamental Rights. Any such exercise would fall foul of Article 8 of the Constitution.
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> 53. The words "Subject to the Constitution" do not, therefore, make Article 137 or 142 subservient to the remaining provisions of the Constitution. All that these mean is that where the Constitution creates a specific bar to the exercise of such executive or legislative authority or provides a different manner for such exercise then that authority must either not be exercised at all or exercised in such manner as the Constitution permits. It does not mean that the provision prefaced with such words is a subordinate constitutional provision. It also cannot mean that once the Province has devolved certain powers on the Local Government, its legislative and executive authority is effaced by that of the Local Government. The said provisions are not subordinate, but provisions, the exercise of authority under which, is untrammeled except where the Constitution itself creates a specific and overriding bar.

27. A reading of above passages from a judgment of the Apex Court is sufficient to remove any misgivings about exact position of this provision in the Constitution. The main object of this provision is to underline lines to guide the federal and provincial legislatures to exercise their respective legislative authority within. Parliament has been authorized to legislate exclusively on

subjects, topics and activities enumerated in the Federal Legislative List comprising two parts and matters incidental or ancillary thereto. (In all there are 59 entries in Part I and 18 entries in Part II). Whereas, the provincial legislature currently has been given exclusive legislative authority on the subjects, topics, and activities not mentioned in Federal Legislative List, in addition to the power to make laws with respect to criminal law, criminal procedure and evidence. In spite of such comprehensiveness, and notwithstanding every care and caution taken and efforts put in, the entries are not extensive. Inherent in subjects covered by all such entries is always a variety and diversity of topics and themes which need to be attended to and addressed while making a law on a particular subject to make it relevant and congruous. An attempt has to be undertaken to integrate entire gamut of aspects related to the subject in a way that no room is left for defeating either import or purpose of the proposed law. But human infallibility is an impossibility. This reach is not easy to come by. This can be gauged from the fact that in Indian Constitution, the legislative subjects, fields, topics and activities are itemized in three comprehensive and independent Legislative Lists. List No.1, called as the Union List, is equivalent to Federal Legislative List, carries 97 entries. List No.II or the State List, equivalent to Provincial Legislative List, has 61 entries, and finally List No.III called as the Concurrent List is the list of 52 items though the last subject is numbered as 47. Despite such extensiveness attained through three Lists, there are still enactments like the **Hemachal Pradesh Assembly (Constitution and Proceedings) Validation Act, 1958 (Jadab v. H.P. Administration, (1960) 3 SCR 755), the Gift Tax Act (Second G.T.O. v. Hazareth AIR 1970 SC 999), etc.** which contain the subjects and topics over which the Union of India through Parliament had to exercise its residuary authority and jurisdiction as conferred upon it under Article 248 of the Indian Constitution.

28. Due to such reason, it has always been held by the superior courts that the entries in the legislative list are to be interpreted liberally, assigned widest meaning in order to give full freedom to legislature to legislate on all aspects of a particular subject so as to comprehend its nature and apply it in true perspective. There is no place for presumption that a subject, topic or activity is not covered by any entry in the legislative list. Or that the legislature is not competent or is shorn of legislative authority to legislate on a particular subject, field, topic or activity. Entry No. 59 of the Federal Legislative List is a testament to such rule of benevolent and generous interpretation which stipulates that the federal legislature can frame laws not only on subjects, topics and activities covered by the entries but also in

respect of matters incidental or ancillary thereto. To legislate is as an intrinsic right of every State, without which concept of an independent State is unrealistic. Because of this right, a State meets and addresses legislative exigencies. Article 142 besides conferring on Parliament and the Provincial Assemble power of legislation in specified areas stipulates residuary jurisdiction for both the legislatures to exercise in such circumstances. When a subject is diversified and is not covered by any of the entries in the Legislative Lists is termed as a residuary subject falling within residuary jurisdiction. Purpose of conferral of such jurisdiction on the legislature is to enable it to meet a contingency arising out of dynamics of ever evolving and changing society which entail an appropriate legislative measure not otherwise specifically set out in the book.

29. Nonetheless, it must be noted, the residuary jurisdiction is resorted to only as a last resort and when all the entries in the legislative list(s) are exhausted, and yet the subject matter of legislation is not addressed. Legislative inability over a given subject has to be established first before residuary jurisdiction is claimed over it. To determine which particular legislature in competent to legislate on a given subject involves predetermination of so many factors such as origin of the subject in the legislative list, its various themes and topics, mandate under the Constitution, legislative ability and inability, territorial bounds, etc. In a case where both the federal and provincial legislatures claim jurisdiction over the same subject and make a law on it, and there is a conflict between the two laws. In terms of Article 143 of the Constitution, to the extent of such repugnancy, the federal law shall prevail. The Constitution by making Parliament the supreme legislative body has left entirely up to it to confer or retrieve legislative competence upon itself, either by specifically enlisting any subject in the Federal Legislative List or by simply excluding it from the List and enlarging the jurisdiction of the provincial legislature. It is however settled that whenever a law is framed on a particular subject, presumption of legislative competence and legitimacy would always be attached to it. And where the validity of a law is questioned, and two interpretations are possible, the one upholding the validity of the law will always be preferred and adopted. The courts are required to lean in favour of upholding the constitutionality of the legislation and to be extremely reluctant to strike down the law as unconstitutional. It has been a time-tested view that all efforts must be directed to save rather than to destroy the law. For reliance, the case of **Messrs. Sui Southern Gas Company Ltd. and others Vs. Federation of Pakistan (2018 SCMR 802)** can be cited.

30. In the case of **Ellahi Cotton Mills Ltd. (PLD 1997 SC 582)**, the Honorable Supreme Court, in a tax matter, while dilating upon legislative competence of the federation has asserted that the court's approach while interpreting the Constitution shall be dynamic, progressive, and oriented with the desire to meet the situation, which has arisen, effectively. The interpretation cannot be narrow and pedantic; the court's efforts should be to construe the same broadly, so that it may be able to meet the requirement of ever-changing society. It is also said, the general words cannot be construed in isolation but are to be taken in the context in which they are employed. In other words their color and contents are derived from their context. Regarding the entries in the legislative list, it is observed, the entries contained therein indicate the subjects on whom a particular Legislature is competent but they do not provide any restriction as to the power contained. It can legislate on the subject mentioned in an entry as long as it does not transgress or encroach upon the power of the other legislature and also does not violate any of the fundamental rights as the legislative power is subject to constraint in the Constitution itself. It is also a well settled proposition of law that an entry in a Legislative list cannot be construed narrowly or in a pedantic manner but it is to be given liberal construction in this behalf.

31. Now, Article 18 of the Constitution which identifies doing a lawful profession, or occupation, or to conduct a lawful trade or business by a citizen as a fundamental right. But at the same time it stipulates that such right is not absolute and is subject to certain conditions that may include a licensing system, regulations, etc. The object appears to be twofold i.e. to contain abuse of such a right at the cost of others' right in this regard, and to foster free competition to daunt anticompetitive behavior harmful to consumers. Both the fundamental right of a citizen to enter upon a lawful trade or profession, and his responsibility to manage it as per law have been collated into this provision. While reminding the federation of its duty in respect of fundamental rights, the Honorable Supreme Court in the cases reported in **PLD 2012 SC 224** and **2020 SCMR 1** has stated that the federation is not absolved of its duty to confer fundamental rights upon its citizens and enforce such rights notwithstanding respective domain of Federal and Provincial executive authority and competence in terms of Articles 97, 137 & 142 of the Constitution post 18th Amendment or the fact that the subject is not listed in the FLL. Therefore, a duty is cast upon the federation to not only look over the right to do lawful trade, etc. by creating conducive conditions, but also to regulate it through legislative instrument in the interest of free competition. When a business activity traverses

bounds of a province physically and effectively, it appears to be only the federation, given its territorial expanse, competent to regulate it. Along with Article 18, recognizing right of an individual to lawful profession or trade, Entry 58 in Federal Legislative List covering matters which under the Constitution are within the legislative competence of Parliament or relate to Federation can be quoted here for a support.

32. Article 151 of the Constitution also contemplates free trade, commerce and intercourse throughout Pakistan and at the same time provides for restrictions in this respect to be applied by Parliament in the public interest. The provinces have been specifically restrained from making any law or executing orders which may impede interprovincial trade in any manner, and imposing a tax which may create discrimination between the goods manufactured within its boundaries and the goods not so manufactured. In terms of sub-article (4), a provincial assembly could legislate in relaxation of aforesaid rule, provided the law is made with consent of the President and the matter relates to public health, public order, morality, or protecting animals, plants from disease, or preventing or alleviating shortage of an essential commodity. The framers of 1973 Constitution, besides innovating this idea: empowering the provinces to make laws despite barriers, have also made sure that in respect of free trade, commerce and intercourse throughout Pakistan, a national goal is rolled out for all the state functionaries to pursue. Every term they have used in this provision namely trade, commerce and intercourse throughout Pakistan has a distinct meaning and connotation is to be read disjunctively to assign it effect independent of others. Article 18 recognizes right of a citizen to enter into a lawful trade subject to certain regulations, and Article 151 expands scope of his right into the entire country. But both the provisions at the same time stipulate regulations and restriction over this right in the public interest.

33. The federation, due to its territorial limits, in terms of Article 151(1), seems to be the only legislature relevant to achieve the goal of free trade throughout Pakistan. This is evidenced from Article 151(2) assigning only Parliament the role of looking after and imposing restrictions on freedom of trade and commerce between one province and another or within any part of Pakistan. Relevancy of federal government can be found further accentuated from the fact that entire scheme of Article 151 is subject to restrictions provided in sub-article (2) envisaging Parliament's part and not to sub-article (3) encapsulating Provincial Assembly's role. Keeping in mind this fact, when Article 151 is read with Article 18, the national objective of

free trade, commerce and intercourse throughout Pakistan and Parliament's power to regulate it becomes unambiguous and dully pronounced. This appears to be the closest construal one can make by looking at above two provisions and which needs to be adopted, all the more necessary, after 18th Amendment whereby many other vistas of national cohesion through erstwhile Concurrent List have been closed. We have discussed Article 151 to some extent. Before further deliberation, for convenience, it is reproduced herein under:

> 151. Inter-Provincial Trade.--(1) Subject to clause (2), trade, commerce and intercourse throughout Pakistan shall be free.
>
> (2) [Majlis-e-Shoora (Parliament)] may by law impose such restrictions on the freedom of trade, commerce or intercourse between one Province and another or within any part of Pakistan as may be required in the public interest.
>
> (3) A Provincial Assembly or a Provincial Government shall not have power to--
>
> (a) make any law, or take any executive action, prohibiting or restricting the entry into, or the export from, the Province of goods of any class or description; or
>
> (b) impose a tax which, as between goods manufactured or produced in the Province and similar goods not so manufactured or produced, discriminates in favour of the former goods or which,
>
> (c) In the case of goods manufactured or produced outside the Province discriminates between goods manufactured or produced in any area in Pakistan and similar goods manufactured or produced in any other area in Pakistan.
>
> (4) An Act of a Provincial Assembly, which imposes any reasonable restriction in the interest of public health, public, order disease or preventing or alleviating any serious shortage in the Province of an essential commodity, shall not, if it was made with the consent of the President, be invalid.

34. The words 'trade, commerce and intercourse' in this provision refer to a wide range of economic activities i.e. buying, selling, transporting, consuming etc. and also embrace acts, transactions and conduct related to such activities in any form. The terms 'free' in Article 151(1) and 'freedom' in Article 151(2) signify independence without any barrier, hurdle or interference in carrying out lawful business or trade with a view to promote a national economy and a free market. It is strongly suggested that for achieving freedom of trade and movement of goods, internal geographical barriers, except for the administrative reasons, will not matter. The idea is to forge economic unity by integrating the federating units constituting Pakistan and to extend protection to the lawful trading, commerce and commercial interaction between various parts of the country. The phrase 'throughout Pakistan' serves to signify freedom of commerce and

economic activity in the whole country. Interprovincial trade and commerce means interaction in respect of business activities between two and more provinces. Intra-provincial trade and commerce would imply such interaction within the territorial bounds of a province. After 18th Amendment, apparently only intra-provincial trade has been left for the provinces to legislate on. The interprovincial trade, being beyond the territorial expanse of the province is not and cannot be within its domain to supervise and regulate. The expression "Shall be Free" does not mean stark and bald freedom without any restriction. Unqualified freedom in any sphere including the trade can never be acknowledged by the Constitution. It can result, with regard to trade, into anticompetitive behavior etc. compromising the goal of free competition set out in Article 18. This view is fortified by the following definition of 'Free' given by the Apex Court within the context of Article 151 in the case of **Pakistan Tobacco Co. Ltd. v. Government of N.W.F.P. (PLD 2002 SC 460)** while dealing with the 'Tobacco Development Cess' levied on the movement of tobacco.

> 'The above discussion persuades us to hold that liberal and dynamic interpretation of the word 'free' does not mean an unqualified freedom at all in the trade, commerce and intercourse between the Provinces because unchecked freedom in the trade, commerce and intercourse without any reasonable prohibition and restriction would be lack of discipline and the Provincial administration would not be in a position to control trade and commerce prohibited/contraband articles, therefore, a qualified restriction if imposed upon the trade which has not financially burdened the traders and had also not impeded the flow of trade and commerce, would not be violative of the provisions of Article 151(1)(3), Clause (a) of the Constitution. It may also be observed that as far as simpliciter levy of cess by the Provincial Government (N.-W.F.P) on the movement of tobacco outside the Province that would not tantamount to placing any prohibition or restriction on the trade, commerce and intercourse between the Provinces. However, if the entry of the goods into the Province or export of goods to the other Provinces is completely banned then of course it would amount to placing a complete prohibition, limitation and restriction as it happened in the cases of Arshad Akarm & Co. (PLD 1982 Lah. 109) and Star Flour Mills (PLD 1996 Lah. 687). As far as the imposition of development taxes like 'Tobacco Development Cess' is concerned, such levy would fall within the definition of compensatory or incidental tax which would not cause hindrance in trade, commerce and intercourse rather such reasonable/ nominal tax would facilitate the Provincial Government for the purpose of generating revenue for development etc.'

35. Articles 18 and 151 envisage trade, commerce, and intercourse throughout Pakistan to be free and Parliament's power to regulate it through restrictions etc. In certain instances, detailed above, the Provinces have also been permitted to promulgate laws. But conspicuously there is nothing in these provisions setting forth territorial boundaries of either Parliament or a Province for this purpose. Trying to find an answer, we have come to eye over Article 141 of the Constitution, which indicates that

Parliament may make laws for the whole or any part of Pakistan including laws with extraterritorial operation, and a Provincial Assembly to make laws for the Province or any part thereof. The territorial jurisdiction of the two legislatures has been clearly specified: federation to make laws applicable to the entire country whereas the province to have such authority limited to its area only. When this set-up is set in juxtaposition with that of Articles 18 and 151- free trade, commerce, and intercourse throughout Pakistan subject to restrictions by Parliament- it would not be hard to understand that a business activity exceeding provincial territorial limits physically or effectively cannot be comprehended by the Province for legislation.

36. Learned defense counsel strongly impressed in arguments that Articles 18 and 151 do not confer legislative competence on Parliament to make law but simply lay out outlines, *inter alia*, for imposing restrictions on free flow of goods and services between Provinces. If these articles are deemed to be an independent source of legislative power this will allow the federation, contrary to the constitutional command, to legislate on subjects which are not even in the Federal Legislative List. This argument, in our view, is not sustainable. Never from an isolated reading of a provision or two in the Constitution can intention of the legislature be gathered. In order to know the true intent of the legislature, the conditions inducing its necessity, the scheme behind it coupled with context of the issue being addressed and subject it seeks to cover and any other provision either adding or enlarging its purport and scope or providing continuity to it have to be taken into account. For this purpose, when a collective reading of Entries 27 **(interprovincial trade, etc.)**, 58 **(matters within legislative competence of Parliament)**, 59 **(matters incidental or ancillary to any matter enumerated in Part-1 of FLL)** and entry 13 Part-II of FLL **(interprovincial matters and coordination)** with Articles 18 and 151 is undertaken, intention of the legislature becomes abundantly clear: to confer authority on Parliament to prescribe a policy/law to foster economic well-being throughout Pakistan in the public interest and to protect consumers from anticompetitive behavior. The federal government would appear relevant and competent to supervise and enforce control over the national economy. While the provinces to operate within their respective boundaries as a single economic unit but without discriminating between goods manufactured within its boundaries and the goods not so manufactured. In our view, idea of free trade, commerce and intercourse throughout Pakistan, even otherwise, by its very connotation and reach is directly related to the federation.

37. When a citizen indulges into a trade activity beyond the boundaries of a province, the regime to check his activity and control it has to be national in character. Any regime prescribed by a province, for obvious reason of its limited applicability in terms of Article 141, cannot be called into service for this purpose. Nor a person can be subjected to assorted regimes of different provinces in respect of same trade activity staggered over more than one province. Such an approach if otherwise is endorsed can lead to incongruous conditions in trade and could be deleterious to dispensation under Articles 18 and 151. Provincial inability thus in such a set-up is undeniably writ large. When inability to frame a law by a province springs from the Constitution itself, Parliament steps in to fill in the gape. This shall confirm that Parliament's power to legislate on a particular subject is not limited to the entries in the Federal Legislative List. In a case, when a provision of the Constitution comprehending a particular subject envisages Parliament' role this will specify its authority to make laws on that subject. Or in a situation which is beyond competence of a province to cope up with legislatively, the power to legislate would be read in favour of Parliament. There is no concept of legislative vacuum or void-ness in the Constitution. Parliament is the supreme law making body and is duly empowered by the Constitution to exercise its authority as and when needed to meet an exigent situation. Even if historically seen, it will be easy to trace that in the 1962 Constitution under Article 131(2), it was the Centre which had the legislature power to make laws to promote national interest where economics and financial stability was involved.

38. It was contended next that at the heart of the 18th Amendment is the provincial autonomy; Article 142 (c) gives authority to provincial assembly to make laws in respect of any matter not enumerated in Federal Legislative List; and as free competition in trade, commerce, etc. can nowhere be found in the said list, it is but domain of the provinces to legislate on it. We have chewed over this argument and have found that legislative competence under Article 142 is not independent. This provision is prefaced by words 'Subject to the Constitution' implying that it cannot be read in isolation of other provisions of the Constitution, nor can be applied independently. If on a subject a province wishes to assume jurisdiction under this provision, it has to specifically fall within its legislative domain in addition to be independent of all the provisions conferring such jurisdiction either explicitly or implicitly upon the federation. The province has no jurisdiction to make a law in derogation

of this rule, and if however a law is made as such, its validity would not be without a question. Indeed, a combined study of foregoing provisions of the Constitution leaves no room for any other construction save the one recognizing Parliament's authority to legislate in respect of trade matters to promote free competition. Free competition in trade, business and profession is requirement of the Constitution itself having been specifically stipulated in Article 18 and amplified by Article 151. This means that every citizen, corporation, company, statutory bodies or government controlled corporations can do business, trade, etc. so long as he or it is managing it in accordance with the law of the land. In accordance with law of the land depicts the authority of the State to impose regulations, the licensing system, etc. A citizen, etc. wishing to avail of such right is required to submit to such regulations in order to seek out benefits arising out of it. Concept of a right given to a citizen is not independent of concomitant obligation to submit to. A right has always a corresponding duty. When the right is conferred upon a person by any law, certain duties upon him at the same time are pieced together to regulate it. In certain cases (like gambling etc.), the State can even go a step further and ban a profession, trade, etc. by declaring it to be unlawful or forbidden by law. This shows that when such right is exercised unlawfully or against the law enacted to regulate it would hardly be treated as a fundamental right even. This delineation neither tends to compromise autonomy of the provinces post 18th Amendment, nor can be counted as repugnant to the scheme laid out in Article 142 for the provinces.

39. Further, we may note that Pakistan has signed several international agreements pledging to ensure free and fair competition within its borders. The World Trade Organization requires the Member States to make laws for fostering free trade among them, and to discourage monopolies to promote free competition. Pakistan being its (WTO) member since 1.1.1995 is required to comply with the same. Further, the United Nations Conference on Trade and Development (UNCTAD) and the United Nations Set of Principles and Rules on Competition require Member States to make appropriate legislation on the subject of free competition. The objective is liberalization of trade to gain greater efficiency in international trade by free and fair competition in the market and to prohibit concentration of economic power or capital in the hands of few so that benefits for general public are realized. Furthermore, the trade agreements with Sri Lanka and China from the platform of South Asian Free Trade Area (SAFTA) also entail the federation to fulfill its obligations of providing conditions for fair competition in trade in goods and services between

these countries. From this angle, when we look at the subjects in entries 3 and 32 Part-I of the Federal Legislative List **(external affairs, implementing of treaties and agreements with other countries, and international treaties, conventions and agreements and international arbitration respectively)** binding Pakistan to enter into trade relations with international community for its own benefit. We cannot miss Parliament's role in making laws on the subject of free competition. For favour, reliance can be placed on the case **Messrs. Sui Southern Gas Company Ltd.** *(Supra)*

40. Before commencing discussion on relevant entries in the fourth schedule of the Constitution, we would like to recapitulate some of the precedents laid down by the superior courts on the interpretation and importance of such entries. In the case of **Sh. Abdur Rehim, Allah Ditta v. Federation of Pakistan (PLD 1988 SC 670)**, the Honorable Supreme Court was seized with a question of imposition of regulatory duty which was agitated to be illegal and beyond the scope provided by item No.43 of the 4th Schedule prescribing custom duties on export and import. It has been held that while considering the scope of legislative powers it should be borne in mind that it is a recognized principle of constitutional law that except where any limitations have been imposed by the Constitution itself, the power of legislature to legislate on the enumerated subjects is unlimited and practically absolute. The legislature is free to exercise this power as and when the occasion arises. It is further said, it was an essential legislative function to add, subtract, decrease and increase the customs duties so long as the subject to legislation was covered by item No.43, which is the touchstone of the validity of the legislative measure.

41. In the case of **PIDC v. Pakistan (1992 SCMR 891)** the Honorable Supreme Court had to deal with the question as to whether free reserves of a company constitutes income within the meaning of Entry 43 of the Third Schedule to the Constitution of Pakistan, 1962 (equivalent to entry 47 to the Fourth Schedule of the 1973 Constitution). It has been held that the Constitution was a living document and was to be interpreted in the widest possible manner so as to ensure continuity and balance in the several constituents and organs of the State. Further, the items in the constitutional entries, which confer the power of taxation, were to be construed in the widest possible manner and not in any restricted or pedantic way. None of the items in the constitutional entries were to be read in a narrow restricted sense, and that each general word would extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it.

42. In the case reported as **Nishat Tek Ltd. v. FOP (PLD 1994 Lah 347)**, the taxpayer had challenged the vires of the federal education fee imposed by the Finance Act, 1992 on the ground that the federal legislature had no authority to regulate the subject of adult education. The learned Deputy Attorney General defending the matter stressed that every possible explanation should be given so as to uphold legislation. It has been held that the constitutional entries do not confer legislative power but merely point out to the broad fields in which the legislative power could be exercised. Further, the Court agreed with DAG that the constitutional entries should be given a very wide construction and the same should not be interpreted in a narrow or pedantic sense. Further, it was the pith and substance of the legislation which should be seen while determining the power of the legislature to legislate on a particular subject.

43. It is clear from the above that words in constitutional entries have to be construed broadly and extensively and not in a narrow manner. Nonetheless, a fair question could arise of the limit or extent to which the words in the constitutional entries could be stretched for this purpose. For taking some guidance, a judgment from the Supreme Court of India reported as **Navinchandra Mafatlal v. C.I.T. (1954) 26 ITR 758 (SC)** is cited here. In this case it has been held that the words in constitutional entries though must be given the most elaborate construction they must be confined to their ordinary, natural and grammatical meaning. The relevant excerpt is reproduced as follows:-

> 'The cardinal rule of interpretation, however, is that words should be read in their ordinary, natural and grammatical meaning subject to this rider that in construing the words in constitutional enactment conferring legislative power the most liberal construction should be put upon the words so that the same may have effect in their widest amplitude.'

44. In another case titled as **L.P. Varghese v. ITO AIR 1981 SC. 1922,** it has been held that: '....It is true that the words used even in their literal sense, are the primary and ordinarily the most reliable source of interpreting of any writing, be it a Statute, a Contract or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that Statutes always have some purpose and object to accomplish whose sympathetic and imaginative discovery is the surest guide to their meaning.'

45. Our own Supreme Court in the case of **Elahi Cotton v. FOP (PLD 1997 SC 582)** met with a challenge to sections 80C, 8000 and 80D of the Income Tax Ordinance, 1979, introduced by the Finance Acts, 1991 and 1992 on the grounds, *inter alia*, that the impugned sections have set up taxes on 'sales' and 'purchases' under the garb of income tax. It was agitated that the impugned taxation violated the mandate conferred upon the federal legislature under Entry 47 of the Fourth Schedule to the Constitution, which only permitted taxes on income and by no stretch of imagination or even connotation 'purchases' and 'sales' could be construed as income. The Supreme Court found the legislation to be intra vires and held that when interpreting laws relating to economic activities, the same must be viewed with greater latitude than the laws relating to civil rights, keeping in view the complexity of the economic problems which do not admit a solution through any 'doctrinaire or strait jacket formula'. Further, an attempt should be made to save rather than destroy the statute, unless where *ex facie* the legislative instrument is violative of any constitutional provision. It has also been observed that the entries in the legislative lists of the Constitution were not powers of legislation but only fields of legislative heads. The allocation of subjects to the list was not by way of any scientific or logical definition but by way of a mere and simple enumeration of a broad catalogue. The key test laid down was whether a particular word in the constitutional entry was susceptible to a particular connotation, not only in the ordinary parlance but also by way of a fiction.

46. In the light of above, we have come to know that the Constitution is a living and organic document prone to evolve and adapt to new circumstances even if it is not formally amended. And the courts in order to get compliant with this interpretation are required to adopt a broad based, dynamic, and progressive approach. The words either in the entries or in any provision of the Constitution are to be given a dynamic interpretation in keeping pace with development of the society and the exigencies of time. The entries do not confer any legislative power but only point out to the broad fields/legislative heads in which the legislative powers can be exercised. The words have to be given ordinary, grammatical and natural meaning and cannot be construed in a narrow or pedantic manner. However, the limit to which a word can be stretched for a meaning is determined by the principle of 'pith and substance'. Pith detonates the 'essence of something' or the 'true nature', while substance means the 'most significant or essential part of something. This doctrine is applied to ascertain the purpose of a given law , its essential character and whether the subject matter legislated on is

related to the federation or not. By applying this doctrine, the basic purpose and effect of the law are discovered and so also so the fact as to which level of government has jurisdiction or authority to frame the law. It can also be found out whether legislation, under challenge, made by one of the legislatures, is rightly enacted or it has trespassed or encroached upon domain of other legislature. In a nutshell, by applying this doctrine, it can be determined whether or not Parliament has the authority to deal with a given subject. Should the answer point out satisfactorily to domain of Parliament, its authority on that subject would stand out confirmed. Further, in the face of a question whether a law relates to a particular subject, it is settled, the court will need to eye upon the substance of matter. If it lies within one of the legislative lists (There is currently only one such list in our Constitution: Federal Legislative List), then incidental encroachment by law on another list will not make it invalid because they are said to be intra vires.

47. Keeping in mind the above discourse, when we look at the preamble of the 2010 Act find the intent of legislature is to make an overarching law, national in character, for creating conditions conducive for free competition in all spheres of commerce with a view to enhance economic efficiency. The law, by its regulatory mechanism, prohibits and discourages anticompetitive ways with aligned purpose of ensuring free competition to ultimately secure consumer protection. Consumer's protection, *among others*, signifies free flow and easy availability of goods required by him in the market without any hindrance, and his freedom to choose among them what is best for him in terms of price and quality. Its various provisions, mostly from sections 3 to 10, serve to arrest abuse of a dominant position poised to prevent, restrict, reduce or distort competition in the market. They also prohibit agreements that restrict competition in the relevant market and encourage deceptive marketing practices set to disseminate deleterious and misleading information to consumer to his disadvantage. Sections 11 regulates merger between undertakings or associations of undertakings leaned to lessen substantially competition by creating and strengthening a dominant position in the relevant market. This law is not a penal statute by character embodying only penalties in the shape of imprisonment etc. followed by prosecution as argued by learned defense counsel. It is not unprecedented either as on various subjects relating to public welfare and interest such as healthcare, food products, environment, price fixation etc., the statutes in the past have been enacted which although carry some kind of penalties but

are mostly aimed at creating deterrence. Therefore, these laws have always been deemed regulatory laws and not penal laws despite the fact that these sometimes carry penalties. The 2010 Act is primarily meant to curb those trade or business related activities or practices that may not be inherently unlawful but are so when done in an illegal manner or mode such as those defined in sections 3, 4 and 10 thereof. Said provisions, preventive in nature, serve to promote free competition by reining in abuse of dominant position, prohibiting agreements preventing or reducing competition within the market, and deceptive marketing practices. The goal is to protect interest of consumers and the public at large and advance healthy and free market competition. It is for this purpose, provisions encapsulating monetary penalties have been provided u/s 38 thereof. But principally, they are remedial measures meant to denude an undertaking or an association of undertakings of unlawful gains made in violation of law. There is no criminal offence under the 2010 Act until and unless there is a failure to comply with orders of the Commission.

48. As we said above, this law by its nature and character is national, and overarching catering to consumer market of entire country and is not meant for any one piece of territory or a province. A provincial law, may be in *pari materia* with the 2010 Act, cannot control and regulate undertakings which happen to operate in more than one province. This calls for a law having jurisdiction all over the country to become relevant and achieve the required results. The market of sugar mills is a part of a larger scheme of one economic unit and is spread across the country has to be regulated and supervised by a law with such reach. Meaning thereby, it has to be Parliament, with jurisdiction all over the country, to legislate over the subject when it relates to sugar mills. This deduction appears to in sync with our opinion held above that in the case of an undertaking having presence in more than one province physically and effectively, to ensure free competition in trade, commerce, etc. is the duty and domain of the federation. A federal law enacted by Parliament can meet the issue and serve national economy for assigned purpose, which is what the scheme of Articles 18 and 151 stipulates: free trade, commerce and intercourse throughout Pakistan with free competition and consumer protection.

49. Further, Article 142 envisages absolute and exclusive power of Parliament to make laws with respect to a subject in the Federal Legislative List and the province when it is not so listed. Entry 27 clearly refers to import

and export across customs frontiers, **interprovincial trade and commerce,** trade and commerce with foreign countries; standard of quality of goods to be exported out of Pakistan. Subject of interprovincial trade, in terms of Article 142 therefore, has to fall within domain of Parliament for legislation. When this becomes obvious, the scheme under Entry 58- matters which under the Constitution are within the legislative competence of Parliament or relate to the federation- rolls out and reinforces Parliament's authority over the subject. Entry 59, raking in all the matters incidental or ancillary to any matter enumerated in Part-I of the Federal Legislative List can also be cited here in support of this view. Entry 27 points out to Parliament's role in terms of Article 142 over interprovincial trade and Entries 58 and 59 collectively bolster such role of Parliament. We may further say that there could be an instance, where the trade, physically confined to only one province, has an impact on the consumer market of another province, or has spillover effect. This kind of activity will also have to be regulated by Parliament through a law having a national character extending all over the country. Because, a provincial regime limited to its borders lack the jurisdiction to take cognizance of the effect of activates spilled over to limits of another province.

50. The concept of federation legislating on the subject of competition is not limited to Pakistan only. Indeed, it is a global phenomenon with USA, Canada, India and many other countries enacting laws on this subject through Center and not through the States. The provinces in this country have never claimed or enacted a broad-based competition law till date. The provinces have enacted only regulatory consumer protection statutes in specific areas such as food, healthcare, environment, education etc. but there has never been a single primary provincial competition law. Further, as stated above, Pakistan is under international obligations qua WTO and UN (The UN set of Principles and Rules on Competition adopted vide Resolution 33/153 of 20.12.78 under the auspices of UNCTAD) as well as regional commitments under South Asia Free Trade Agreement (SAFTA) to provide for free trade amongst member States by enacting laws to discourage monopolies and restrictive business practices. These obligations too enjoin on the federation to try to rise to the occasion and seek out its due place by fulfilling its part of bargain.

51. Now we come to the contention of learned defense counsel that petitioner sugar mills are at present subjected to a number of laws enacted by Sindh province on the subject. That, more or less, means that the field has already been occupied, and that as the federation has no

jurisdiction to legislate on the subject of competition not provided in any of the entries in Fourth Schedule, the impugned legislation is illegal and ultra vires the Constitution. To expound this argument learned counsel cited enactments such as **Sugar Factories Control Act, 1950; Sugar Factories Control Rules, 1950; Sugarcane Act, 1934; Industries (Control on Establishment & Enlargement) Ordinance, 1963; the Price Control and Prevention of Profiteering and Hoarding Act, 1977 and the Foodstuffs (Control) Act, 1958**. But we, with due respect to learned counsel, are not impressed by their opinion. Seeking nullity of a federal law on an argument that the field has already been occupied by a provincial law on the same subject is not sustainable. In fact, the federation is competent to make a law on a subject falling within its and provincial legislative domain simultaneously and occupy the field. The doctrine of 'occupied field' was defined in NS Bindra's Interpretation of Statute (9th edition), (a Butterworths Publication) by quoting Isaacs J. in Cycle Engineering Co. v. Cowburn (1926) 27 CLR 466, 488 in the following words, 'If however a competent legislature expressly or impliedly evinces its intention to cover the whole field, that is a conclusive test of inconsistency where another legislature assumes to enter to any extent upon the same field'. Mr. A.K. Brohi, a renowned jurist, in his book Fundamental Laws of Pakistan (1958 Ed.) at page 251, while expounding Article 110 of the 1956 Constitution (contemporary to Article 143 of 1973 Constitution), has opined as under:-

> 'The doctrine of occupied field as an argument is often pressed in the service of a contention that in the cases of clash between a law passed by the Provincial Legislature, which merely incidentally encroaches upon the forbidden federal field, the Provincial Law be not allowed to be treated as valid law since the forbidden field is not vacant but occupied by the pre-existing law. Once again we see that the doctrine of occupied field, like the doctrine of incidental encroachment, is only another way of discovering what is the pith and substance of an impugned Act. The law would be valid if in pith and substance it falls in the Provincial field but incidentally encroaches upon the forbidden field with the limitation that only to the extent of repugnancy those incidental provisions will be knocked out if they come in clash with the previously enacted law which occupies the forbidden field. The Provincial law will however be fully valid if, in relation to the incidental encroachment upon the forbidden field, it could be said that it has only trenched upon the unoccupied portion of that field. This is precisely what Art. 110 of our Constitution says in respect of conflict between the Provincial Law and the Federal or Existing Laws with respect to matters in the Concurrent List. The controlling words in Art. 110 are that the Provincial law will be void but only to the extent of repugnancy. The pith and substance rule helps us to determine the competence of the legislature, but Art. 110 which deals with repugnant laws being void to the extent of repugnancy helps us to determine what portion of the impugned law become void when they clash in the occupied field within the forbidden sphere of the Legislature.'

Justice Muhammad Munir in his Commentary on 'Constitution of the Islamic Republic of Pakistan', edited by Mian Bashir Ahmed, has commented at page 693 on this principle in following words:-

> 'The questioned law was made by a Provincial Assembly, what has again to be determined is whether it is covered by the Federal List or what part of the concurrent list on which the Parliament has either legislated or which is covered by existing law. In either case, the Provincial law would be invalid. If however, that is not the case, and the subject on which the Province has legislated neither falls in the Federal list nor the occupied part of the concurrent list, it will be valid unless Parliament subsequently legislate a law on that subject the matter falls in the concurrent list.'

52. It can be discerned from above two paragraphs that doctrine of occupied field relates to those legislative entries of the province which are expressly made subject to a corresponding entry in the concurrent list. This doctrine is merely concerned with legislative power and starts off when the federal legislature legislates and frames the law on a subject and occupies the field and no room or space is left for the provincial legislator to enter the field. Even when the field is not occupied by a federal law and provincial legislature first legislates in respect of a field hitherto unoccupied, and then the federal legislature makes a law on the very subject. Such law being passed by dominant legislature will push aside the provincial law to the extent it is in conflict with it. In such a situation, however, doctrine of repugnancy and not the doctrine of occupied field would come into play. There is very thin line of difference between doctrine of repugnancy and doctrine of occupied field. Where occupied field ends, repugnancy starts. Repugnancy arises when there is an actual conflict between two legislations, one enacted by a provincial legislature and the other by Parliament, and both are competent to do so. Doctrine of occupied field has nothing to do with conflict of laws between the province and the Center; it is concerned only with the existence of legislative power. While repugnance is with the exercise of legislative power that is shown to exist. Normally, when there is a conflict, the courts try to construe federal law and provincial law on the same subject harmoniously. But when the Parliament tries to occupy the field, being the supreme law-making body in constitutional scheme, shall prevail over the provincial law regardless of whether it precedes or succeeds the federal law. This rule of propriety and supremacy qua federal law is aptly encoded in Article 143 of the Constitution.

53. The court to trump a provincial statute at the anvil of doctrine of occupied field will have to see that both the provincial and federal legislature are competent to legislate on the subject; provincial statute in pith

and substance is compatible or in *pari materia* with the federal statute; the provincial law is subsequent to the federal law etc. When compared, none of the laws cited by the learned defense counsel appears to be compatible in pith and substance or in *pari material* with the 2010 Act to even justify a need for such consideration. Nonetheless, when we examined the said provincial laws to ascertain whether or not the petitioners sugar mills have been subjected to the regime expressed in impugned law(s), and if so, to what extent. We found that none of the provincial laws tends to foster free competition in all spheres of commerce to enhance economic efficiency and to protect consumers from anticompetitive behavior in the manner and to the extent as the impugned laws. The subject matter, topic or activity covered by the impugned law(s) is neither comprehended by any provincial legislation. Nor does the combination of broad spectrum of objectives set out thereunder to check anticompetitive conduct have even overlapping similarity with the provincial laws to draw doctrine of repugnancy either. Instruments to ensure free competition among the undertakings for the purposes as sacrosanct and comprehensive as above are conspicuously missing in the laws cited in defense. Legislative incompetence of the federal legislature on the doctrine of occupied field, even if considered attracted, is not established.

54. It has already been opined that presumption always leans in favour of constitutionality and legality of a statute and where two opinions are possible, one, favoring validity of the law, is to be adopted. But such presumption is considered rebuttable and prone to discard and disgorge when the person challenging the law succeeds in establishing discrimination among the persons or objects who are similarly placed; the particulars of discrimination; arbitrariness and irrationality in classification or selection of the person or goods or activity; or is able to show that the law is violative of any of the fundamental rights or the provisions of the Constitution. The courts looking at the statute for determining its constitutionality, nonetheless, will not be affected by the actions or stance taken by the executive tasked to enforce the law. Because, enforcement of a law as a concept is different from competence of Parliament to make a law, former has genesis in rules, etc. enacted for implementation of the law and is subservient to the constitutional scheme employed for the latter. The considerations in this regard would be to see what is the source of legislative authority; whether the law is covered by any entry or not; falls within residuary subject; which legislature has framed the law, whether it was competent under the Constitution; the law is not in derogation of any of the constitutional provision or any superior law; and that whether the law infringes any of the fundamental rights of a person. None of the defense

counsel was able to show the impugned law(s) is in derogation of any law superior to it in pith and substance, is discriminatory, encroaches equal protection clause, discriminates similarly placed persons and/or is violative of fundamental rights.

55. Now we proceed to examine contention of the petitioners that impugned Ordinances suffer from lack of constitutionality due to gaps in their enactment without there being any provision in later enactment providing either saving clause or continuity in some form to earlier proceedings. It was urged that there are three unexplained periods or gaps in the legal regime enforced by the impugned laws. Therefore, practically and legally proceedings initiated in terms of one Ordinance stood abrogated when subsequent Ordinance or law replacing it was passed. Further, there is nothing in the 2010 Act to save the actions, proceedings and orders passed under the Ordinances already lapsed. Section 62 of the 2010 Act, purported validation clause, merely stipulates that orders, proceedings pending since 2007 are valid but does not seem to validate proceedings wound up on account of gaps between the 2007, 2009, 2010 Ordinances and the 2010 Act. As such section 62 does not have the effect of covering any of the gaps nor can it save the proceedings which were never saved in the first instance under *ibid* Ordinances. The proceedings initiated under the 2007 Ordinance having already expired on 02.02.2008 cannot survive till the year 2009 when the 2009 Ordinance was promulgated; the life of an Ordinance cannot be resuscitated by another Ordinance. Further, as the proceedings under the 2007 Ordinance cannot sustain under the 2009 or the 2010 Ordinances and there is nothing in the Act to save, revive or continue the proceedings or the orders passed under any of the Ordinances, all the proceedings taken thus far are nullity in the eyes of law. And since the Ordinances, 2007, 2009, 2010 and the 2010 Act repealed the 1970 Ordinance would indicate that the Ordinance, 1970 was in field and operative during the given period.

56. Learned Attorney General on this point stated that first gap between the 2007 Ordinance and the 2009 Ordinance is covered by the judgment passed by the Supreme Court in the case of **Sindh High Court Bar Association** (*supra*). The second gap between the 2009 Ordinance and the 2010 Ordinance is of 24 days and is covered by assigning retroactive effect to the 2010 Ordinance. The third gap between the 2010 Ordinance and the Act is covered under section 62 of the Act. Per him, section 62 of the 2010 Act has given legal cover to all gaps from the year 2007. Besides other case laws, he relied on the case of **Federation of Pakistan and others**

v. M. Nawaz Khokhar and others (PLD 2000 SC 26) in which a similar issue with reference to the Ehtesab Act was considered and all proceedings, relying on the intent of the legislature, were upheld.

57. We have noticed that objection to validity of the impugned law(s) on this point is predicated mostly on a misconception that the 1970 Ordinance being a permanent law could not be repealed by the Ordinances, 2007, 2009 and 2010, which were temporary statutes, and was in the field all the time rendering the proceedings taken under the said laws nullity in the eyes of law. But, as will be seen from the figure given below about the time lapses, the 1970 Ordinance was practically never allowed to remain in operation. It was completely eclipsed and overshadowed for the entire period from 2.10.2007 to 18.4.2010 save when it sprung back into existence during small interludes when the Ordinances 2007, 2009, and 2010 stood expired before being revived by subsequent law. Always, at the time of promulgation of later Ordinance, it was ensured that the 1970 Ordinance was repealed and consigned to oblivion. It was for this reason i.e. brief revival of 1970 Ordinance that each new law had a provision repealing the 1970 Ordinance. Sections 2 of the Ordinances and Section 62 of the 2010 Act can be quoted here in support. And this fact has no adverse impact in law over applicability or validity of Competition Ordinances/Act, as the case may be.

58. Further, the 2007 Ordinance promulgated on 2.10.2007 was to expire on 2.2.2008. But before its expiry Provisional Constitutional Order (PCO) 1/2007 was promulgated on 3-11-2007 making all the Ordinances permanent. The judgment in the case of **Sindh High Court Bar Association** came on 31.7.2009. Relevant observation extending life of all the Ordinances falling under PCO 1/2007 from 31.7.2009 till 30.11.2009 for 120 days has been made at page 1204 in Para 188. Before that the 2007 Ordinance, saved under the PCO 2007, was covered by the judgment in **Tika Iqbal Muhammad Khan v. General Pervez Musharaf and others (PLD 2008 SC 178)**. The Competition Bill, 2009 was tabled before the National Assembly within time granted by the Apex Court on 14.10.2009. Meanwhile the Competition Ordinance, 2009 was promulgated on 26.11.2009 for four moths till 25.3.2010. On 27.1.2010 before expiry of the said Ordinance, the National Assembly passed the Competition Bill, 2009. In the Senate the Competition Bill, 2009 was tabled on 24.2.2010. In the meantime, the Competition Ordinance, 2010 was promulgated on 18.4.2010 to expire on 16.8.2010. The Competition Bill, 2009 was passed as Competition Act, 2010 by the Parliament on 23.9.2010. The President assented to the Competition

Act, 2010 on 6.10.2010. What the Honourable Supreme Court in the case of Sindh High Bar Association has held is reproduced herein under:

> It may be noted that such Ordinances were continued in force throughout under a wrong notion that they had become permanent laws. Thus, the fact remains that on the touchstone of the provisions of Articles 89 and 128 read with Article 264 of the Constitution and Section 6 of the General Clauses Act, 1897, only such rights, privileges, obligations, or liabilities would lawfully be protected as were acquired, accrued or incurred under the said Ordinances during the period of four months or three months, as the case may be, from their promulgation, whether before or after 3rd November, 2007, and not thereafter, until such Ordinances were enacted as Acts by the Parliament or the concerned Provincial Assembly with retrospective effect.
>
> In the light of the above, the question of validation of such Ordinances would be required to be decided by the Parliament or the concerned Provincial Assembly. However, the period of four months and three months mentioned respectively in Articles 89 and 128 of the Constitution would be deemed to commence from the date of short order passed in this case on 31st July, 2009 and steps may be taken to lay such Ordinances before the Parliament or the respective Provincial Assemblies in accordance with law during the aforesaid periods. This extension of time has been allowed in order to acknowledge the doctrine of trichotomy of powers as enshrined in the Constitution, to preserve continuity, to prevent disorder, to protect private rights, to strengthen the democratic institutions and to enable them to perform their constitutional functions, which they were unconstitutionally and illegally denied under PCO No.1 of 2007. Needless to say that any validation whether with retrospective effect or otherwise, shall always be subject to judicial review on the well recognized principles of ultra vires, non-conformity with the Constitution or violation of the Fundamental Rights, or on any other available ground.

59. There is a gap in the 2007 Ordinance from 3.2.2008 to 25.11.2009, but as noted above, it is covered by aforesaid judgment rendered in the case of **Sindh High Bar Association**. The Ordinance, 2009 promulgated on 26.11.2009 expired on 25.3.2010. The Ordinance, 2010 was promulgated on 18.4.2010 after 23 days. This gap has been covered by retrospective application given to the Ordinance, 2010 with effect from 26-3-2010 protecting thus proceedings and actions taken, and orders issued under the 2009 Ordinance. The Ordinance, 2010 lapsed on 16.08.2010. The 2010 Act was passed on 6-10-2010. There is a gap of 50 days between 17.08.2010 and 5.10.2010. To cover this, there has been provided a savings clause u/s 61 of the 2010 Act- Repeals and Savings- stipulating repeal of the 1970 Ordinance and continuity of proceedings, actions taken and orders issued thereunder. Apart from it, there is a validation provision, section 62, validating in effect anything done, actions taken, proceedings initiated, powers assumed or conferred or exercised by the Commission or its officers, etc. on or after 2·10.2007 till commencement of the 1010 Act. It is not just a validation simpliciter but is a declaration by the legislature to give

permanency to all actions, orders, proceedings under the impugned Ordinances. This whole mathematic indicates that a legal cover has been extended to all actions, orders, proceedings etc. taken under the 2007, 2009, and 2010 Ordinances and the 2010 Act by assigning them retrospective effect, and there has been left no uncovered period. In all the three Ordinances a Repeal and Saving clause has been provided to the effect that all suits and other legal proceedings instituted by or against the Monopoly Control Authority before enactment of the given Ordinance shall be deemed to be suits and proceedings by or against the Commission as the case may be and may proceed and be dealt with accordingly. All acts done by the Commission in the entire duration from 2.10.2007, when the 2007 Ordinance was promulgated till enactment of the 2010 Act on 06.10.2010, have been protected and validated accordingly. The impugned enquiry report giving rise to impugned SCNs is also covered by this period.

60. In the end, on this point, a reading of case of **Nawaz Khokhar (PLD 2000 SC 26)** rendered in identical context is necessary. It is held by the Supreme Court that there is a difference between simple repeal and simultaneous repeal and re-enactment of legislation. Although an Ordinance is a temporary legislation but if the legislature intended to provide continuity to its provisions by first repealing the same by the Ordinance and then converting the latter into an Act, it would be a glaring mark of intent of the legislature to give continuity and permanency to proceedings initiated under the provisions of the Ordinance, in spite of the fact that there was no saving clause in the Ordinances. The relevant elucidation from above case is as under:-

> The next contention of the learned counsel for the private appellants in the above cases is, that Ordinance XX having repealed and replaced Ordinance CXI, the proceedings pending on the date of repeal of Ordinance CXI, could not be saved and continued under Ordinance XX in the absence of a specific clause in the repealing Ordinance saving the proceedings pending under Ordinance, CXI. It is contended by the learned counsel for the private appellants that section 28 of the Ordinance XX which repealed Ordinance CXI, Ordinance VII and Ordinance XI, did not specifically save the proceedings which were pending under Ordinance CXI and therefore, all proceedings pending under Ordinance CXI came to an end with the repeal of Ordinance, CXI, and the same could not be continued or saved under Ordinance XX. In support of this contention, reliance is placed by the learned counsel on Government of Punjab v. Zial Ullah Khan 1992 SCMR 602 and Muhammad Arif v. State 1993 SCMR 1589.
>
> Before considering the above contention, it may be stated here that if any Ordinance stands repealed under the Constitution, the consequences of repeal are provided under Article 264 of the Constitution. However, if a law is repealed by a subsequent Act, the consequences flowing from such repeal are to be determined with reference to the provisions of Section 6 of the General Clauses Act.

> The contention of the learned counsel for the private appellant is, that Ordinance XX while repealing Ordinance CXI, though contained a saving clause, did not provide for continuation of the proceedings pending under Ordinance CXI, which shows that the Legislature did not intend to keep the pending proceedings alive under Ordinance XX. Repeal of Ordinance CXI, by Ordinance XX was not a case of simple repeal but it was a case of simultaneous repeal and re-enactment of a legislation, and therefore, besides consequences mentioned in section 6 of the General Clauses Act, section 24 of the General Clauses Act were also attracted. Ordinance XX was a verbatim reproduction of Ordinance CXI. Ordinance CXI, was still enforced when it was repealed by Ordinance XX. It may also be mentioned here that Ordinance XX was finally converted into a permanent legislation when the Legislature passed it as Act IX of 1997. It is, therefore, quite clear to us that although Ordinance CXI, was a temporary legislation but the Legislature intended to provide continuity to its provisions by first repealing it by Ordinance XX and then converting the later into an Act of Legislature by passing it as Act IX of 1997.

61. We may say, it is not uncommon to use a deeming provision in any statute to give validity to a situation which did not exist but by a deeming provision is assumed to exist and therefore validated. In case of **Mehreen Zaibun Nisa v. Land Commissioner, Multan and others (PLD 1975 SC 397)**, it has been held by the Supreme Court that when a statute contemplates that a state of affairs should be deemed to have existed, it clearly proceeds on the assumption that in fact it did not exist at the relevant time but by a legal fiction we are to assume as if it did exist. Plainly put, a deeming clause means that Parliament requires something which is not real to be treated as if it is real. In so many other cases also, the Apex Court has referred to this concept for importing intent of the legislature and has held that by way of the deeming provision the legislature declares its intent, that is, to remove, if any, doubts, defects or errors, and the courts are bound by this intent. For guidance on this point, the followings cases can be cited. **Muhammad Mubeen-us-Salam and others Vs. Federation of Pakistan and others (PLD 2006 SC 602)**, and **Federation of Pakistan and others v. Mian Muhammad Nawaz Sharif and others (PLD 2009 SC 644).** Further, albeit in a slightly distinct context, the Honorable Supreme Court in the case of **Molasses Trading and Export (Pvt.) Limited v. Federation of Pakistan and others (1993 SCMR 1905)** while dealing with an effort of legislature to avoid court's decision by enacting a law to validate a tax declared by the court as illegally collected has held that the legislature has, within the bounds of the constitutional limitations, the power to make such law and give it retrospective effect so as to bind even past transactions. The relevant observations are as under:-

> It will not be sufficient merely to pronounce in the statute by means of a non obstante clause that the decision of the Court shall not bind the authorities, because that will amount to reversing a judicial decision rendered in exercise of the

> judicial power which is not within the domain of the legislature. It is therefore necessary that the conditions on which the decision of the Court intended to be avoided is based, must be altered so fundamentally, that the decision would not any longer be applicable to the altered circumstances. One of the accepted modes of achieving this object by the legislature is to re-enact retrospectively a valid and legal taxing provision, and adopting the fiction to make the tax already collected to stand under the re-enacted law. The legislature can even give its own meaning and interpretation of the law under which the tax was collected and by "legislative fiat" make the new meaning binding upon Courts. It is in one of these ways that the legislature can neutralize the effect of the earlier decision of the Court. The legislature has within the bounds of the Constitutional limitations, the power to make such a law and give it retrospective effect so as to bind even past transactions. In ultimate analysis therefore the primary test of validating piece of legislation is whether the new provision removes the defect which the Court has found in the existing law and whether adequate provisions in the validating law for a valid imposition of tax were made.

62. From foregoing discussion laden with precedents, it is not difficult to perceive that a deeming provision has to be understood by its inherent intent: to consider a non-existent situation as existent. There is no doubt in law over legislature's competence to enact a deeming provision to presume existence of facts or state of affairs which did not exist at the given time. When in the statute a deeming provision is provided to believe a non-existent situation as extant, the court is bound to assume it does. Seen from this vantage point, the intent of legislature in enacting section 62 of the 2010 Act can be clearly understood- to extend deeming protection to all proceedings, decisions and actions taken by the Monopolies Control Board and the Commission from the promulgation of 2007 Ordinance on 2.10.2007. It is not illegal or against the law to protect subsequently, orders passed or actions taken by the executive or judicial authorities earlier when they lacked legal authority. The 2010 Act has followed with only small gaps the 2009 and 2010 Ordinances, with a clear-cut intent of the legislature i.e. to protect the proceedings, etc. taken thereunder by extending them continuity, and the courts are bound by such intent. Lastly, it is noted, both the Ordinances (2009 and 2010) were prior to the 18th Amendment promulgated on 19.4.2010 and therefore were strictly as per Article 89 as it stood before. Since in the entire period, including the breaks, the Commission kept working, any action taken or proceedings initiated by this forum in *de facto* existence has been given cover accordingly.

63. Then it was argued, the Commission had already proceeded against PSMA on the basis of Inquiry Report and found it liable for fixing sale prices in breach of section 4 of the 2010 Act. Therefore, the Commission was

not competent to issue SCNs founded on the same set of facts and Inquiry Report and it amounted to double jeopardy in violation of Article 13 of the Constitution that provides protection against double punishment. Further, such action falls foul of scheme u/s 11 of the Code of Civil Procedure, 1908, and the Commission having already proceeded against PSMA has been rendered *functus officio* in relation to the matter. But we are not impressed by such contention. There is no bar in law that on the basis of same set of facts or Enquiry Report multiple proceedings either against the same person(s) or entity or against different persons cannot be launched. The process of enquiry and the facts, if found, only indicate a preliminary stage of the issue identified thus far. It is neither a beginning nor a culmination of the process commenced as such. Discovery of certain facts shall always yield to further probe and proceedings not only against the ones being enquired about but against those who are found connected with the matter in any capacity.

64. Further, the 2010 Act provides for and regulates the conduct and activities of multiple stake holders including individual entities or persons as well as representative bodies and associations. In the scheme of this law, an individual undertaking and an association thereof are distinctly identified with different role and obligations to perform within their distinct spheres (overlapping sometime may be). As per definition of 'undertaking' u/s 2(q) of the 2010 Act, the petitioners and PSMA are separate and independent entities. PSMA being an association of undertakings is an undertaking within its own capacity. Whereas, each petitioner is a separate entity despite being member of PSMA is not even under dispute here. Hence, section 4 of the 2010 Act, prohibiting an undertaking and/or an association of undertakings from entering into prohibited agreements, is equally applicable to both of them. Furthermore, any purported breach of the law by each one of them separately or together may not be simultaneous by time and tenor, and constituents constituting such breach may differ in terms of context and approach. The breach of statute, referred, by PSMA varies by time and was complete when it took certain decisions in its meetings in violation of section 4 of the 2010 Act. The individual undertakings/petitioners were issued SCNs when they were found to have acted in violation of provisions of the competition law pursuant thereto. Two acts are varied by time and tenor and have to therefore entail a distinct reach to deal with. But in any case, all these factors need to be determined first before forming any final opinion in this respect.

65. Then any past proceedings by the Commission against PSMA, mother association, would not render the proceedings against the petitioners to find out their part, if any, in prohibited agreements either nullity in the eyes of law or hit by doctrine of double jeopardy or *res judicata.* If any undertaking is found in breach of a provision of the 2010 Act is to be held accountable for its individual act. But when it commits such breach in its dual capacity i.e. individual and a part of the association (PSMA) can be made answerable separately for its actions. It is because a breach by an undertaking in individual capacity is bound to bring about distinct and separate consequences in volume and peril to the consumer than such breach by an association in supervisory role. Independent and separate proceedings are required to determine their role and the fall out, if any, it has induced. More so, section 4 forbids an undertaking and an association of undertakings separately from engaging in prohibited agreements. The legislative intent behind section 4 read with section 2(q) defining undertaking is to hold an undertaking independently liable for entering into prohibited agreements from its association.

66. Under the impugned law(s), the Commission has to first determine whether or not the undertaking has committed any breach of a provision of the statute. If the reply is in affirmative, further course i.e. issuing a show cause notice to the undertaking etc. is pursued. In the case in hand this process has already been completed, inquiry has been made and show-cause notices issued on the basis thereof. Imputations in SCNs are that the petitioners have acted in collusion with each other and with PSMA to fix the sale price of sugar. This allegation *prima facie* is tantamount to entering into a prohibited agreement as defined under section 4 of the 2010 Act, which include (a) fixing the purchase or sale price or imposing any other restrictive trading conditions with regard to the sale or distribution of any goods or the provision of any service; (b) dividing or sharing of markets for goods or services, whether by territories, by volume of sales or purchases, by type of goods or services sold or by any other means; (c) fixing or setting the quantity of production, distribution or sale with regard to any goods or the manner or means of providing any services; (d) limiting technical development or investment with regard to the production, distribution or sale of any goods or the provision of any service; or (e) collusive tendering or bidding for sale, purchase or procurement of any goods or services; (f) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a disadvantage; and (g) make the conclusion of contracts subject to acceptance by the other parties of supplementary

obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

67. The above definition of prohibited agreement first outlined in the 2007 Ordinance has not changed in any material form since, and has remained mostly the same from advent. It is not the case of the petitioners, in essence, that charges mentioned in SCNs against them are not attracted or that their conduct did not or does not come within purview of prohibited agreement, and hence SCNs are void *ab initio*. Their best case at best is based on alleged gaps in promulgation of the impugned laws, resurrection of expired Ordinance by means of subsequent Ordinance in breach of Article 89, and lack of authority to Parliament or the President to promulgate the laws on a subject not itemized in Federal Legislative List. All these points after a detailed discussion held above have been found misconceived and unsustainable and thus need not be attended to again. All the more, SCNs only seek explanation of petitioners in regard to allegations. It neither amounts to a predetermination of their guilt nor can be construed to be in violation of their right to a fair trial, or hit by *res judicata* or considered as double jeopardy. In fact, in terms of SCNs the petitioners have been afforded a remarkable opportunity to explain their conduct, present their case and demonstrate that they were/are not culpable and did not commit any violation of the provisions of the 2010 Act and get relief. But in case they are found guilty of charges in SCNs would still be liable to incur regulatory penalties, if any, only. Even against that, the petitioners will have the right of appeal before an Appellate Bench of the Commission as provided by the 2010 Act. But if suppose they are absolved of the charges and their explanation is found cogent and satisfactory, there would be no occasion for them to plead for protection enshrined in Article 13. Lastly, neither the petitioners have been prosecuted and punished or acquitted for any offense under the 2010 Act, a condition precedent to attract doctrine of double jeopardy. Nor they have been tried on same issues directly and substantially in an earlier suit between them and the Commission. Therefore, neither doctrine of double jeopardy nor doctrine of *res judicata* is attracted. The petitioners and PSMA are independent entities (undertakings) under the 2010 Act, therefore, proceedings against the one are not likely to set out applicability of principle of *res judicata* to proceedings against the other. In view of above discussion, we are persuaded to hold that SCNs do not suffer from any illegality, invalidity or even jurisdictional defect.

68. Vires of the said laws in identical context by several undertakings including sugar mills were challenged before a Full Bench of the learned Lahore High Court in several writ petitions titled as **LPG Association of Pakistan Vs. Federation of Pakistan (2021 CLD 214).** Deciding the same vide an elaborate judgment dated 26.10.2020, the learned Lahore High Court has castoff completely all objections over their constitutionality and has held them to be valid laws. Later on, when a similar challenge against the said laws was mounted before learned Islamabad High Court in **W.P.No.4942/2010 Islamabad Feeds (Pvt.) Ltd.** the learned High Court fully subscribed to the ratio laid down by the learned Lahore High Court. We have gone through both the judgments with due respect and find the ratio laid down in complete synchronization with the view expressed by us in preceding paragraphs. We are quoting some selected paragraphs of the said judgments herein under for further elucidation.

69. First we would like to recapitulate some excerpts from the judgment of Learned Islamabad High Court. It has been held that the nature of restraints the Competition Act applies must be considered together with the question whether it is the federation or the provinces which are empowered by the Constitution to apply such restraints. One has to see the individual right to freedom of trade and business (under Article 18), and the collective right to freedom of trade, commerce and intercourse (under Article 151) with a view to identify balance the 2010 Act seeks to strike between the two. Besides, given nature of our Constitution leaned to federalism, it has to be analyzed whether application of restrains on an individual's freedom to enter into contracts and engage in business transactions falls within the bailiwick of the federation or the provinces.

70. When the State interferes with the liberty of a citizen, it must do so in accordance with the Constitution and the law and only to the extent allowed. Chapter 1 of the Constitution lists fundamental rights of citizens. Article 8 prohibits the State from abridging these rights and states that any law inconsistent with fundamental rights is void to the extent of such inconsistency. The Constitution simultaneously makes allowance for encumbering fundamental rights of a citizen to the extent essential to uphold competing rights of other citizens or to enable the State to pursue its legitimate interests in securing collective public interest. Even in the event that a law does not fall foul of Article 8 of the Constitution, it can still be void if promulgated by a legislature that is not empowered by the Constitution to enact a law or impose the restraint in question. This is where the question of

legislative competence of the federation versus a unit of the federation becomes germane.

71. The Competition Act is the fetter that the State has put in place to regulate the liberty of the citizen to engage in trade or business to uphold the objectives set in there. Once it is settled that Competition Act is a fetter on citizen's liberty to conduct trade or business, Article 151 will come into play that clarifies the legislative arm of State is qualified to impose such fetter. Article 151(1) sanctions the right to free trade, commerce and intercourse throughout Pakistan as a collective right and a feature of economic life across Pakistan. It is whole of Pakistan within which such right is to be enforced and not a locality or a federating unit. Freedom of trade, commerce and intercourse "throughout" Pakistan, would signify that such right and feature of economic life in Pakistan has to be a federal subject as no one federating unit has the territorial competence to enforce or provide for the same. Article 151(2) explicitly confers legislative power on Parliament to regulate freedom of trade, commerce and intercourse between one province and another or within any part of Pakistan.

72. The common law doctrine of restraint of trade curtails the freedom of citizens to enter into contracts inimical to the freedom of trade of others engaged likewise and was the precursor to competition laws or anti-trust legislation that codified the law against restraint of trade. An individual's right to freedom of trade means his choice to deal with another individual in conducting business affairs, or freely negotiate price of goods and services, or purchase a business, etc. without the state intervention. Competition law however acts as a fetter on such absolute freedom of the individual or entity. In other words, the rule against price fixing, cartelization, and abuse of dominant position or mergers of entities that could impede competition within the market is a restraint applied by law on the absolute freedom of business or trade of the individual undertaking.

73. That Article 141 defines that Parliament is competent to make laws for the whole of Pakistan. Article 142 states that subject to the Constitution, Parliament is competent to make laws in relation to matters listed in the Federal Legislative List. The legislative competence of Parliament to promulgate a law can flow from the text of the Constitution itself or from the Federal Legislative List. The Constitution does not envisage independent economies across federating units or competition between such units as the means to promoting the collective economic interest of Pakistan as a

federation. Further, the Constitution, as amended through the 18th Amendment, limits the legislative competence of Parliament. However, Parliament's ability to legislate in relation to matters enumerated in the Federal Legislative List or ancillary thereto remains unfettered, as highlighted by items 58 and 59 of the said List. Legislative subjects do not exist in isolated compartments and despite abolition of the Concurrent List, the Centre and provinces still retain overlapping legislative competence in innumerable matters.

74. The distribution of authority between the Centre and provinces is for the advantage of all citizens of Pakistan and not the provinces or citizens of a particular province, as our Constitution does not endorse the concept of dual-sovereignty. And notwithstanding the division of authority between the federal and provincial governments and the omission of the Concurrent Legislative List, there will always remain some common fields that will continue to be administered concurrently. Irrespective of whether you substitute one list for two or provide for a hierarchy of jurisdictions, the overlap of subject matter is inevitable. This is why it is settled law that entries within legislative lists must be construed liberally.

75. It has also been observed, despite the fact that Europe comprises independent sovereign states, for the European Union to emerge as one economic market and for the competition regime to be effective across such market, it has not been left to each nation state to frame its own competition regime. European Union has a centralized competition regime and the efficacy of such regime is contingent on the ability of a central regulator to ensure that independent nation states comprising the European Union do not adopt measures that seek to protect products and services produced within their territories or discriminate against products and services produced by other states. European Union is not a federation. But in order for EU to emerge as a common economic market, the sovereign states comprising the union have entered into a treaty to put in place a uniform and centrally enforced competition regime.

76. Finally, learned Islamabad High Court has concluded that Articles 18(b) and 151(1) and (2) read together with Article 141, 142 and Entry 58 of the Federal Legislative List identify Parliament as the competent legislature to promulgate a law to regulate trade, commerce and intercourse across provinces and within any part of Pakistan. On the question of legality of SCNs raised on the ground that the Inquiry, ordered on 15.12.2009, relied

on documents dating back to 2007 and concluded on 08.07.2010, seek to retrospectively apply provisions of the Competition Act to actions of the petitioners from a time when such law was not in place. Learned Islamabad High Court has opined that through section 62 of the 2010 Act, the Parliament has validated all actions taken, instruments issued and proceedings initiated by the Commission on or after 02.10.2007, when the Competition Commission Ordinance, 2007 was first promulgated. Further, **LPG Association of Pakistan** case has clarified that section 62 of the Competition Act has cured any infirmity in actions taken by the Commission since 02.10.2007 due to lack of continuity of competition laws.

77. After quoting above paragraphs from the judgment of learned Islamabad High Court, we would like to refer to the case of **LPG Association of Pakistan through Chairman Vs. Federation of Pakistan through Secretary, Ministry of Petroleum and Natural Resources, Islamabad and others (2021 C L D 214)** decided by a full bench of learned Lahore High Court comprising three Honorable judges. By this judgment a bunch of petitions filed by associations of different undertakings including Sugar Mills, posing same questions as are here i.e. vires of the Competition Ordinances, the Competition Act, 2010 and its few provisions 43, 44 and 62 besides legislative competence of Parliament to promulgate the same, have been decided. For deliberation over pleadings and contentions of the parties and decision, the learned Lahore high court framed following issues:

> A) Whether Parliament has legislative competence to enact the Act and the earlier Ordinances?
>
> B) Whether the Act and the Ordinances create a parallel judicial system in violation of Articles 175 and 203 of the Constitution such that the CCP and CAT exercise judicial power which is in violation of the Mehram Ali and others v. Federation of Pakistan and others (PLD 1998 SC 1445) (Mehram Ali Case).?
>
> C) Whether sections 43 and 44 of the Act are unconstitutional as they provide for an appeal before the august Supreme Court of Pakistan which is in contravention to Article 185 of the Constitution?
>
> D) Whether the proceedings and orders etc. under the Ordinance have been saved revived or continued pursuant to section 62 of the Act; and whether section 62 of the Act is unconstitutional?

78. All the three Honorable judges have concurred on the issues of 'Appellate jurisdiction of Supreme Court' and 'Validation clause in the Competition Act, 2010'. But their Lordships, Messrs. Shahid Jamil Khan, and Muhammad Sajid Mehmood Sethi, J J, have disagreed with the head of bench Her Ladyship Ayesha A. Malik, J over the findings on 'Federal and Provincial competence to legislate on Competition laws' and

'Parallel Judicial System' (the nature of Competition Appellate Tribunal). Their lordships have held that Parliament has authority to legislate on competition to the extent of interprovincial trade and commerce spread beyond territorial limits of a province. Simultaneously, the Provinces have legislative power to ensure free competition within their territorial limits. On Competition Appellate Tribunal their lordships have held that it is a Judicial Tribunal is to be separated from executive influence.

79. Her Ladyship Ayesha A. Malik, J while dismissing Writ Petitions has observed, *inter alia*, that by giving supremacy to the intent of the legislature, the **Nawaz Khokhar Case** has sufficiently addressed the issue of continuity. However, in the cases before the Court, section 62 of the Act provides for the intent of the legislature in the clear words of a deeming provision. Although the Petitioners have attempted to distinguish the Nawaz Khokhar Case on account of the express repeal by Ehtesab Ordinance No.XX of the Old Ehtesab Ordinance No.CXI and section 31 of the Ehtesab Act, 1997, and have also relied on cases to explain the effect of the expiry of an Ordinance, we find that Section 62 of the Act is distinguished as the intent of the legislature is evident from the statute itself, that by giving continuity to the actions, proceedings, decisions and orders initiated by the CCP, the legislature has not decided any dispute or settled any issue, it has merely given continuity, to correct the lapse of there being no savings clause in the Ordinances. Hence section 62 of the Act removes the flaw by creating the legal fiction of continuity which gives legal cover to the proceedings, show cause notices and orders challenged before us. As such the Petitioners rights under the Act if any, to challenge the proceedings or orders before CAT or any legal forum remain intact and no prejudice is caused to them.

80. We, in the light of dicta laid down in above two judgments by learned Lahore High Court, and learned Islamabad High Court plus our discussion preceding the same, find the 2010 Act intra vires the Constitution and the proceedings taken pursuant to the 2007 Ordinance, the 2009 Ordinance or the 2010 Ordinance including but not limited to impugned SCNs valid and according to law.

81. Notwithstanding, it is hard to ignore that 18th Amendment has significantly transformed centre-province relations. Devolution of powers on the provinces in terms of said amendment has changed the very face of the governance structure. At least 15 ministries previously held by the federation have been devolved upon the provinces and they have also

been given control of mineral resources within their boundaries. Most importantly, the 18th Amendment has provided the provinces with strong legislative and financial autonomy. Such autonomy to the provinces has turned the country into a true federation by removing the basic cause of friction among the provinces on the distribution of resources. Emphasis on provincial autonomy in respect of a raft of subjects and topics is more pronounced in the Constitution now than before. Article 140A, introduced in the Constitution resultantly, is the embodiment of such autonomy and commands each Province to establish a local government system and devolve political, administrative and financial responsibility and authority to the elected representatives of the local governments. This command is yet to materialize fully, however. But in any case, the rule contained in Article 141 is still the same i.e. Parliament shall have power to make laws for whole or any part of Pakistan, including laws having extra-territorial operations, and a Provincial Assembly may make laws for the Province or any part thereof. This rule is not subject to any other provision of the Constitution like Article 142 prefaced with words 'Subject to the Constitution' making exercise of powers thereunder contingent upon other provisions.

82. Mandate extended to the provinces under Articles 140A and 141 to establish local government system having a measure of financial responsibility through a legislative instrument is absolute and does not necessitate intervention by the federation. Legislative power of the province within its territorial jurisdiction in respect of subjects not in Federal Legislative List and not otherwise within domain of Parliament is a constitutional reality. As noted above, Entry 27 obligates Parliament to legislate over interprovincial trade and commerce, along with import and export, trade and commerce with foreign countries, etc. And Article 151 envisages freedom of trade, commerce and intercourse throughout Pakistan. But nothing definitive is posited there about intra provincial trade and commerce carried out by a province strictly within its territorial boundaries. The Constitution does not postulate or recognize either that trade and commerce is solely a subject of federation to the exclusion of the provinces. Such an argument even otherwise would not be acceptable in any democratic set up comprising units constituting a federation. Encouraging political participation, protecting citizen's rights and ensuring economic efficiency and welfare is not only duty of the federation but every component it is made of. The provinces being inseparable part of the federation are equally obligated to strive for and achieve the said goals by establishing relevant institutions with a measure of financial

responsibility. This endeavor if undertaken cannot sustain without the ring of economic liberty extended to the provinces to be availed by them within territorial jurisdiction in line with letter and spirit of 18th Amendment.

83. Albeit, vibrant national economy free from encumbrances envisaging free trade, commerce and intercourse throughout Pakistan is the ultimate goal the constitution has set out for Parliament to reach. But the existence and role regional or local economies can play to get to that final benchmark cannot be overstated. No doubt, the country would be economically efficient and strong by having commerce throughout the country undertaken by the trans-provincial entities like the petitioners. But at the same time, no one would deny that the economic activity at local or regional level also plays a paramount part in this regard. Small economies are like puddles of water which coalesce into small streams which when collate make a river running through the country. Without small economies therefore running throughout the country a concept of national economy would be absurd and non-practical. Even the big-size economies being run by interprovincial undertakings are hugely dependent on small economies for survival.

84. Small size economic activities limited to a territory of a local government largely remain independent of an economy transcending boundaries of a province. These activities are and need to be governed and regulated by the local government. Sometime a condition at local level giving rise to a situation like cartelization, etc. could obtain which may not affect a large economic activity undertaken by interprovincial undertakings but may harm the local market and the people attached to it in any capacity. At this level if there has to be any anticompetitive regime to control and regulate such activity, it has got to come from the local government. Likewise when such condition has obtained in respect of trade and commerce surpassing boundaries of a local government but not that of a province, it shall be the province competent to govern and regulate such activity. It shall mean that if an economic activity, with a regional effect, exceeds or spills over territorial limits of a local government should become a provincial subject to legislate on. Where the size of an economic activity looked after by the local government is beyond its financial capacity to run or execute, the province can step in and work with the local government to carry on its objects.

85. Where an alleged anticompetitive conduct is not affecting the trade and commerce of another province and is exclusively confined to

a province. The federation has no mandate to intervene and control it because such conduct has nothing to do with 'interprovincial trade and commerce', stipulated in Entry 27 and Article 151. Any intervention like that by the federation would be against combined spirit of Articles 140A and 141. Nonetheless, if any act or omission, translated as anticompetitive behavior, is although committed within geographical boundaries of a province has spillover effect into territorial limits of another province or a territory would fall not only within executive competence of the federation to regulate but also within its exclusive legislative mandate to legislate on.

86. All the relevant articles, and the entries in the Federal Legislative List, of the Constitution, discussed as they are above, do not seem to abridge the right of the province to make a law to regulate an economic activity which is physically and effectively confined to its territorial limits strictly in terms of any consequence arising out of it, and when such activity has absolutely no spillover effect into another province or a territory. For foregoing discussion these petitions are dismissed and disposed of accordingly along with pending applications, if any, and following terms are settled.

Parliament has power to legislate on subject of free competition in all spheres of commercial and economic activity to enhance economic efficiency and to protect consumers from anticompetitive behavior. The Competition Act 2010 enacted by Parliament for this purpose (or the previous Ordinances, 2007, 2009 and 2010) is a valid piece of legislation and covers interprovincial trade, commerce and intercourse throughout Pakistan. Under section 62 thereof anything done, actions taken, orders passed, instruments made, notifications issued, agreements made, proceedings initiated, process or communication issued, powers conferred, assumed or exercised, by the Commission or its officers on or after 2.10.2007 are deemed valid and legal. The impugned show cause notices issued under the 2009 Ordinance to the petitioner sugar mills individually or PSMA based on Enquiry Report have been validly issued and do not suffer from any illegality or jurisdictional defect or incompetency to warrant interference by this court.

Notwithstanding the above, we hold that the Provinces have also the same legislative power to introduce and ensure regime qua free competition to achieve the objectives, among others, set out in the 2010 Act for enhancing economic efficiency and protecting consumers from anticompetitive behavior in respect of an economic activity strictly confined within their territorial limits physically and effectively.

JUDGE

JUDGE