**IN THE HIGH COURT OF SINDH AT KARACHI**

BEFORE:
**Mr. Justice Mohammed Shafi Siddiqui**

Total 377 Suits bearing Nos. 1009, 1042 to 1050, 1069, 1085, 1086, 1114, 1134, 1177, 1183, 1184, 1187, 1189, 1190, 1192, 1194 to 1202, 1204 to 1227, 1230 to 1242, 1247, 1248, 1250 to 1253, 1255 to 1261, 1263 to 1286, 1290 to 1351, 1353 to 1355, 1357 to 1376, 1378 to 1380, 1382 to 1385, 1387, 1388, 1390, 1392 to 1394, 1397 to 1399, 1401, 1404, 1405, 1407, 1408, 1410, 1412, 1414, 1419, 1420, 1422 to 1424, 1426 to 1428, 1438, 1439, 1442, 1446, 1448, 1452, 1455, 1472, 1474, 1480, 1488, 1489, 1499 to 1506, 1509 to 1512, 1514, 1515, 1517, 1518, 1520, 1523, 1525, 1527, 1533 to 1537, 1540, 1546, 1569, 1632, 1634, 1672, 1674, 1684, 1706, 1712, 1718, 1724, 1726, 1744 to 1746, 1748, 1757, 1765, 1812, 1819, 1839, 1841, 1850, 1851, 1899, 1907, 1916, 1919, 1928 to 1930, 1948, 1963, 1965, 1985, 2015, 2017, 2048, 2055, 2060, 2073, 2103, 2128, 2139, 2154, 2202, 2209, 2221, 2230, 2235, 2252, 2274, 2296, 2318, 2348, 2349, 2351, 2362, 2377, 2491, 2502, 2504, 2510 of 2015 and Suits No.86, 102, 118, 120, 156, 257, 258, 261, 319, 367, 399, 410, 421, 439, 447, 493, 572, 621, 635, 663, 668, 709, 774, 858, 930, 932, 933, 1006, 1064, 1307, 1412, 1647, 1656, 1704 and 1821 of 2016. And Suits not registered bearing (-) No.1524, 1527, 1537, 1551, 1723, 1909, 1910, 1911, 1951, 2209, 2408, 2807 of 2015 and 1967 of 2016.

M/s Century Paper & Board Mills Ltd. and
several other plaintiffs in above said connected suits

Versus

Federation of Pakistan & others in all the above suits

***Dates of hearing:*** *04.03.2016, 14.03.2016, 21.03.2016, 19.04.2016, 10.05.2016, 18.05.2016, 17.08.2016, 29.08.2016, 02.09.2016.*

***Plaintiffs through*:** Mr. Khalid Anwar a/w Mr. Raashid Anwar, Mr. Jawad Qureshi and Mr. Mustafa Ali advocate, Mr. Makhdoom Ali Khan a/w M/s Hyder Ali Khan, Jam Zeeshan and Samiur Rahman advocates, Mr. Dr. Muhammad Farogh Naseem advocate, Mrs. Naveen Merchant advocate, Mr. Abid S. Zuberi Advocate, Ms. Sofia Saeed Shah advocate, Mr. Ameen Bundukda advocate, Mr. Saad Siddiqui Advocate, Mr.Jamshed Malik Advocate, Mr. Khalid Mehmood Siddiqui Advocate, Ms. Lubna Parvaiz advocate, Mr. Ravi Panjani Advocate, Mr. Anas Makhdoom a/w Mr. Ahmed Farhaj Makhdoom advocate, Mr. Mayhar Qazi Advocate, Mr. Yousuf Moulvi Advocate, Mr. Abdul Jabbar Mallah advocate, Mr. Akhtar Ali Memon advocate, Ms. Rafia Murtaza advocate, Mr. Umer Memon advocate, Mr. Kashan Ahmed advocate, Mr. Muhammad Javed advocate, Mr. Muhammad Imran advocate, Mr. Muhammad Mustafa Hussain advocate, Ms. Sana Valika advocate, Mr. Muhammad Vawda along with Mr. Saad Fayyaz advocates, Mr. Fahim Shah advocate, Mr. S. Zeeshan Ali advocate, Mr. Shaharyar Mahar advocate, Mr. Iqbal Hashmi advocate, Mr. Naeem Suleman a/w Mr. Arshad Shahzad Advocate, advocate, Mr. Zakir Hussain Khaskheli advocate, Mr. Muhammad Shahid Qadeer advocate, Mr. Faiz Durrani a/w Mrs. Samia Durrani and Manzoor-ul-Haq advocates, Mirza Qasim Baig along with Mr. Rao Liaquat Ali Khan advocate, Mr.

Darvesh Mandhan advocate, Mr. Salman Ahmed advocate, Mr. A.B. Lahsari advocate, Syed Mohsin Ali advocate, Mr. Abdul Hameed Iqbal Advocate, Mr. Kashif Nazir advocate, Mr. Abid Naseem advocate, Mr. M. Azhar Ali advocate, Mr. Kazi Ajmal advocate, Mr. Shahzad Raheem advocate, Mr. Junaid M. Siddiqi advocate, Mr. Muhammad Iqbal Bhatti, advocate, Mr.Muhammad Idrees advocate, Mr. Patras Pyara Advocate, Mr. Nadir Hussain Abro Advocate, Mr. Amaar Athar Saeed Advocate, Shahid Iqbal Rana Advocate, Mr. Danish Nayyar Advocate, Mr. Anwar Kashif Advocate, Mr. Hakim Ali Khan Advocate, Mr. Muhammad Usman Advocate and Mr. S. Samiullah Shah Advocate.

***Defendant Federation of Pakistan through***: Mr. Salman Talibuddin, Additional Attorney General assisted by Ms. Maria Ahmed advocate and Mr. Abdul Qadir Laghari Standing Counsel.

***Defendant Sui Northern Gas Company Ltd. through***: Mr. Asim Iqbal Advocate along with Mr. Farmanullah Advocate.

**J U D G M E N T**

**Mohammad Shafi Siddiqui, J**.- All these 348 suits filed by different plaintiffs involves a challenge to the vires of the Gas Infrastructure Development Cess Act, 2015 (Act 2015) and in some of these suits the plaintiffs have called in question Gas Infrastructure Development Cess Act, 2011 and Gas Infrastructure Development Cess Ordinance 2014 as well.

On 19.02.2016 all the learned counsel appearing for the plaintiffs proposed that the suits may be disposed of on the basis of material available on record as the documents are admitted and no oral evidence is required to be led and accordingly, by consent of all present, following issues were framed:-

1. *Whether GIDC could be imposed retrospectively under the GIDC Act, 2015 from 15th December, 2011 onwards?*

2. *Whether the imposition of GIDC on the fertilizer sector while imposing it at lower rates on, or completely exempting, other sectors is discriminatory?*

3. *Whether in order to fulfil its commitments under the Fertilizer Policy 2001 and the international tender awarded to the plaintiff, the Federal Government is required to issue a notification under the GIDC Act, 2015 exempting the plaintiff from payment of GIDC on feed stock gas supplied to it?*

4. *Whether the amount so collected in pursuance of GIDC Act, 2015 is liable to be returned/adjusted?*

5. *What should the decree be?*

Thereafter on 14.03.2016 on the pointation of Mr. Makhdoom Ali Khan and with the consent of the learned counsel one more issue was framed which is as followed:-

*Whether the GID Cess the impugned Act is ultra vires the Constitution?*

M/s Khalid Anwar, Makhdoom Ali Khan, Farogh Naseem, Abid S. Zuberi, Ameen Bandukda and Jamshed Malik have argued the case as leading counsels on behalf of the plaintiffs while other counsels have adopted their arguments. On behalf of the defendants Mr. Salman Talibuddin, Addl. Attorney General, has argued the matter representing Federation of Pakistan while Mr. Asim Iqbal appearing for defendant No.3 Sui Northern Gas submitted that defendant No.3 is only an agent for recovery of the amount and has nothing to say in the matter. Since the leading arguments were advanced by Mr. Khalid Anwar and Mr. Makhdoom Ali Khan and most of the counsels have adopted the arguments with some amendment/addition hence I would provide a brief gist of such arguments of Mr. Khalid Anwar and Mr. Makhdoom Ali Khan in order to reach the conclusion as to the vires of Act 2015 whereafter issue-wise finding if required for other related issues will be provided.

Mr. Makhdoom Ali Khan started the arguments and provided background leading to the subject challenge. On 15.12.2011, first Gas Infrastructure Development Cess Act, 2011 (Act 2011) was passed, which was amended on 26.06.2012. The consumers, including the present plaintiffs, challenged the constitutionality of Act 2011 and on 13.06.2013 Peshawar High Court struck down Act 2011 which case is titled as Ashraf Industries v. Federation of Pakistan reported as 2013 PTD 1732 (hereinafter referred as Ashraf Industries case). The Federation of

Pakistan filed an appeal before the Hon'ble Supreme Court which was dismissed on 22.08.2014 and reported as Federation of Pakistan v. Durrani Ceramics reported in 2014 SCMR 1630 (hereinafter referred as Durrani Ceramics case). As against this the Federation of Pakistan preferred a review petition on 25.09.2014.

It is argued that while the review petition was pending, Gas Infrastructure Development Ordinance 2014 was promulgated which was further extended for another 120 days on 16.01.2015 w.e.f. 22.01.2015 which Ordinance expired on 22.05.2015. This ordinance was also challenged by different consumers including the plaintiffs in different high courts and interim orders were also granted. While this was being exercised the Hon'ble Supreme Court on 15.04.2015 dismissed the review petition referred above which is reported as Federation of Pakistan v. Durrani Ceramics reported in PLD 2015 SC 354 (hereinafter referred to as Durrani Ceramics Review). Subsequent to this decision of Review, on 21.05.2015 the GIDC Ordinance 2014 received presidential assent, having been passed by both the houses of Parliament (as Act 2015).

It is claimed that this Act 2015 is identical to the Ordinance 2014 i.e. (i) it repealed the Act 2011 (ii) did not repeal or save the Ordinance 2014 (iii) Section 3 levy GIDC as a tax (iv) Section 4(1) provides that GIDC will be utilized for gas infrastructure development (v) Section 8 of Act 2015 seeks to purportedly give it retrospective effect and levy GIDC w.e.f. 15.12.2011.

Mr. Makhdoom Ali Khan while commencing his arguments raised grounds some of which were also subsequently supplemented by Mr. Khalid Anwar hence I sum up their common arguments as under.

Learned counsels have raised substantive arguments and asserted that in both the Act 2011 and Act 2015 the levy is defined as cess. It is claimed that the ordinary dictionary meaning of cess is the fee imposed for a specific purpose and has relied upon Durrani Ceramics case and has also relied upon the case of Vijayalashmi Rice Mills v. Commercial Tax Officer reported in AIR 2006 Supreme Court 2897. Learned Counsel further submitted that cess is also a kind of tax however a levy, which is called a cess, may also be a fee depending on the intention of the legislature. It is argued that the Hon'ble Supreme Court in Durrani Ceramics case looked at the language of the law and the conduct of the government and came to the conclusion that the levy under Act 2011 was a fee. It is argued that the Hon'ble Supreme Court's findings were heavily based on the treatment of the "finance" that it met under Act 2011.

Learned counsel further argued that the Hon'ble Supreme Court did not consider whether the levy complied with all the conditions which are necessary to make a fee valid since the Hon'ble Supreme Court had already decided that this Act could not have been introduced through a money bill and therefore there was no need to go any further in this regard and hence this question is still open as to whether despite it being presented in both the houses can still be a valid fee under the law.

Both Mr. Khalid Anwar and Mr. Makhdoom Ali Khan after hearing Addl. Attorney General submitted that the federation has taken a position that levy under Act is a fee which is contrary to paragraphs 46 and 47 of the written statement in Suit No.962 of 2015 wherein it is claimed that GIDC is a fee/tax. Although written statement in every case has not been filed however initially all the suits including Suit No.962 of 2015 were clubbed together and hence this view was taken by Federal Government. It is urged that the Federal Government was and still not

sure about status of such levy. It is, as claimed by the learned counsel, that federal government changed opinion that it should be treated as fee as held by Hon'ble Supreme Court in Durrani Ceramics case when the case was verbally argued by plaintiffs.

Mr. Khalid Anwar and Mr. Makhdoom Ali Khan have also argued that the Hon'ble Supreme Court has held that a tax on natural gas does not fall within any of the Entries in the Part-I of the Federal Legislative List which means that any attempt of the Federal Government to impose tax on natural gas would be unconstitutional as being beyond the Entries in Part I of Fourth Schedule.

Counsel further submitted that this stand of the federal government as to the cess being treated as fee/tax has a fundamental defect and highly contradictory. The Hon'ble Supreme Court in Durrani Ceramics case has held the levy under Act 2011 as a fee because of the treatment given by the federal government under Article 80 of the Constitution as it had declared such revenue to be a "non-tax revenue" hence the same principle is to be applied while determining the status of the levy under Act 2015. It is argued that while applying same principle the conclusion that could be drawn is that the levy under Act 2015 is a tax and not a fee. The intention of the federal government is clear. It is argued that the federal government by their own choice took the position and called levy under the new law as a cess and not a fee which they could have taken after decision of the Hon'ble Supreme Court in Durrani Ceramics case.

They have additionally argued that the government is classifying this revenue as a tax in a "constitutional document i.e. Annual Budget Statement" which is heavily relied upon by Hon'ble Supreme Court in the earlier round. They have now in those constitutional documents classified this revenue as a tax revenue which is a complete

opposite/contradictory stance as compared to the one taken while Act 2011 was introduced. It is claimed that the intention of the government could be determined on the basis of this constitutional document which is called as Annual Budget Statement under Article 80 of the Constitution.

Learned counsel next argued that the language of Act 2015 wherein a charging provision as Section 3 is introduced also provide aid to the above submissions. It is argued that previously the law requires the company to collect and pay cess which has now been changed into a proper charging section. They thus sum-up this point that the words levied and charged are sufficient to conclude the indication and intention of the government in relation to imposing tax only. Thus, it is claimed to be clear that the levy under Act 2015 intended to be a tax and hence is unconstitutional having not been covered by any of the Entries in List-I of the Federal Legislative List.

Alternatively it is further argued that even if it is assumed to be a fee without conceding then also it is unconstitutional as the Council of Common Interest has been unconstitutionally and illegally ignored by Federal Government. It is claimed that the federal government rely upon Entry 2 read with Entry 15 which relates to fee in respect of any matter enumerated in list of Part II of the Federal Legislative List of Fourth Schedule of the Constitution to state that it has power to impose a fee on natural gas, which is unconstitutional in terms of Article 153 and 154 of Constitution of Pakistan.

It is argued that after the changed scenario i.e. post 18$^{th}$ Amendment there is one legislative list which is called federal legislative list which consists of Part-I and Part-II. Part-I falls within the exclusive domain of the federation whereas Part-II of the list is in relation to the legislative power in relation to the subjects therein, which powers

cannot be exercised by disregarding the provinces hence it is argued that all legislation under Part-II has to be carried out in a specified manner together with Articles 153 and 154 of the Constitution. It is thus urged that after reading Articles 153 and 154 of the Constitution the only conclusion that could be drawn is that Council of Common Interest under no stretch of imagination could be regarded as a federal body. It is a forum comprising of members from federation as well as provinces.

It is further argued that the Hon'ble Supreme Court in the earlier round had already decided that the levy being a fee could not have been introduced through a money bill and hence there was no occasion to deal with any other ancillary issues such as government failure to consult Council of Common Interest because the constitutionality of fee was never an issue before. It is claimed by the learned counsel that non-referring the matter to Council of Common Interest would in fact render the levy illegal and/or invalid. In Durrani Ceramics case, learned counsels, contended that it is only fleeting remarks as no detailed analyses were made. It was further claimed that this was not a substantial issue before the Hon'ble Supreme Court and even the judgment of the larger Benches of the Hon'ble Supreme Court which were prior in time to Durrani Ceramics was not referred by counsels which has expressly held that rules for procedure of Council of Common Interest are mandatory. It is further claimed that for Hon'ble Supreme Court the reference to Article 153 and 154 was not necessary once they have decided that fee could not have been introduced through a money bill and hence such observation in relation to Council of Common Interest was not part of ratio decidendi of the judgment. He submitted that in order to determine whether any part of the judgment does not form ratio decidendi lies in a test as to whether the result would be different if that part of the judgment is completely removed. Meaning

thereby if the main decision is not based on such part, that particular part may not form ratio decidendi. While applying this universally admitted principle in Durrani Ceramics case there will be no two opinions that in the absence of observations in Para 42 the result would have remained the same and hence it could not form ratio decidendi.

Learned counsel further submitted that the observations of Para 42 referred above are not in consonance with the observations of Hon'ble Supreme Court in the case of Watan Part v. Federation of Pakistan reported in PLD 2006 SC 697 which decision was rendered by larger Bench of nine judges and must be given precedence.

The next ground argued by learned counsel is the utilization of the amount recovered for the purposes specified in the Act 2015. It is claimed that not a single penny out of the amount collected under the old and new Act were spent towards the purposes stated in the Statute. It is claimed that they have collected almost 136 billion under the head of GIDC but no part of this amount has been spent towards gas related infrastructure projects. It is claimed that since the government is not spending the amount it has collected for specified purpose there is no quid pro quo and no fee can be charged from consumers. It is claimed that the GIDC to be recovered under Act 2015 is to be used for the development of Iran-Pakistan Gas Pipeline project or the TAPI pipe line project. None of the projects have been finalized nor any timeframe for launching or its completion is provided. On this score learned counsel has relied upon the case of Kewal Krishan v. State of Punjab (AIR 1980 SC 1008), Shri Sajjan Mills Ltd. v. Krishi Upaj Mandi Samiti, Ratlam (AIR 1981 MP 30) and Sharma Transports v. State of Karnataka (IRL 2005 Karnataka 80).

Learned counsel further submitted that the fee can be regulatory thus if the GIDC is a fee it is obviously a compensatory fee as it

contemplates the purpose of gas infrastructure for the benefit of consumers from the funds collected and it is necessary for the government to provide basis by quantum of the cess. It is claimed that Federation may be right in not providing the quantum of cess where the levy is a tax but where the levy is a compensatory fee, the nexus between quantum and service must necessarily be shown. In this regard learned counsel relied upon the case of Jindal Stainless Limited v. State of Haryana reported in AIR 2006 SC 2550.

Both the learned counsels lastly argued that insofar as the judgment of the Islamabad High Court is concerned it is not binding on this Court and this Court should independently arrive at its own conclusion on the basis of assistance provided.

In addition to above common grounds, Mr. Khalid Anwar, learned counsel for plaintiffs in Suit No.1291 of 2015 has raised some preliminary submissions/objections, which relates to framing of rules under Act 2015 and that absence of notification as to exact rate of cess, to be charged from different consumers, such recovery is fatal under the scheme.

Mr. Makhdoom Ali Khan, learned counsel for the plaintiffs in some of the suits, while arguing raised some additional grounds that Peshawar High Court Judgment has merged with that of the Hon'ble Supreme Court's judgment. He submitted that since the judgment of the Peshawar High Court was not disturbed and the appeal of the Federal Government was dismissed, it could only lead to a conclusion that all points raised and resolved by the Peshawar High Court stands merged with the judgment of the Hon'ble Supreme Court. Mr. Makhdoom Ali Khan relied upon the judgment in the case of Glaxo Laboratories Limited v. Inspecting Assistant Commissioner of Income tax (PLD 1992 SC 549) and Nasrullah Khan v. Mukhtar-ul-Hassan (PLD 2013 SC 478).

He submitted that reliance of Federation on an isolated part of a lone sentence was misplaced and he drew attention of the Court to Para 5 of the judgment. He submitted that it was pointed out to Hon'ble Supreme Court that while the cases in Peshawar had been decided, the cases impugning the same Act 2011 were pending in Baluchistan, Punjab and Sindh. The decision of the Hon'ble Supreme Court in Peshawar appeals would bind all high courts and would result in all those cases being disposed of as well. He, therefore, sought permission to raise additional grounds taken up in the matters pending before the high courts but not dilated upon in the judgment impugned in these appeals. Such request was granted as being reasonable considering importance of the issue and its application throughout the country.

Learned counsel further emphasized that the Hon'ble Supreme Court also noted that the counsel for the Federation of Pakistan had also submitted that the Federation be allowed to take new points not raised before Peshawar High Court. Thus, the request of both the parties to raise new/additional points was allowed as was considered necessary as the Hon'ble Supreme Court does not, as a matter of practice, consider grounds not raised before high court in earlier round. It is argued that there was nothing in the judgment to suggest that either party gave up any of the grounds urged in the high court. In view of the above, Mr. Makhdoom Ali Khan submitted that doctrine of merger would apply and without removing the bases of the invalidity, stated in both the judgments, it cannot be overruled legislatively.

Mr. Makhdoom Ali Khan next argued the point of constructive resjudicata. He submitted that any point raised or which ought to have been raised before the Hon'ble Supreme Court would be deemed to have been raised and decided against the federation. All points made before Peshawar High Court were made or ought to have been made before

Hon'ble Supreme Court and would therefore be covered by doctrine of constructive resjudicate which principle is incorporated in explanation (IV) to Section 11 of CPC which are attracted here in view of the above facts and circumstances. In this regard counsel relied upon the case of M.K.B. (2005 SCMR 699) and Khushi Muhammad & others v. Province of Punjab (1999 SCMR 1633).

Learned counsel further argued that the judicial decisions declaring a Statute as invalid cannot be overruled by the legislature simply by enacting an invalid Statute containing a non-obstante clause. He further argued by providing reasons that if this is permissible it would authorize the legislature to undo judicial decisions at will and would be destructive of the doctrine of separation of powers. The legislative overruling is permissible only when the basis of a judicial decision is first removed which is often done by introducing legal fiction in the form of deeming clause which removes the basis of invalidity and then by a non-obstante clause which overrides the judicial decision.

He then argued that the Peshawar High Court judgment and Hon'ble Supreme Court judgment is based on some important legal grounds and except one none of the grounds or basis was cured and unless all such basis of invalidity are removed the enactment of Act 2015 would amount to a legislative overriding of a judicial decision. Learned counsel in support of this contention has relied upon the case of Molasses Trading & Export (Pvt.) Ltd. v. Federation of Pakistan (1993 SCMR 1905), Fecto Belarus Tractor Ltd. v. GoP (PLD 2005 SC 605) and contempt proceedings against Chief Secretary Sindh reported in 2014 PLC (CS) 82.

Learned counsel further argued that defect according to the Federal Government was only to the extent that it was introduced through a money bill and since the Act 2015 having been passed by both

the houses it cures all the defects, is incorrect. He argued that such stance of Federal Government is misconceived and that further stance that all other defects did not form part of the ratio of the judgment of the Hon'ble Supreme Court and hence not required to be cured is also misconceived. Learned counsel submitted that the appeal against the judgment of Peshawar High Court has failed and the Hon'ble Supreme Court has not disagreed with any of the findings of the Peshawar High Court which thus acquired finality. The Act 2015 suffers from same defects. He argued without prejudice that even doctrine of merger and constructive resjudicate do not apply to the new legislature, in order to be valid must conform to fundamental rights and other constitutional provisions. Act 2015 is sub-constitutional legislation and hence cannot survive the constitutional transgressions. A validating Statute is as much legislation as any other Statute and must therefore meet the same constitutional criteria for its validity and in case of failure it must be struck down. Learned counsel with regard to above proposition has relied upon the case of Usif Patel v. Crown (PLD 1955 FC 387), Mirpurkhas Sugar Mills Ltd. v. District Council Tharparkar (1991 MLD 715), Municipal Corporation of the City v. The Municipal Corporation of the City of Ahmedabad v. The New Shrock Spg. and Wvg. Co. Ltd. (AIR 1970 SC 1292).

Learned counsel further argued that if the Statute offends a fundamental right it will be void and can only be resurrected or revived after the fundamental rights are put in abeyance or amended and in case it violates any other constitutional provision, particularly one relating to competence of the legislature, it will be void ab-initio as if it had never been written on the Statute book. In this regard counsel relied upon the case of Sayid Abul Ala Maudoodi v. The Government of West

Pakistan (PLD 1964 SC 673), Province of East Pakistan v. M.D. Malir (PLD 1959 SC 387).

The next ground as raised by Mr. Makhdoom Ali Khan is in relation to the rates of GIDC, which are claimed to be discriminatory. He read Second Schedule of the Act 2015 to demonstrate that the rates of GIDC are discriminatory as the domestic and commercial sectors benefited hugely from gas yet they were made to pay nothing as they are not mentioned in the Second Schedule of the Act.

He further submitted that the person generating electricity for own use (captive power) are charged twice as much as KE/GENCOS and IPP and hence there is no rational basis for this classification. He submitted that a person who generates his own electricity instead of buying it from KESC/KE has to pay twice as much despite the fact that he generates his own power and releases the burden and load of KE grid leaving the electricity to be provided to others.

Learned counsel further argued that Region-I i.e. KPK, Baluchistan and Potohar region pay 63.56 per MMBT more than Region-II i.e. Sindh and Punjab (excluding Potohar) and hence there is no rational basis for this. Similarly, the fertilizer sector pays thrice more than the power sectors and any other industry. GIDC for fertilizer feed is twice of what is being charged from fertilizer fuel hence the rates are discriminatory and similarly placed people are not being treated similarly and hence, per learned counsel, violative of Article 25 of the Constitution. In this regard counsel has relied upon Nishat Tek Limited v. Federation of Pakistan (PLD 1994 Lahore 347), Mandviwala Muaser Plastic Industries Ltd. v. Federation of Pakistan (1996 CLC 1042), Syed Nasir Ali v. Pakistan (2010 PTD 1924), Collector of Customs v. Flying Kraft Paper Mills (Pvt.) Ltd. (1999 SCMR 709), Government of NWFP v. Mejee Flour & General

Mills (Pvt.) Ltd. (1997 SCMR 1804) and also Ittefaq Foundry v. Federation of Pakistan (PLD 1990 Lahore 121).

Learned counsel argued that this discrimination was earlier identified by Peshawar High Court and held to be discriminatory. He argued that in matters of taxation this authority of the State, which they claim to be a policy, is untrammeled and drew attention to the case of Ittefaq Foundry reported in PLD 1990 Lahore 121.

He next argued that burden of proof that the rates are discriminatory is upon assesse and once the assesse establishes that there is a difference and no justified basis for such classification being provided, it shifts to the State which must define it by establishing that it is not discriminatory and in case State fails to provide any justification or classification then such classification must be held to be discriminatory and it must be struck down being unconstitutional. Counsel relied upon the case of Ghulam Nabi v. Province of Sindh (PLD 1999 Karachi 372), State of Maharastra v. Manubhai Pragaji Vasi (AIR 1996 SC 1), Bachan Singh v. State of Punjab (AIR 1982 SC 1325).

Learned counsel further emphasized that disparity in rates of GIDC is contrary to Article 158, 160 and 162 of the Constitution. Under Article 158 of the Constitution, a province within which a well head of gas is located has a priority to use the gas and hence Sindh has a surplus of gas and produces 70% of the gas consumed in Pakistan therefore does not require additional gas and cannot be required to pay GIDC for increasing gas supply. In support of this counsel relied upon case of Ashraf Industries v. Federation of Pakistan (2013 PTD 1732), Engro Fertilizer Limited v. Islamic Republic of Pakistan (PLD 2012 Sindh 50) and Lucky Cement Limited v. Federation of Pakistan (PLD 2011 Peshawar 57).

In relation to the status of the cess, learned counsel contended that the Peshawar High Court in Ashraf Industries case struck down the previous Act after observing that it could not be levied as tax. In the same way Hon'ble Supreme Court while hearing appeal observed that the tax could only be levied under certain entries and therefore such levy is beyond the scope of these entries and could not be levied as tax. The review petition also faced the same fate. He argued that insofar as the present stance of the federal government in relation to the status of the subject cess is concerned, the Annual Budget Statement of 2014-15 maintained it as a tax. The said budget statement was enacted after the Hon'ble Supreme Court's decision that it could not be levied as tax as the federal government took the same stance in the Annual Budget Statement for 2015-16 dated 05.06.2015. It was only after the arguments advanced in these cases, the federal government on 30.05.2016 after realizing the fault and considering the arguments of the plaintiffs took different stance and took U-turn, which is inconsistent with the previous two budget statements in relation to the same cess. It is claimed that once the status of this cess is assigned as a tax continuously for two years, the government cannot take a 'U' turn and is an inconsistent position.

It is further claimed that these budget statements are constitutional documents and not mere accounting procedure. It is claimed that Hon'ble Supreme Court on this score struck down the levy and such observation form part of the ratio decidendi.

The next point raised by the learned counsel is in relation to Section 8 of Act 2015 which seeks to validate the GIDC levied previously under Act 2011 and Ordinance promulgated subsequently. He argued that contrary to this the charging section 3 of Act 2015 does not provide any retrospectivity for such levy. None of the provisions of Ordinance

were saved by Act of 2015 and hence no collection under the Ordinance can therefore be made under Act 2015.

Another significant and important point raised by the learned counsel is the lack of cabinet approval. The GIDC was not laid before the federal cabinet and on this score alone it is liable to be struck down as the proposal was not approved by the cabinet and the previous Act of 2011 was struck down on the same score and the present statute i.e. Act 2015 suffers from same error/defect. In a recent judgment of the Hon'ble Supreme Court it is observed that the fiscal bills in particular must be placed before the federal cabinet prior to be laid before parliament. Reliance is placed on the case of Mustafa Impex v. Government of Pakistan passed in Civil Appeal No.1429 to 1436 of 2016.

In addition to the above Mr. Makhdoom Ali Khan has also raised points in relation to the rates of cess mentioned in the Second Schedule to the Act 2015 which provides a maximum cap whereas the actual rate of tax is to be specified through a notification. The arguments in relation to the rate of cess were addressed without prejudice to the above points of arguments.

Last argument as raised by the learned counsel is in relation to the decision of the Islamabad High Court. He claimed that this decision is not binding on this Court and is not even persuasive as it does not respond to the questions under discussion. He claimed that counsels appearing in the referred judgment of Islamabad High Court did not press the vires of GIDC Act 2015 and assailed only levy on the petitioners therein on the ground that cess so levied is in the nature of fee against which no services are provided by the respondents and so also in paragraph 5 on pages 69 and 70 the same observation was made. He further relied upon page 75 Para 14 that the only question involved was whether the petitioners derived any benefit or service due to the levy

and is there any element of reciprocity hence the referred judgment is totally distinguishable.

M/s Farogh Naseem and Abid S. Zubery also raised identical points as raised by M/s Makhdoom Ali Khan and Khalid Anwar and for the sake of brevity are not being repeated here while other counsels have adopted the arguments, as stated above.

As far as case of Mr. Jamshed Malik Advocate is concerned, his case with some other cases have already been separated from this bunch vide order dated 29.08.2016, which cases shall dealt with separately and independently along with other identical cases as and when fixed as being not covered with the issue involved in these suits.

In reply to the above arguments, Mr. Salman Talibuddin, learned Additional Attorney General appearing on behalf of Federation of Pakistan contended that the arguments of plaintiffs' counsels have rested primarily on the Peshawar High Court judgment in Ashraf Industries case which was upheld in appeal by the Hon'ble Supreme Court in case of Durrani Ceramics. He argued that on the basis of Durrani Ceramics judgment the entire case that was before Peshawar High Court, was argued afresh before the Hon'ble Supreme Court and therefore decision of Durrani Ceramics is binding on the issue of GIDC. It is further claimed that Durrani Ceramics judgment itself deal with and address each ground that was raised before Peshawar High Court and is now being agitated again before this Court. Learned Addl. Attorney General has relied upon the judgment of the Hon'ble Supreme Court that it was argued afresh and thereafter Hon'ble Supreme Court held that the levy was a fee and not a tax and thus could not have been introduced through a money bill. Learned Addl. Attorney General submitted that Hon'ble Supreme Court went on to observe that undoubtedly other consumers of the country as a whole would also

benefit from such projects but the same is inconsequential compared to the advantage that will accrue to the payers.

In relation to the domestic consumer on the ground of discrimination the Hon'ble Supreme Court has dealt with the issue and has also validated retrospective application of GIDC which is claimed to have been struck down by Peshawar High Court. He further argued that the Hon'ble Supreme Court has held that although it would have been appropriate to consult Council of Common Interest regarding levy of GIDC in the context of Article 160 of the Constitution however non-reference of the matter to it would not render the levy illegal or invalid. He claimed that since on the basis of above facts and circumstances it is argued that since Ashraf Industries case merged in Durrani Ceramics judgment reference can only be made to Hon'ble Supreme Court's decision and any reference to Ashraf Industries case would be bad in law as the Hon'ble Supreme Court has given its independent findings on the basis of re-argument of entire case before Hon'ble Supreme Court. The only ground remain to be cured on which the Peshawar High Court decision was upheld by the Hon'ble Supreme Court was that GIDC is a fee and not a tax which could not have been introduced through a money bill and therefore was not validly levied under the Constitution. Since this defect per learned counsel is now cured, Act 2015 is a valid enactment and piece of legislation.

He further argued that the plaintiffs' contention regarding fee that it cannot be charged for a service to be provided in future has already been addressed in Durrani Ceramics judgment. In addition the plaintiffs while re-arguing the case before Hon'ble Supreme Court did not raise this point even once and this stage is a belated try and weak attempt to avoid payment of cess. He gave example of Cotton Cess Act 1923 to show that cess has historically been charged under the law for

specific purpose such as for improvement and betterment of cotton manufacturer where no specific details and purpose is mentioned in the Statute or its schedule. He submitted that the rules framed under Cotton Cess Act did not even contain rate of cess that is charged and such omission has not served as a basis for nullifying the statute itself. He contended that specific leave to appeal was granted by the Hon'ble Supreme Court in Durrani Ceramics case as to whether any discrimination was made at the time of levy of cess on different consumers. He further argued that the Hon'ble Supreme Court while addressing this point of discrimination has considered the data of domestic sector and other consumers of the gas from whom cess is to be collected under the Act. He argued that this in no manner violates fundamental rights including property right or right to equality and that the ratio decidendi of the Hon'ble Supreme Court judgment is binding on this Court. He argued that the Statute can be revalidated by curing the defect on the basis of which it has been struck down and reliance was placed in the case of Molasses Trading & Export v. Federation of Pakistan (1993 SCMR 1905). It is claimed that the defect has now been cured as the bill for levying the fee is passed by both the houses and has validly reenacted. He submitted that once Hon'ble Supreme Court has termed the cess as fee it cannot change its classification and therefore mere classification of the GIDC as a tax revenue in the Budget Statement, contrary to the observation of the Hon'ble Supreme Court, cannot conceivably on its own form basis of striking down a validly enacted law. It is claimed that on the basis of reply of the Federal Government that it is a cess, its status cannot be changed in view of the observations of the Hon'ble Supreme Court. The plaintiffs' counsel took a stance that it is being imposed and levied as a tax on the basis of the Annual Budget Statement and a charging section as Section 3 in the Act 2015 would only show the unwillingness of the plaintiffs to make payment of GIDC. He

further relied upon the Court Fee Act 1870 and the Diplomatic & Consular Officers (Oaths and Fees) Act, 1948 which contains charging sections however it seeks to impose a fee only. It is claimed that since 2011 Act did not create any exemption or vested right in the consumer therefore the argument that their costs for the previous years have been accounted for and therefore GIDC Act affected past and closed transaction, is without any substance and basis. It is further argued that GIDC Act has been enacted pursuant to Entry No.2 in Part II of the Federal Legislative List (FLL) and hence parliament has legislative competence to enact the same as it has enacted several other laws in relation to natural gas such as Gas Theft Control & Recovery Act, 2016.

As to the contention of plaintiffs that the GIDC so collected is not being utilized for the purposes contemplated in Section 4 of Act 2015, it is claimed that it cannot form basis of striking down a validly enacted law. Without prejudice, learned Addl. Attorney General submitted that such contention would require a determination on fact which cannot be done in view of this Court order dated 19.02.2016 in terms whereof it is held that the suits are to be disposed of on the basis of question of law and will be decided as such without recording evidence.

As to non-framing of rules under Act 2015, it is replied that it cannot conceivably render the law and recovery thereunder as illegal. The rules under Act 2011 or under Act 2015 are only procedural in nature and do not contain any provision which concern the consumers. In this regard learned counsel has relied upon case of Punjab Employees Social Security Institution v. Manzoor Hussain Khan (1992 SCMR 441) and Amanullah Khan v. Federal Government of Pakistan (PLD 1990 SC 1092). Learned Addl. Attorney General further relied upon the two Acts i.e. Carriage by Air Act, 2012 and Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011 where no such rules

as required were framed and despite non framing of such rules the applications filed under these statutes are being considered and disposed of.

As to the rate of cess not being notified by the federal government, learned Addl. Attorney General submitted that Section 3 of Act 2015 in terms whereof cess is levied does not mention the term ‘notify’ or ‘notification’ which terms have been discussed by the Hon’ble Supreme Court in Karachi Metropolitan Corporation Karachi v. S.N.H. Industries (1997 SCMR 1228) and does not state that the rates must be notified by the federal government prior to being collected. Subsection 2 of Section 3 clearly states that the company shall collect and pay cess at the rates specified in the Second Schedule and subsection 3 further provides that the rate will be subject to maximum rates which have already been notified in the second schedule as part of Act 2015. Therefore, the contention that further notification is still required before GIDC can be collected, does not find any basis.

Insofar as Article 158 of the Constitution is concerned, it is claimed that it is not applicable insofar as imposition of cess for development of gas pipeline is concerned, as it does not relate to the distribution of gas between provinces. He further argued that notwithstanding Article 158 is a policy matter such a challenge would require a determination on the fact and as such cannot form basis for striking down of Act 2015 in the present proceedings.

Learned Addl. Attorney General thus concludes that in view of aforesaid facts and circumstances the suits are liable to be dismissed as the defect highlighted by the Hon’ble Supreme Court has been cured.

Heard learned counsel for the parties and perused the material available on record and so also the case law cited by the learned

counsels. The additional issue framed on 14.03.2016 is of substantial importance and all other issues are subject to the outcome and dependent on this issue i.e. Whether GID Cess ultra vires the Constitution? Hence, I propose to deal with this issue first.

680 For the purpose of deciding the constitutionality of the levy of cess it is important to determine the pedigree of this cess first. It has been argued by learned Addl. Attorney General that the nomenclature of the cess is already determined by the Hon'ble Supreme Court. It may well have been determined on the basis of Act 2011 but insofar as Act 2015 is concerned it requires an independent determination; the reason being that it is the intention of the legislature and the language of the Act which would form basis of such determination. Hence, simply on the basis of earlier determination the present cess under Act 2015 cannot be adjudged either as a fee or tax.

690 In both the Acts levy is defined as cess. In normal parlance cess is a tax imposed for specific purpose however any levy which is named as cess may also be a fee depending upon intent of legislature. In Durrani Ceramics case the Hon'ble Supreme Court after applying all principles and tests came to the conclusion that the levy under Act 2011 was a fee and that was also the intention of the federal government. Hon'ble Supreme Court while determining such classification looked at the language and conduct of the government and the treatment that the revenue met. Hon'ble Supreme Court also held that a tax on natural gas does not fall within any of the entries in Part-I of the Federal Legislative
700 List. An argument that this observation of the Hon'ble Supreme Court is sufficient to determine status of the cess is farfetched. The Hon'ble Supreme Court certainly has held that a tax on natural gas does not fall within any of the entries in Part-I but it does not automatically means that the cess under the present statute is necessarily a fee, it has yet to

pass certain hurdles which were considered by the Hon'ble Supreme Court in the earlier determination and hence are also relevant for the determination of present cess.

The Hon'ble Supreme Court further observed that since the GIDC is a fee and not a tax it could not have been introduced through money bill. Passing of the bill from both the houses again does not necessarily mean that the subject levy is immune from other tests prescribed under the law. The stand of the federal government insofar as present Act is concerned is that they have termed it as fee/tax and in the oral submissions as well learned Addl. Attorney General has classified the revenue as fee. Although the government could have been straightforward and termed such levy as fee after the conclusion and the determination of Hon'ble Supreme Court but they kept it vague. They could have named this revenue as fee straightaway to avoid any confusion but they opted to classify it as a cess, which they highlighted in their written statement as a fee/tax. Why have they chosen to call this revenue as a cess is best known to the government however the intention of the government is deduced from the Annual Budget Statement for the year 2014-15 and 2015-16. There seems to be a contradiction in statement given by the federal government and the Annual budget statement. The Annual Budget Statement classified this revenue as a tax revenue. This test was also applied by the Hon'ble Supreme Court in order determine the classification of the cess introduced through Act 2011 as the government under Article 80 of the Constitution had declared the revenue as "non-tax revenue" at the relevant time; meaning thereby that it could only be considered as a fee and that was the basis of determination. If it was to be determined only on the basis of domain of Federal Legislative List, subsequent tests were not required. The intention of the federal government could be

adjudged from the Annual Budget Statements of 2014-15 and 2015-16 which are constitutionally backed documents.

It is also significant that Annual Budget Statement for the year 2016-17 shows it as a non-tax revenue. This was done on account of the fact that the plaintiffs' counsels have already taken note of the earlier two Annual Budget Statements where the revenue has been defined as a tax revenue and insofar as the Annual Budget Statement of 2016-17 is concerned it does not demonstrate the true/actual intention of the government. This statement in the Annual Budget Statement was changed once the arguments were raised by plaintiffs' counsel in March, 2016.

They may have crossed the one hurdle by not presenting it through a money bill, as held by Hon'ble Supreme Court, for the reason that it was a fee and not a tax however they chose to have it presented before two houses but also chose to term it as a tax revenue which is apparently fatal as far as the entries in the First list of Fourth Schedule of Constitution is concerned since tax on the natural gas does not find its place within any of the entries mentioned therein.

Another significant point that leads to conclude as far as the classification of the present cess is concerned is language of Act 2015 which is different from old Statute as far as basic norms are concerned. The difference and distinction between Act 2011 and that of 2015 to the extent of Section 3 are as under:-

***Section 3 from Act 2011.***

> ***3. Levy of cess.***---*(1) The company shall collect and pay cess at the rates specified in the Second Schedule and in such manner as the Federal Government may prescribe;*
>
> *Provided that the Federal Government may decide to levy any rate of cess on any category of gas consumers subject to maximum rate provided in the Second Schedule.*

*(2) A mark up at the rate of four percent above three months KIBOR prescribed by the Federal Government shall be payable on any amount due under subsection (1), if the said amount is not paid within the prescribed time.*

***Section 3 from Act 2015***

***3. Levy of cess.***—*(1) The cess shall be levied and charged by the Federal Government from gas consumers, other than the domestic sector consumers, or the company at the rates as provided in the Second Schedule to this Act. The gas company shall be responsible for billing of cess to gas consumers, its collection from gas consumers and its onwards payment to Federal Government in the manner as prescribed by the Federal Government;*

*(2) The company shall collect and pay cess at the rates specified in the Second Schedule and in such manner as the Federal Government may prescribe;*

*Provided that the Federal Government may decide to levy any rate of cess on any category of gas consumers subject to maximum rate provided in the Second Schedule.*

*(3) A mark up at the rate of four percent above three months KIBOR prescribed by the Federal Government shall be payable by the gas consumer or the company on any amount due under subsection (1), if the said amount is not paid by the said gas consumer or by the said company respectively within the prescribed time, markup payable by the gas company or any markup payable by gas consumer to the gas company shall be deposited in such manner as the Federal Government may prescribe:*

*Provided that the said markup shall be payable with effect from the 1st July, 2015."*

Previously it was obligated upon gas companies to collect and pay cess whereas in the present Statute under challenge a proper charging section has been introduced which states that cess shall be levied and charged by the Federal Government. The word levied and charged are essential and conclusive insofar as the determination of revenue is concerned as it relates to imposition of tax. What prompted them to cause this substantial change in the Statute especially with regard to the charging section is not ascertainable. Had it been introduced as a fee, section 3 could have been incorporated unchanged. These are some of

the material grounds which tend to indicate that the intention of the legislature is to introduce this cess as a tax and hence could not withstand the restrictions imposed by the legislative entries of Fourth Schedule.

Lets analyze the subject cess from angle as presented by the Federal Government i.e. “the levy is a fee”. The primary objection in this regard as raised by plaintiffs’ counsels is ignorance of Article 153 and 154 of the Constitution. The federation has sought to rely upon Entry No.2 (Natural Gas) and Entry No.15 (fee in respect of any matter enumerated in the list) of Part II of Fourth Schedule of Federal Legislative List. It is the case of federal government that they have thus powers to legislate and impose a fee on natural gas. The position of Articles i.e. 153 and 154 and the Federal Legislative List as it emerged out after 18th Amendment is that there is only one legislative list which is Federal Legislative List which is further divided in Part-I and Part-II.

Insofar as the subject of Part-I of the list is concerned it falls in exclusive domain of federal government for legislation whereas with regard to Part-II the construction and structure of Article 153 and 154 of the Constitution is raised in such a way that no doubt that the legislative powers were/are still with the parliament however it shall be only after the policy is formulated by CCI. Although the federation has legislative powers in relation to subjects in Part-II as well it however does not enjoy the exclusive jurisdiction over the subject of Part-II of the list insofar framing of policies of Part-II of Federal Legislative List is concerned. In case the arguments of learned Addl. Attorney General is accepted the intention behind the two separate lists would become redundant. It is the interest of the provinces in these subjects which are to be protected by means of division of such subjects of Part-II of Federal Legislative List to ensure that the federating units should frame

a policy for the federation to legislate. Thus the legislation under Part-II of the list has to be carried out in a specified manner. The Federal Legislative List, specially Part-II, cannot be read in isolation of Article 153 and 154 of the Constitution. For the assistance Article 153 and 154 are reproduced as under:-

*"153. (1) There shall be a Council of Common Interests, in this Chapter referred to as the Council, to be appointed by the President.*

*(2) The members of the Council shall be------*

*(a) the Chief Ministers of the Provinces, and*

*(b) an equal number of members from the Federal Government to be nominated by the Prime Minister from time to time.*

*(3) The Prime Minister, if he is a member of the Council, shall be the Chairman of the Council but, if at any time he is not a member, the President may nominate a Federal Minister who is a member of the Council to be its Chairman.*

*(4) The Council shall be responsible to [Majlis-e-Shoora] (Parliament)].*

*"154. (1) The Council shall formulate and regulate policies in relation to matters in Part II of the Federal Legislative List and, in so far as it is in relation to the affairs of the Federation, the matter in entry 34 (electricity) in the Concurrent Legislative List, and shall exercise supervision and control over related institutions.*

*(2) The decisions of the Council shall be expressed in terms of the opinion of majority.*

*(3) Until [Majlis-e-Shoora (Parliament)] makes provision by law in this behalf, the Council may make its rules of procedure.*

*(4) [Majlis-e-Shoora (Parliament)] in joint sitting may from time to time by resolution issue directions through the Federal Government to the Council generally or in a particular matter to take action as [Majlis-e-Shoora (Parliament)] may deem just and proper and such directions shall be binding on the Council.*

*(5) If the Federal Government or a Provincial Government is dissatisfied with a decision of the Council, it may refer the matter to [Majlis-e-Shoora (Parliament)] in a joint sitting whose decision in this behalf shall be final."*

Thus, it will be seen that in terms of Article 153(2) the Council of Common Interest consists of Prime Minister, Chief Ministers of all

provinces and three additional members from federal government which constitute “federating units”. In terms of Article 153(4) it is the Council which is responsible to both houses of parliament having federal and provincial representation. Article 154(1) provides basic functions of the council which functions include formation and regulation of policies in relation to matters in Part-II of the Federal Legislative List and shall exercise supervision and control over related institutions.

In view of the above it is the policy which is to be formulated first before legislation i.e. once the policy is framed only then the powers vested with the federal government to legislate on the subject could be exercised. The structure and scheme of the Constitution thus as available to us provides that all subjects available in Para-II of the Legislative List must be placed before the council to formulate a policy before it could be referred to the Parliament for legislation. Reliance of learned Addl. Attorney General in Durrani Ceramics case with reference to Council of Common Interest is also attracted in a sense that the powers for legislation rest with the Federal Government. No doubt such powers are with the Federal Government and are not being taken away and would still be with the Federal Government however it is only once the policy is framed by CCI that the powers of legislation could be exercised. Although in the case of Durrani Ceramics the question of framing of policies was neither raised nor discussed however it provides a forum of legislation. In this regard question was considered by Hon’ble Supreme Court in the case of Watan Party v. Federation of Pakistan reported in PLD 2006 SC 697. In this case the Hon’ble Supreme Court consisting of 9-Member Bench gave certain observations and relevant paragraphs are as under:-

> *(1) Conscious of the mandate of Articles 153 and 154 of the Constitution we hold that the establishment and working of the Council of Common Interests (CCI) is a*

*cornerstone of the Federal structure providing for protection of the rights of the Federating units. Mindful that this important institution is not functioning presently and taking note of the statement made by the counsel for the Federal Government Mr. Abdul Hafeez Pirzada that the process for making it functional is underway, we direct the Federal Government to do the needful expeditiously as far as possible but not later than six weeks.*

*29. Besides above reasons there is an important aspect of the case namely these remedies are available within the Ordinance and Mr. Abdul Mujeeb Pirzada learned ASC has challenged its vires on the touchstone of Articles 153 & 154 of the Constitution. Therefore the law vires, of which have been challenged, it would not be fair to compel the petitioner to avail the remedy under the same law. The High Court within its limited jurisdiction under section 28 cannot strike down any of the provisions of the Ordinance. Furthermore, petitioner's learned counsel has raised issues of great public importance falling within the Constitutional domain of this Court which could not have been adequately addressed to by the Court in terms of section 28 of the Ordinance.*

*35. After perusal of judgment in Muhammad Nawaz Sharif's case as well as an earlier judgment reported in Khawaja Ahmad Tariq Rahim v. The Federation of Pakistan (PLD 1992 SC 646), one can well conceive the importance of CCI and by making it functional the Federal Government can resolve number of issues/differences including the process of privatization of industries owned by the Federal Government as per mandate of the Constitution and procedure laid down therein. In the instant case, the decision/approval was taken to privatize good number of industries mentioned in the schedule attached to the decision dated 29th May, 1997 including P.S.M.G. Therefore the view taken by this Court in the case of Messrs Gadoon ibid is respectfully approved with reference to functioning of C.C.I. under Articles 153 & 154 of the Constitution. As a consequence whereof the view taken by the Sindh High Court in the impugned judgment is upheld.*

*52. Before discussing the manner in which CCI policies are implemented by the Federal Government it would be appropriate to note that framing the policy and issuing the programme for the purpose of carrying out privatization are distinct and different from each other. The word "Policy" has been defined in Black's Law Dictionary 7th Edition Page 1178 as follows:*

> *"the general policies by which a Government is guided in its management of public affairs."*

*Whereas the word "Programme" has been defined in 20th Century Dictionary Page 1107:*

> *"the schedule of proceedings for and list of participants in a theatre performance, entertainment, ceremony, etc; an agenda, plan or schedule, a series of the planned projects to be undertaken".*

*On having seen the meanings of both the expressions one can conveniently conclude that the programme which is to be provided by the Commission is merely a schedule for the purpose of the privatization in a manner prescribed in law.*

*53. Article 154 of the Constitution has itself provided mechanism for the purpose of functioning of the CCI. Its sub Article (3) lays down that until "Majlis-e-Shoora (Parliament) makes provisions by law in this behalf, the Council may make its rules of procedure". In pursuance of such interim arrangement the Council has framed its rules as far back as 12th January, 1991 which have inter alia provided, a procedure for implementing the decisions. Rule 4 of the Procedure stipulates the kind of cases which are to be submitted to the Council for formulation and regulation of the policies on which the CCI has jurisdiction of supervision and control. The list provided under the sub rule (c) includes all undertaking projects and schemes of such institutions, establishments, bodies and corporations; industries, projects and undertaking owned wholly or, partially by the Federal Government or by a Corporation set up by the Federation. Essentially it also includes the supervision and control over PSMC."*

The Hon'ble Supreme Court has thus held Council of Common Interest to be a cornerstone of the Constitution. Cornerstone of a building is equated with one without which entire edifice collapses. Durrani Ceramics case, while dealing with the issue, in paragraph 42 of the judgment observed that by not referring the matter to CCI the validity of legislation cannot be challenged. The point that has now been raised and in consideration is that unless the policy is formulated, the legislation by Federal Government would be premature.

Next point is in relation to the amount under the Acts recovered which has not been utilized for the purposes specified in the Acts. The reliance was placed on the newspaper reports that the government has collected around 136 billion under GIDC head but no part of this has been spent on the gas related infrastructure development. The constitutionality of legislation on the touchstone of the amount being spent for some other purpose cannot be challenged on the touchstone of news clipping unless it is determined conclusively that amount was/is meant for other purpose. It may have some other legal recourse for

diverting such finances if no other supporting grounds are available for such determination.

This point however is also crucial in relation to determining the intention of Federal Government and status of cess as all these reports including the minutes of meeting of Economic Coordination Committee of the Cabinet held on 28.01.2016 tent to show mis-utilization of GIDC. The relevant part of the minutes read as under:-

> "*The ministry requested the ECC of the Cabinet to:*
>
> *(i) Re-affirm its earlier decision made vide case No.ECC-124/15/2015, dated 03.09.2015 whereby gas companies were allowed to arrange funding amounting to Rs.101.00 billion from commercial banks, instead of GIDC based, on GoP guarantee.*
>
> *(ii) Advise OGRA that subject be included in the asset base of gas companies subject to condition that RLNG pricing will be ring fenced and all directly attributable costs will be charged/recovered from RLNG consumers without affecting the consumers relying on domestically gas.*
>
> *(iii) Allow financial costs incurred in creation of RLNG infrastructure of national importance as admissible expense in the revenue requirement of the utility companies.*
>
> *Decision*
>
> *The Economic Coordination Committee of the Cabinet considered the Summary dated 15th January 2016 submitted by the Ministry of Petroleum …. And approved the proposals contained in Para-7 of the Summary."*

If the subject cess is used other than the purpose for which it was recovered the intention of the government for treating the subject cess is clear i.e. tax as only then these finances could be utilized and diverted as deemed fit and proper by the government. Since the government is not spending the amount for the purposes it is being collected there is no quid pro quo and hence no fee could be charged in this regard. Reliance is placed on the case of Kewal Krishan Puri v. State of Punjab reported in AIR 1980 SC 1008, the relevant part of which reads as under:-

> *"23. From a conspectus of the various authorities of this Court e deduce the following principles for satisfying tests for a valid levy of market fees on the agricultural produce bought or sold by licensees in a notified market area:-*
>
> *(1) The amount of fee realized must be earmarked for rendering services to the licensees in the notified market areas and a good and substantial portion of it must be shown to be expended for this purpose.*
>
> *34. …No Market Committee can be permitted to utilize the fund for an ulterior purpose howsoever benevolent, laudable and charitable the object may be. The whole concept of fee will collapse if the amount realized by market fees could be permitted to be spent in this fashion."*

Similarly in the case of Shri Sajjan Mills Ltd. v. Krishi Upaj Mandi Samiti, Ratlam reported in AIR 1981 MP 30, the relevant part of which reads as under:-

> *"… The argument is that although the fee has been enhanced, the respondent No.1 has not rendered nor contemplated to render services to the traders in the notified market area, nor any substantial portion of the fee so realized by enhancement is shown to be spent for the purpose. This argument has substance and must be accepted….*
>
> *…*
>
> *In Kewal Krishan's case (supra), the Supreme Court was concerned with the provisions of the Punjab Agricultural Procedure Markets Act which also contains similar provisions for levying and charging market fee on agricultural produce bought or sold in the notified market area. After discussing the law on the subject at length, their lordships pointed out that at least a good and substantial portion of the amount collected on account of fees, may be in the neighborhood of two-thirds or three-fourths, must be shown with reasonable certainty as being spent for rendering services to the licensees… We have earlier show that in the present case the major amount of market fee collected was spent on the purchase of plant protection pesticides, and that being not a purpose correlated with the service to the buyers of agricultural produce the imposition must be held to be invalid."*

Much emphasis was provided in relation to the doctrine of merger. It is substantially argued that Peshawar High Court judgment has merged with that of Hon'ble Supreme Court, which contention is opposed by learned Addl. Attorney General on the basis of a part of the judgment as in paragraph 5, it is stated that it was argued afresh and hence the

doctrine of merger would not apply. Mr. Makhdoom Ali Khan also drew attention to paragraph 5 of the judgment of Durrani Ceramics case and submitted that learned Addl. Attorney General pointed out that while the case in Peshawar had been decided, other cases impugning GIDC were pending in Baluchistan, Punjab and Sindh. The decision of Hon'ble Supreme Court in Peshawar appeals would have bound all the high courts and as a result all those cases would have been disposed of. He therefore sought permission to raise additional grounds taken up in the matter pending before other high courts. The Hon'ble Supreme Court granted the request as being reasonable.

Perusal of the judgment of the Hon'ble Supreme Court in Durrani Ceramics case does not at all suggest that any of the grounds urged before Peshawar High Court were given up. It was appeal preferred by Federal Government. It seems that the request was to raise additional grounds in the cases pending before different high courts. None of the grounds as raised before Peshawar High Court were abandoned by respondents. Even otherwise the Hon'ble Supreme Court while disposing of the appeal has not interfered with the findings of the Peshawar High Court.

In the case of Glaxo Laboratories Limited v. Inspecting Assistant Commissioner of Income tax (PLD 1992 SC 549), the Hon'ble Supreme Court has held that:

> *"In a case when there is only one order against which appeal has been provided, filed and decided then there does not seem to be a scope for argument that as some objections or pleas which did exist but have not been taken, pressed or considered, that part of the order which is covered by such plea do not merge in the appellate order. Such a view will create uncertainty and is bound to result in confusion and chaos and law does not favour uncertainty in decision and in revenue matters one has to be very specific and certain."*

Similarly in the case of Nasrullah Khan v. Mukhtar-ul-Hassan (PLD 2013 SC 478) it has been observed as under:-

> *"It is well settled on the basis of merger principle, that when a judgment and decree of a Court below is assailed in appeal or revision before the higher forum and it is affirmed by that (higher) forum, for all intents and purposes, the decree/order of the forum below merges into the decree of the higher forum, meaning thereby, that it is integrated, implanted, inculcated, infixed and instilled into the decree of the higher forum and becomes the decree/order of the later forum for all legal intents and implications."*

Following the dictum laid down by the Hon'ble Supreme Court the judgment of Peshawar High Court is merged with that of Hon'ble Supreme Court. The points raised and decided by Peshawar High Court were not disturbed by Hon'ble Supreme Court and all such defects were not rectified or corrected in a subsequent legislation, hence the observation of the Hon'ble Supreme Court and that of Peshawar High Court so long these were not reversed would continue to bind the courts.

The judicial decision declaring a Statute as invalid cannot be overruled by subsequent legislation simply by enacting a validating Statute containing non-obstante clause. Non-obstante clause would take its presumptive effect only when the basis of the judicial decision is removed which normally is exercised by introducing deeming clause and a non-obstante clause for overriding any judicial decision. The consequence is very important and relevant. The deeming clause which removes the basis of invalidity should come first. There were as many as ten basis for considering the Act 2011 as unconstitutional and ultra vires as declared in Ashraf Industries Case and to be examined in the light of Hon'ble Supreme Court judgment which are as under:-

i) Act 2011 could not have been passed by the National Assembly as a money bill;

ii) Federation cannot take inconsistent position before the parliament under Article 80 of the Constitution and before the Court under Article 199 of the Constitution;

iii) This was not a mere accounting procedure;

iv) GIDC is one of the costs added to the price of the product;

v) Right to property (Article 23 and 24 of the Constitution) was violated;

vi) Right to equality (non-discrimination) (Article 25 of the Constitution) was violated;

vii) Fees cannot be charged for future services;

viii) Act 2011 suffered from excessive delegation;

ix) Article 158 of the Constitution was violated;

x) GIDC Bill was not laid before the Federal Cabinet.

The present Statute was since passed by both the houses therefore the first basis apparently was removed. Hon'ble Supreme Court has upheld the judgment and has not disturbed the findings of the Peshawar High Court which has now merged with the judgment of the Hon'ble Supreme Court, meaning thereby that all the basis provided to invalidate the Statute are now part of the order of the Hon'ble Supreme Court.

Those defects mentioned above are some formidable basis to declare Act 2011 as unconstitutional by Peshawar High Court. I have given my view in relation to the merger of the Peshawar High Court judgment with that of Hon'ble Supreme Court based on the findings of the case reported as Glaxo Laboratories Limited v. Inspecting Assistant Commissioner of Income tax (PLD 1992 SC 549) and other as Nasrullah Khan v. Mukhtar-ul-Hassan (PLD 2013 SC 478).

The counsels before the Hon'ble Supreme Court in the earlier round made a request to urge new grounds before different high courts

where the vires of 2011 Act was challenged. In the absence of such request for raising new grounds, the judgment of Hon'ble Supreme Court may have an effect on pending cases including constructive resjudicata if no such request of new ground was raised before Hon'ble Supreme Court.

After applying the principles of merger, the fresh finding or new finding for the basis which rendered the earlier law ultra vires is certainly not required. However as to the point in relation to discriminatory rates of GIDC which was one of the bases as provisions of Article 23 to 25 of the Constitution were claimed to have been violated, no doubt legislation is domain of Federal Government but it is also to be viewed from the angle of Articles 153 and 154 and 158 of the Constitution since the two provinces are bulk producer of gas and no priority was given.

The Act of 2015 also transgresses the Constitution in a manner that it was not laid before Cabinet for its approval. In the case of Ashraf Industries Peshawar High Court in paragraph 15 of the judgment laid down that in a parliamentary system of government, it is mandatory that before tabling the bill before parliament for legislation to make it an Act of Parliament it shall be placed before the federal cabinet. The GIDC Bill 2015 was not laid before the federal cabinet. It is quite surprising that despite this discrepancy as highlighted by the learned Division Bench of Peshawar High Court, the federal government has not taken any step before tabling the bill before parliament for legislation to rectify the error. Learned Addl. Attorney General has also surprisingly made no submissions in this regard. The Hon'ble Supreme Court while passing judgment in the case of Mustafa Impex v. Government of Pakistan in Civil Appeal No.1429 to 1436 of 2016 held that no bill can be moved in parliament on behalf of the federal government without having been

approved in advance by the cabinet. The relevant text of the judgment is mentioned in paragraph 84 which is reproduced as under:-

> *(v) The ordinance making power can only be exercised after a prior consideration by the Cabinet. An ordinance issued without the prior approval of the Cabinet is not valid. Similarly, no bill can be moved in Parliament on behalf of the Federal Government without having been approved in advance by the Cabinet. The Cabinet has to be given a reasonable opportunity to consider, deliberate on and take decisions in relation to all proposed legislation, including the Finance Bill or Ordinance or Act. Actions by the Prime Minister on his own, in this regard, are not valid and are declared ultra vires.*
>
> *(vi) Rule 16(2) which apparently enables the Prime Minister to bypass the Cabinet is ultra vires and is so declared."*

Although it could have been argued that it relates to an issue pertaining to levy of tax and since stance of the learned Addl. Attorney General is that this cess is being treated as fee therefore it is not necessary for the federal government to lay it before the cabinet, I am of the view that primarily the defendant has treated this revenue as tax revenue and as such the case of Mustafa Impex referred above had its applicability. Even otherwise if this is to be treated even as a fee the case of Ashraf Industries which is merged with that of Hon'ble Supreme Court, plays a pivotal role since such levy which was being considered as a fee was thrown out on account of the fact that it was not laid before the cabinet. These principles would apply to levy of fee as well.

Lastly the decision of Islamabad High Court at the outset is not applicable for the simple reason that the petitioner therein did not press the vires of GIDC Act 2015 and assailed only the levy on the petitioner therein on the ground that the cess so levied is in nature of fee against which no service is provided. In paragraph 5 of the judgment the Court observed that the petitioner inter alia assailed the vires of Gas Infrastructure Development Cess however during course of the argument learned counsel for petitioner submitted that he shall not press the vires

of the referred Act. Similarly, in Para 14 the learned Islamabad High Court held that the sole question that was to be determined in view of judgment cited above and the facts and circumstances of the case was whether the petitioner derived any benefit of service due to the levy or was there any element of reciprocity. This decision thus has no relevance for the controversy before this Court.

There is one additional point raised which relates to the issuance of notification of the exact amount/rate of cess to be recovered under the Act 2015 which notification has not been issued and the government under the Act is recovering the maximum amount. I am convinced with the reasoning of learned Addl. Attorney General that on this count entire Statute cannot be struck down. It may affect the recovery mechanism until such time the notification is issued, if at all required under the law, however the vires of the Statute itself would remain unaffected.

The appeal thus filed by the Federal Government was dismissed and for the reasons disclosed therein the impugned judgment of the learned Peshawar High Court was not liable to be reversed. Learned Peshawar High Court provided as many as eight grounds for striking down the cess and except one in relation to introducing the GIDC through money bill, none of the grounds and reasons were cured. The Hon'ble Supreme Court has highlighted such grounds in paragraph 3 of the judgment. I have not discussed other grounds in detail as discussed by Peshawar High Court against which appeal was preferred and dismissed for the reasons that by way of merger with the judgment of Hon'ble Supreme Court such fresh findings were not required.

All such points, which were not disturbed by the Hon'ble Supreme Court or by way of merger form part of judgment of Hon'ble Supreme Court, are not being addressed except those which are additional, new and unattended points hence are expressly dealt with.

In view of above facts and circumstances I am of the view that the Gas Infrastructure Development Cess Act, 2015 (GIDC Act 2015) impugned in these suits ultra vires the Constitution for the reasons mentioned above. As far as Gas Infrastructure Development Cess Act,
1280 2011 and Gas Infrastructure Development Cess Ordinance 2014, as challenged in some of the subject suits, are concerned the same are also hit by same reasoning and held to be ultra vires and unconstitutional. In so far as Issue No.4 is concerned since the amount has already been collected in pursuance of Act 2015, it is thus in view of above reasoning the issue is answered in affirmative and the amount so collected is liable to be refunded/adjusted in the future bills of the respective plaintiffs. The suits are accordingly decreed in terms of the above with no orders as to costs.

Dated: 26.10.2016 **Judge**