

ORDER SHEET

IN THE HIGH COURT OF SINDH, KARACHI

Suit No.839 of 2012 alongwith with Suit Nos.1060/13, 1084/13, 1088/13, 1089/13, 1311/13, 1436/13, 1474/13, 1574/13, 329/13, 357/13, 478/13, 565/13, 639/13, 693/13, 755/13, 759/13, 803/13, 805/13, 816/13, 871/13, 912/13, 973/13, 940/13, 964/13, 967/13, 999/13, 1478/14, 1170/14, 1562/14, 1563/14, 02/14, 337/14, 345/14, 346/14, 347/14 & 62/14,

Date	Order with signature of Judge
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1. For hearing of CMA No.8289/2015
2. For hearing of CMA No.7227/2012
3. For hearing of CMA No.7112/2012
4. For hearing of CMA No.7113/2012
5. For arguments.

19.05.2016.

M/s. Dr. Farogh Naseem and Nasir Latif, advocates for plaintiffs in Suit No.839/2012.

M/s. Abid S. Zubairi and Ayan Memon, advocates for plaintiffs in Suit No.1389/2012.

Mr. Khalid Jawed Khan, advocate.

M/s. Faiz Durrani, Samia Durrani and Manzoor-ul-Haq, advocates for plaintiff in suit No.866/2012.

Mr. Hamid Idrees advocate for plaintiff in suit No.1345/2012.

Mr. Jehanzeb Awan, advocate for plaintiff in suits No.897/2012 and 898/2012.

Khawaja Shamsul Islam, advocate for plaintiff in suit No.1186/2012.

Mr. Khalid Anwar Khan advocate for plaintiff in suit No. Nil/2012.

Mr. Muhammad Ahmer advocate for plaintiff in suits No.Nil/2012, Nil/2012 and 1355/2012.

Mr. Muhammad Idrees Sukhera, advocate for plaintiff in suit No.839/2012.

Mr. Azam Suleman, advocate.

Mr. Shoa-un-Nabi, advocate.

Mr. Samiur Rehman Khan advocate for plaintiff in suit No.963/2012.

Mr. Abid Naseem, advocate for plaintiff in suit No.759/2013.

Mr. Khuram Ashfaq advocate for plaintiff in suit No.1474/2013.

Ms. Sofia Saeed Shah advocate for plaintiff in suit No.839/2012.

Mr. Naeem Suleman, advocate

Mr. Bashir Ahmed Khan, advocate for defendant

Mr. Sajjad Bashir advocate for defendant

Mr. Zeeshan Bashir Khan advocate for defendant No.1.

Mr. Asim Iqbal, advocate for defendants No.2 and 3.

Mr. Salman Talibuddin, Additional Attorney General.

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SALAHUDDIN PANHWAR, J: Through captioned suits, the plaintiffs had challenged the Gas Infrastructure Development Cess Act, 2011, Section 19 of the Finance Act, 2012 and Section 9 of the Finance Act 2014.

2. At the outset, learned counsel for defendant-Sui Southern Gas Company Ltd contends that bundles of cases, *fixed today*, can be disposed of in terms of order dated 01.03.2016, passed by a Division Bench of this Court in C.P. No.D-3867/2014. He referred paragraph-8 of decision given by the apex Court on review petitions in the case of Federation of Pakistan through Secretary, Ministry of Petroleum and Natural Resources and another v. Durrani Ceramics and others, reported as PLD 2015 Supreme Court 354; it would be conducive to reproduce relevant paragraph of the same, as under:

“8. The learned Attorney General also brought to our notice that the respondents have now filed applications/petitions before the High Court for refund of the Cess already paid to the Government. It was argued that since the burden of the Cess had already been passed on to the ultimate consumers by the respondent companies, they are not entitled to its refund. Mr. Makhdoom Ali Khan however submitted that in a number of cases the burden had not been passed on to the consumers. We have nothing before us to determine whether or not the Cess had been passed on to the consumers. Perhaps it would be appropriate that we leave it to the High Court to determine the question on case to case basis. With these observations the review petitions are dismissed”.

He further contends that the prayer of plaintiffs regarding recovery of amount, received in pursuance of Act, 2011, is covered by section 8 of Gas Infrastructure Development Cess Act 2015 and almost all the plaintiffs have challenged vires of section 8 of the Act, which reads as under:

“8. Validation of the cess collected:- (1) Notwithstanding any omission or anything to the contrary contained in the Gas Infrastructure Development Cess Act, 2011 (XXI of 2011) or the

Gas Infrastructure Development Cess Ordinance, 2014 (VI of 2014) or the rules made thereunder, or anything to the contrary contained in any decree, judgment or order of any Court, the cess levied, charged, collected or realized by the company from gas consumers under the aforesaid Act or Ordinance shall be deemed to have been validly levied, charged, collected or realized under the provisions of this Act.

(2). *Where any cess referred to in sub-section (1) has not been paid or realized before the coming into force of this Act or if so paid or realized, has been refunded to or adjusted against other fees or taxes or charges payable by the gas consumers or the company, the same shall be recoverable in accordance with the provisions of this Act:*

Provided that the said cess shall not be collected from industrial sector excluding Fertilizer Fuel Stock, mentioned at S.No.3 of the Second Schedule to both the Gas Infrastructure Development Cess Act, 2011 (XXI of 2011) and the Gas Infrastructure Development Cess Ordinance, 2014 (VI of 2014), if it has not been collected by it:

Provided further that where gas consumers have collected the said cess at the rates under the Gas Infrastructure Development Cess Act, 2011 (XXI of 2011) and the Gas Infrastructure Development Cess Ordinance, 2014 (VI of 2014), the collection of the said cess shall be made on the said rates”.

3. At this juncture Mr. Jehanzeb Awan, counsel for plaintiffs in suits No.897/2012 and 898/2012, refers case of Nishat Chunian Ltd. & others v. Federation of Pakistan & others, reported as 2015 CLC 22, whereby all petitions were accepted in terms of the judgment passed by the Peshawar High Court, Peshawar and Apex Court of the Country.

4. At this juncture learned counsel for plaintiffs contended that these suits may be decreed to the extent of judgment of Apex Court. I am not inclined to accept such request of the plaintiffs’ counsel for simple reason that termination of a *lis* undoubtedly is through a verdict of a court, which, *in legal parlance*, is called a ‘**judgment**’ but *legally* only those orders shall qualify the term ‘**judgment**’ whereby the rights and

liabilities of the parties in *lis* are determined. The term '**judgment**' has been explained in the case of *MEMY Industries* (2015 SCMR 1549) as:-

'5. Termination of a *lis* undoubtedly is through a verdict of a court which is a **decision** disposing of a matter in dispute before it (the Court) and in legal parlance, it is called a **JUDGMENT**'. It is invariably known that a Judge finally speaks through his judgment. According to Black's Law Dictionary, a judgment has been defined to mean '**A court's final determination of the rights and obligations of the parties in a case**' and per Henry Campbell Black, A Treatise on the Law of Judgment '*An action is instituted for the enforcement of a right or the redress of an injury. Hence a judgment, as the culmination of the action declares the existence of the right, recognizes the commission of the injury, or negatives the allegation of one or the other. But as no right can exist without a correlative duty, nor any invasion of it without a corresponding obligation to make amends, the judgment necessarily affirms, or else denies, that such a duty or such a liability rests upon the person against whom the aid of the law is invoked.*' These definitions are adequately self-explanatory. In our procedural law (*civil*), judgment as defined in Section 2(9) of Code of Civil Procedure means '*the statement given by the judge of the grounds of a decree or order*'. It should be emphasized here that a judgment should supply adequate reasons for the conclusion reached and arrived at and should be reflective of application of proper judicial mind by the Judge and it should not be a mechanical and not speaking judgment in nature.'

(Emphasis supplied)

Since, within meaning of Article 189 of Constitution of Islamic Republic of Pakistan any decision of the Supreme Court, to the extent that it decides a question of law or is based upon or initiates a principle of law, shall be binding on all other Courts in Pakistan and *even* High court(s) have no exception to such *mandatory* obligation. (*Mirza Shaukat Baig v. Shahid Jamil* (PLD 2005 SC 530).

5. I would further say that honouring the mandatory obligation within the meaning of Article 189 of the Constitution shall not require an exercise *necessary* to fulfill term of '*judgment*' nor it (*compliance of Article 189*) shall require a '*decree*' from a court of law because the '*decree*' is

meant to execute what is determined by the Court through *judgment* (rights or obligations). In short, a decision of Honourable Supreme Court, if qualifying the requirements of Article 189 shall in itself is a direction (*decree*) for mandatory compliance by all.

6. Now, reverting to merits of the case, since it needs no much debate that question(s), involved in all these suits, stood decided by the honourable Supreme Court of Pakistan in case of Federation of Pakistan through Secretary Petroleum & Natural Resources (2014 SCMR 1630) has categorically held as:-

‘45. To conclude the GIDC is a fee and not a tax, in the alternative it is not covered by any Entry relating to imposition or levy of tax under Part-I of the Federal Legislative List. On either counts the 'Cess' could not have been introduced through a money bill under Article 73 of the Constitution. The same was, therefore, not validly levied in accordance with the Constitution.’

Further, said principle was also followed in the case of Nishat Chunian Ltd. & others (2015 CLC 22). The operative part whereof is reproduced hereunder:-

*“4. After hearing learned counsel for the petitioners as well as the learned Additional Attorney General, learned Deputy Attorney General as well as learned counsel for the respondents and going through the documents annexed with these petitions and the case-law on the subject, I have observed that the provisions of the Act came under discussion before a Division Bench of the Peshawar High Court in case reported as Ashraf Industries (Pot.) Ltd. V. Federation of Pakistan through Secretary, Ministry of Petroleum and Natural Resources Control Secretariat and 3 others (2013 PTD 1732) whereby the recovery of GIDC was declared illegal. The said decision of the Peshawar High Court has been upheld by the august Supreme Court of Pakistan in the case of Federation of Pakistan v. Durrani Ceramics and others (Civil Appeal No.1540 of 2013) and other allied matters whereby the Act has been declared ultra vires. **After decision of fate of the Act by apex Court of the Country this Court is left with no option but to follow the dictum laid down by august Supreme Court of Pakistan in view of Article 189 of the Constitution of Islamic Republic of Pakistan, 1973”.***

Further, the order of *Division Bench*, passed in C.P. No.D-3867/2014, also decided the same questions, involved in these suits. Such decision, within meaning of Article 201 of Constitution, is binding upon all *subordinate court(s)*. The operative part thereof is reproduced hereunder:-

“The petitioner No.1 is a company incorporated under the laws of Pakistan and is engaged in the business of manufacturing of fertilizer products, while the petitioner No.2 is the Chairman/Director of the petitioner No.1 and they have maintained this Constitutional Petition assailing the levy of Gas Infrastructure Development Cess (GIDC) under the Gas Infrastructure Development Cess Act, 2011, with the following prayers:

- i. Declare that the Gas Infrastructure Development Cess Act, 2011 is completely without jurisdiction, illegal, unlawful, unconstitutional, void ab initio and of no legal effect;*
- ii. Declare that Section 19 of the Finance Act, 2012 purportedly amending the Gas Infrastructure Development Cess Act, 2011 is completely without jurisdiction, illegal, unlawful, unconstitutional, void ab initio and of no legal effect;*
- iii. Declare that Section 9 of the Finance Act, 2014 purportedly amending the Gas Infrastructure Development Cess Act, 2011 is completely without jurisdiction, illegal, unlawful, unconstitutional, void ab initio and of no legal effect;*
- iv. Declare that the Invoice dated 16.07.2014 issued by the Respondent No.2 (Mari Petroleum) is illegal and unlawful since it purports to recover Gas Infrastructure Development Cess along with sales tax thereon from the Petitioner Company on feedstock gas;*
- v. Set-aside the Invoice dated 16.07.2014 issued by the Respondent No.2 (Mar Petroleum) as being illegal and unlawful since it purports to recover Gas Infrastructure Development Cess along with sales tax thereon from the Petitioner Company on feedstock gas;*
- vi. Furthermore, declare that the imposition of Gas Infrastructure Development Cess on the Petitioner Company by the Respondent No.1, Federation of*

Pakistan, in purported exercise of its powers under the Gas Infrastructure Development Cess Act, 2011 is illegal, unlawful and in violation of its constitutional obligations to honour its commitments under the Fertilizer Policy, 2001;

- vii. *Furthermore, declare that the Respondent No.1, the Federation of Pakistan's, is legally estopped from imposing and collecting Gas Infrastructure Development Cess from the Petitioner Company in view of its legally binding commitments under the Fertilizer Policy 2001 and the Ministry of Petroleum and Natural Resources, Government of Pakistan's, letter dated 04.09.2004;*
- viii. *Furthermore, declare that Gas Infrastructure Development Cess cannot be collected from the Petitioner Company without the issuance of a formal notification by the Respondent No.1 in accordance with law and any attempt to do so will be illegal, unlawful and unconstitutional;*
- ix. *Restrain the Respondents, their officers and agents, from imposing and/or collecting Gas Infrastructure Development Cess from the Petitioner Company and from taking any coercive action whatsoever for the recovery of the cess, and refund all amounts recovered so far;*
- x. *Restrain the Respondents from charging or collecting any amount in excess of US\$ 0.70/MMBTU, inclusive of all taxes and levies whatsoever, on the supply of feedstock gas to the Petitioner Company's plant;*
- xi. *Grant ad interim relief;*
- xii. *Grant costs; and*
- xiii. *Grant any other relief(s) deemed fit by this Hon'ble Court.*

At the very outset, Mr. Rashid Anwar, the learned counsel for the petitioners submits that the Hon'ble Supreme Court of Pakistan in the case of Federation of Pakistan through Secretary Ministry of Petroleum and Natural Resources and another v. Durrani Ceramics and others, reported as 2014 SCMR 1630, while maintaining the orders passed in several Constitutional Petitions of identical nature by the Peshawar High Court, has declared the levy imposition and recovery of the 'Cess' unconstitutional by holding that "the GIDC is a fee and not a tax, in the alternative it is not covered by any Entry relating to imposition or levy of tax under Part-I of the Federal Legislative List. On either counts the 'Cess' could not have been introduced through a money bill under Article 73 of the Constitution. The same was, therefore, not validly

levied in accordance with the Constitution". Mr. Rashid, therefore, submits that the instant petition may be allowed in the light of the said decision of the Hon'ble Apex Court.

Mr. Asim Mansoor, the learned D.A.G. conceding to the contention of the learned counsel for the petitioners requests for the disposal of this petition accordingly.

Since the GIDC has already been declared by the Apex Court to be unconstitutional being fee and not tax and therefore could not have been imposed through money bill, this petition stands disposed of accordingly, alongwith the listed application, in the light of the decision referred above by the learned counsel for the petitioners."

It can be observed at present that controversy with regard to Act of 2011 has already been adjudicated and decided, whereas with regard to recovery parties are at liberty to agitate the same before proper forum and defendants are bound to abide by the judgment of the Apex Court in letter and spirit.

7. The above discussion should leave nothing ambiguous that the questions, *involved in all these suits*, stood decided by Apex Court which, *on notice*, are sufficient for disposal of all these suits without making any further comment except that Articles 201 and 189 of Constitution shall bring all authorities, including Courts to honour and oblige such decision.

8. Accordingly, following the above settled principle of law all these suits are hereby disposed of leaving the parties to bear their own costs. All interlocutory applications pending in these suits also stand disposed of.

J U D G E