

**Stereo. H C J D A 38.**  
***Judgment Sheet***

**IN THE LAHORE HIGH COURT LAHORE**  
**JUDICIAL DEPARTMENT**

**Case No: W. P. No. 23657 of 2016.**

Nishat Hotel and Properties      **Versus**      The Province of Punjab, etc.  
Limited etc.

**JUDGMENT**

Date of Hearing:	19.07.2019.
Petitioner(s) by:	M/s Imtiaz Rashid Siddique and Barrister Shehryar Kasuri, Advocates.
Petitioner(s) in other petitions by:	M/s Uzair Karamat Bhandari, Mansoor Usman Awan, Shehzad Ata Elahi, Naved Amjad Andrabi, Khurram Saleem, Khalid Ishaq, Rana Muhammad Afzal, Muhammad Raza Qureshi, Rashid Anwar, Asad Hussain, Munawar-us-Salam, Shahid Hussain, Barrister Aiyan Tariq Bhutta, Mubashir Aslam Zar, Shahbaz Butt, Khurram Shahbaz Butt, Maria Farooq, Mian Tariq Hassan, Muhammad Humzah, Raza Imtiaz, Jamshaid Alam, Sabeel Tariq Mann, Qadeer Kalyar, Barrister Ahmed Pervaiz, Shehzeen Abdullah, Hyder Ali Khan, Mohsin Mumtaz, Ali Almani, Asghar Leghari, Barrister Kashif Rafiq Rajwana, Muhammad Asif Butt, Mansoor Ali Ghanghro, Barrister Ameer Abbas Ali Khan, Barrister Haroon Dugal, Waqas Ajwad, Syed Zia Haider Rizvi, Sajjad Haider Rizvi, Gulraiz Asghar, Jahanzaib Awan, Khawar Bharwanah, Aamir Iqbal Basharat, Umair Yasin, Moeen Ahmed, Adnan Ahmad, Imran Muhammad Sarwar, Muhammad Ajmal Khan, Ch. Muhammad Saeed Zafar, Dr. Ilyas Zafar, Syed Nasir Ghillani, Iram Fatima, Mustafa Kamal, Muqaddas Zahra, Rabia Rehman, Rao Athar Akhlaq, Azmat Sidhu, Rana Munir Hussain, Mudassar Shujauddin, H.M. Azhar Ali, Muhammad Azhar Khan Joyia, Sikandar Javed, Sohail Anjum Virk, Ehsan-ur-Rehman, Muhammad Nasir Khan, Abdul Waheed Habib, Mian Muhammad Shafiq, Daud Aziz Khokhar,

Shezada Mazhar, M. Jawwad Khan Lodhi, Asad Raza, Ali Rana, Muhammad Younas Khalid, Bilal Bashir, Masood Ahmad Wahla, Ashan Masood, Miss Rohi Saleha, Sajjad Ali, Muhammad Yasir Randhwa, Syed Muhammad Ijaz, Mian Muhammad Usman, Muhammad Saad Khan, Haji Abdul Ghafoor, Muhammad Shahid Piracha, Muhammad Azam Zafar, Muhammad Mohsin Virk, Muhammad Ahsan Virk, Arsalan Chaudhry, Muhammad Shabbir Hussain, Malik Muhammad Ali Awan, Waheed Ashraf Bhatti, Salman Akram Raja, Malik Ahsan Mehmood, Umer Akram Chaudhry, Barrister Syed Reza Ali, Humzah Mehboob, Barrister Sardar Mohammad Ali, Mahr Bano Langrial, Iftikhar Ahmad Ansari, Khurram Hussain, Sheikh Aqeel Ahmad, Saqib Haroon Chishti, Hina Bandealy, Arslan Saleem Chaudhary, Imran Iqbal, Farhan Shahzad, Zohaib Ali Sidhu, Amir Wali, Moazam Ali Malhi, Ch. Waqas Ali Bhutta, Mian Mahmood Rashid, Faqir Hussain Rana, Sh. Muhammad Umar, Zaeem-ul-Farooq Malik, Barrister Muhammad Ahmad Pansota, Zahid Ateeq Ch., Ahmad Uzair, Shahbaz Siddique, Sumair Saeed Ahmad, Raja Muhammad Ali, Ch. Bilal Butt, Hameed Ahmad Butt, Tariq Mahmood Ansari, Zahid Imran Gondal, Ayyaz Shaukat, Ahmad Uzair, Rana Bilal Ghaffar Khan, Uzair Khalid, Malik Faisal Khalid, Khalil-ur-Rehman, Minam Karim, Muhammad Rafique Chaudhry, Sayyed Alamdar Hussain, Barrister Hassan Nawaz Shaikh, Manzar Latif Mian, Arslan Riaz, Humza Humayun, Muhammad Ijaz Ali Bhatti, Khurram Saeed, Mirza Israr Baig, Mehdi Tirmzi, Rana Zain Tahir, Saadat Ali Saeed, M. Zohaib Shahid, Nawazish Ali, Kashif Hussain, H. M. Majid Siddiqi, Ch. Babar Ali, Muhammad Baqir Hussain, Khursheed Ahmed, Irteza Ali Naqvi, Asif Afzal Bhatti, Muhammad Naeem Munawar, Riaz Ahmad Bajwa, Usman Ali Bhoon, Ajab Gul, Waseem Ahmad Malik, Syed Muhammad Ijaz, Muhammad Taimoor Hassan, Mian Asif Arshad, Hashim Aslam Butt, Zain Sakander, Abid Hussain Sial, Imran Anjum Alvi, Muhammad Faheem Bashir, Mirza Mubashar Baig, Basharat Ali Awan, Fazal Abbas, Manzoor Ahmad Khan, Hammad-ul- Hassan Hanjra, Ali

	<p>Awais, Tahir Butt, Mohammad Raheel Kamran Sheikh, Khubaib Ahmad, Zulfiqar Ali Khan, M. Naveed Khan, Mudassar Ali Hussain, Sardar Balakh Sher Khosa, Shahzaib Masood, Ali Sibtain Fazli, Hasham Ahmad Khan, Umar Tariq Gill, Esa Ahmad Jalil, Abad-ur-Rehman, Rabeel Raza Bhatti, Sardar Kalim Ilyas, Salman Zaheer Khan, Ahmer Bilal Soofi, Ch. Muhammad Ali, Usman Virk, Farid Adil Ch., Sajid Wali, Abid Wali, Almas Arif, Majid Jehangir, Muhammad Bilal Ramzan, Khalid, Shoaib Rashid, Usman Nasir Awan, Shahzad Hassan Pervaiz, Habib-ur-Rehman, Faizan Shuja Butt, Tahir Bashir, M. Iqbal Hashmi, Saad Rasool, Hamza H. Rashid, Shabbir Ahmad Mughal, Muhammad Bilal Pervaiz, Syed Sajjad Hussain Zaidi, Ch. A. D. Kahlon, Fawad Malik Awan, Malik Muhammad Arif Bara, Malik Mubarak Ali, Rao Tasavvur Ali, Sayyed Ali Imran Rizvi, Ali Imran Rao, Zahid Saleem, Muhammad Salman Siddiqui, Rustam Nawab Luk, Naeem Anjum, Malik Muhammad Asghar Javed, Mirza Bilal Zafar, Tahir Mahmood Sundhu, Barrister Haris Ahmad, Malik Zahid Hussain, Babar Ilyas Chatha, Ch. Awais Ahmad Qazi, Zaki Rehman, Mubashar Hussain, Sheikh Khurram Abbas, Tanveer Ahmad, Khudad Chattha, Raza Kazim, Ali Abid Khagga, Muhammad Yousaf Ch., Faisal Hameed Butt, Muhammad Siddiq Mughal, Jabran Tariq Butt, Tanveer Aslam, Ubaid Ullah Kalyar, Muhammad Munsif Ali, Syed Raees-ud-Din Ahmad, Ashfaq Ahmad Malik, Ch. Qamar uz Zaman, Malik Kafeel Ahmad Khokhar, Waqar Ranjha, Muhammad Zubair, Muhammad Arif Goraya, Syed Iftikhar Hussain Shah, Malik Bashir Ahmad Khalid and Muhammad Asim Mumtaz, Advocates.</p>
Respondent(s) by:	<p>M/s Sajid Ijaz Hotiana, Tanzil-ur-Rehman Hotiana, Barrister Asfandyar Khan Tareen, Waqqas Ahmed Mir, Sarfraz Ahmad Cheema, Shahzad Ahmad Cheema, Barrister Bilal Ramzan, Ahmad Hassan, Muhammad Hassan Abdullah Niazi, Syed Moazzam Ali Shah, Adeel Shahid Karim, Foziya Bukhsh, Kausar Parveen, Sufian Ejaz, Mohammad Amir Malik, Mian Wajahat Ali, Malik Muhammad Awais Khalid, Muqtadir Akhtar Shabbir, Mian Osman A.</p>

	<p>Shaukat, Ijaz Mahmood Chaudhary, Ch. Muhammad Zafar Iqbal, Ch. Muhammad Jawad Zafar, Qamar Zaman Qureshi, Muhammad Awais Kamboh, Hassan Iqbal Warraich, Mian Yusuf Umar, Saleem Akhtar Sheikh, Malik Abdullah Raza, Shahid Sarwar Chahil, Ans Gull, Muhammad Umer Qureshi, Arslan Abbas, Rana Muhammad Mehtab, Muhammad Faisal Iqbal, Shahid Usman, Muhammad Hussain, Rai Muhammad Javed Iqbal Kharal, Umair Anwar, Abdul Waheed Khan Baloch, Falak Sher, Saba Saeed Sheikh, Zubair Siddique, Rana Irfan Shahid, Hassan Ali, Ali Usman, Syed Zail-ul-Abideen Bukhari, Afzal Hussain and Saad Amir, Advocates for the respondents.</p> <p>Mr. Monim Sultan, Assistant Attorney General for Pakistan.</p> <p>Barrister Zargham Lukhesar and Ch. Muhammad Jawad Yaqoob, Assistant Advocates General, Punjab, Lahore.</p> <p>Mrs. Naseem Mushtaq, Law Officer, Finance Deptt.</p> <p>Mr. Muhammad Akmal, Section Officer (Tax).</p> <p>M/s Nadeem Saleh-ud-Din and Muhammad Afzal Bashir, Deputy Secretaries (Legal), Punjab Revenue Authority.</p> <p>Mahmood Ali, Assistant Manager NLC, T.N.B., Lahore.</p>
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**Shahid Jamil Khan, J:-** Composition and establishment of Punjab Revenue Authority (“PRA”), under the Punjab Revenue Authority Act, 2012 (“PRA Act of 2012”) is questioned, through this and connected petitions (enlisted in Schedule-A) by seeking a declaration that validation through Punjab Revenue Authority (Amendment) Act, 2016 (III of 2016) (“**First Amendment Act**”) and Punjab Revenue Authority (Second Amendment) Act, 2016 (XL of 2016) (“**Second Amendment Act**”) is *ultra vires* for not curing the lacunas as pointed out in judgment by learned Single Bench in *Institute of Architects, Pakistan (Lahore Chapter) v. Province of*

Punjab and others (PLD 2016 Lahore 321) “*Institute of Architects’ Case*”.

2. The judgment in, *Institute of Architects’ Case*, was delivered on a challenge to the actions and constitution of PRA in absence of notification for its establishment under Section 3(1) of PRA Act of 2012. Since absence of notification was undeniable, therefore, appointments of the Chairperson, Members and all actions, decisions including framing of the Rules under PRA Act of 2012 were declared without lawful authority.

During proceedings, Punjab Revenue Authority Amendment Act, 2013 was promulgated on 22.10.2015, which lapsed in January 2016, being not placed before the Provincial Assembly and was repealed also by the First Amendment Act. After the judgment, in *Institute of Architects’ Case*, on 25.01.2016, First and Second Amendment Acts were promulgated, respectively on 06.02.2016 and 06.09.2016.

Intra Court Appeal against the judgment was dismissed; holding that Appellants had admitted the declared defects and discrepancies by introducing First Amendment Act, whereby Section 36 was inserted into the PRA Act of 2012, to validate the actions and decisions by Chairperson/PRA. Appellants’ grievance to the observations with reference to appointment process for Chairperson was also repelled, holding that the findings in paragraphs 26 and 27 of the judgment in *Institute of Architects’ case*, are unexceptionable.

Civil Petition against the decision by learned Division Bench was also dismissed by the August Supreme Court of Pakistan (“**the Apex Court**”), at leave granting stage, by holding, “.whereas the acts and actions impugned in instant proceedings were single handedly performed by the Chairperson acting as authority and, therefore, were rightly declared illegal and without lawful authority.” It was conceded before the Apex Court that *vires* of Amendment Acts were not adjudged, in

the judgments impugned before it, and had already been challenged through separate petitions (the instant petitions), therefore, the plea of having validated all the impugned actions and decisions was not entertained.

3. This Court is now seized with the duty to determine, whether the omissions, discrepancies and defects, bases of the judgment in the Institute of Architects' case, are competently removed by Legislature, within the permissible modes of validation.

Perusal of the judgment would depict that no provision of the Act of 2012 or Punjab Sales Tax on Services Act, 2012 (“**PSTS Act of 2012**”) was declared *ultra vires*, but the actions by the then Chairperson and defectively constituted Authority. Plea of protection under Section 8 of the Act of 2012 was also rejected with remarks that in absence of duly established Authority, these provisions could not rescue the respondents. While declaring the Authority as defectively constituted, appointments of Chairperson and Members were also declared illegal, being in absence of prescribed qualifications and without due process.

Basic defect was absence of notification, under the Section 3(1), besides actions purported to have been taken by the Authority including Rules framed and appointments made.

4. A Division Bench of this Court, in Federal Board of Revenue and others v. Chenone Stores Ltd (2018 PTD 208), has already dealt with the extent and modes of validation by Legislature of actions and law declared *ultra vires* by a Court. Explanations were inserted in different Federal Taxing Statues through Finance Act, 2013 to neutralise the effect of a judgment by learned Single Bench of this Court, whereby an amendment to provisions for conduct of audit was declared *ultra vires*. The Explanations were held to be an effective mode of validation by giving legislative interpretation to existing provisions. Various judgments by August Supreme Court of Pakistan

and of other jurisdictions were discussed including, Molasses Trading & Export (Pvt.) Limited v. Federation of Pakistan and others (1993 SCMR 1905), Al-Samrez Enterprise v. Federation of Pakistan (1986 SCMR 1917), Fecto Belarus Tractor Ltd. v. Government of Pakistan through Finance Economic Affairs and others (2005 P T D 2286), Shri Prithvi Cotton Mills Ltd., etc. v. Broach Borough Municipality and others (AIR 1970 SC 192), The Province of East Pakistan v. MD. Mehdi Ali Khan (PLD 1959 Supreme Court (Pak.) 387), Federation of Pakistan and others v. Shaukat Ali Mian and others (PLD 1999 Supreme Court 1026) and Lahore Development Authority through D.G. and others v. Ms. Imrana Tiwana and others (2015 SCMR 1739). Relevant excerpt from the judgment in *Chenone Case* is reproduced:-

“20. For validation of any law, **Competence of the Legislature** is a precondition. A law declared *ultra vires* for want of legislative competence will have to be re-enacted even if the competence is supplied latter. Article 8 of the Constitution provides that any law inconsistent with the fundamental rights shall be void “**to the extent of such inconsistency**”. A law declared as void or invalid, being inconsistent with any fundamental right, remains a valid enactment, however, becomes ineffective or inoperative to the extent of inconsistency. As soon the inconsistency is removed, it becomes effective and operative without being re-enacted.

Different methods of validation are deducible from the law discussed *ibid*:-

First method is that the defect or cause of invalidity, declared in a judgment, must be removed by the validating statute, before the validation can said to have taken place effectively.

Second method is that the provision declared as invalid is so fundamentally altered that the decision could not have been given in the altered circumstances.

As was held in Molasses Trading's judgment that by insertion of section 31-A, the law had so changed that Al-Samrez's judgment could not have been delivered in its presence.

Third method is that the legislature gives its own meaning and interpretation of the law and by legislative fiat makes the new meaning binding upon Courts.

It is held that the legislature may follow any one method or all of them to neutralize the effect of an earlier decision of Court

which becomes in-effective after the change brought through validating statute.”

“21. ...This view has been endorsed in Lahore Development Authority through D.G. and others v. Imrana Tiwana and others (2015 SCMR 1739) in following words:-

“71. This Court has on several occasions held that where the statute is not ex facie repugnant to Fundamental Rights but is capable of being so administered it cannot be struck down unless the party challenging it can prove that it has been actually so administered:”

In this judgment, the August Court also narrowed down the guidelines, spreading over the judgments mentioned therein, to be followed and taken care of while dealing with a case where vires of a law is challenged, which are:-

“65.....the rules which must be applied in discharging this solemn duty to declare laws unconstitutional. These can be summarized as follows:-

- I. There is a presumption in favour of constitutionality and a law must not be declared unconstitutional unless the statute is placed next to the Constitution and no way can be found in reconciling the two;
- II. Where more than one interpretation is possible, one of which would make the law valid and the other void, the Court must prefer the interpretation which favours validity;
- III. A statute must never be declared unconstitutional unless its invalidity is beyond reasonable doubt. A reasonable doubt must be resolved in favour of the statute being valid;
- IV. If a case can be decided on other or narrower grounds, the Court will abstain from deciding the constitutional question;
- V. The Court will not decide a larger constitutional question than is necessary for the determination of the case;
- VI. The Court will not declare a statute unconstitutional on the ground that it violates the spirit of the Constitution unless it also violates the letter of the Constitution;
- VII. The Court is not concerned with the wisdom or prudence of the legislation but only with its constitutionality;
- VIII. The Court will not strike down statutes on principles of republican or democratic government unless those



principles are placed beyond legislative encroachment  
by the Constitution;

IX. Mala fides will not be attributed to the Legislature.”

5. The amendments, consequent to the judgment in *Institute of Architects’ Case*, are examined to determine its effect in the light of arguments by the parties.

Definition of Member, as contained in Section 2(j), was amended to include *ex-officio* Members and subsection (4) was inserted in Section 5, giving powers to Chairperson till the Authority (PRA) is established, which is as under;

“(4) Till such time that the Authority is constituted under this Act, the Chairperson shall perform the functions and discharge the duties of the Authority.”

Section 36 was inserted, in PRA Act 2012, through First Amendment to cure the omissions, deficiencies and defects, declared in the *Institute of Architects’ Case*. Clause (c) was inserted through Second Amendment Act, whereby the Authority was deemed to have been established from 1<sup>st</sup> of July 2012. The Section 36, brought on statute book through both Amending Acts, is as follows:

“36. Validation.-Notwithstanding any omission, discrepancy or defect in the establishment or composition of the Authority or anything to the contrary contained in this Act or the Punjab Sales Tax on Services Act 2012 (XLII of 2012) or the rules made thereunder:

“(a) Any action of the Chairperson on behalf of the Authority, or anything to the contrary contained in any decree, judgment or order of any court, the sales tax or any other amount levied, charged, collected or realized by the functionaries of the Authority from any person shall be deemed to have been validly taken, levied, charged, collected or realized under the Act;

(b) any action taken by the Chairperson till the establishment of the Authority under section 3 of the Act shall be deemed to be the action taken by the Authority.” And

(c) the Authority stands established under section 3 and shall be deemed to have been established with effect from 1 July 2012.”

[emphasis supplied]

Both the amendments, under both Amending Acts, were made effective from 1<sup>st</sup> July 2012, however, retroactivity of the Authority (PRA) is reiterated in the Clause (c) to establish it by command of law, without issuance of notification under the Section 3(1). All Actions taken by Chairperson, during interregnum period are deemed, by fiction of law, to have been taken by the Authority and the Sales Tax and other amounts levied, charged, collected or realized are validated under the Act.

Legislative competence to promulgate the impugned Amendment Acts, being not argued against, is not in question. Since the Provincial Legislature was competent to enact the impugned Amendment Acts, therefore, in this Court's opinion, Clause (c) of Section 36 has cured the lacuna of non-issuance of Notification for establishment of the Authority, employing *Second Method* of validation, *supra*. Absence of consequent amendment in Section 3(1) and other provisions, shall not effect the validation, which would be treated as silenced or impliedly repealed in view of law laid down in *Lt.-Col. Nawabzada Muhammad Amir Khan v. The Controller of Estate Duty, Government of Pakistan, Karachi and others (PLD 1962 Supreme Court 335)*.

The law has so fundamentally been changed that it has materially affected the enunciation of law, whereafter, it could not be held, in the *Institute of Architects' Case*, that the Authority was not established. Strength is sought from the law laid down by Apex Court in *Molasses Trading Case*, which is:-

“.....The language of section 31-A, as discussed above, clearly envisages and stipulates that the consequences that flow from the act of withdrawal or modification of an exemption notification, shall take effect with reference to the date of its issue, irrespective of the fact that the contract for the import of goods and the L.C. had come into existence prior to such date. This effect has been now prescribed by a mandatory provision of law by legislative fiat, to use the phrase earlier mentioned. The Courts would therefore have to give effect to it notwithstanding the decision in the case of Al-Samrez Enterprise.

There is **another aspect** of the matter which may also be mentioned. The exposition of law made in the case of Al-Samrez Enterprise took into consideration the law as it stood on the date when that decision was rendered. As shown hereinabove, ***the law has changed by the insertion of the new section 31-A materially affecting the enunciation of the law made therein.*** Therefore the changed state of law that has come into effect was not contemplated in that decision and it cannot therefore be urged with any justification, that the principles laid down therein would still apply to the interpretation of the provisions of law discussed therein. In this view of the matter the argument that the deeming clause takes back the insertion of section 31-A to the time of enforcement of the Act in 1969 and therefore the non obstante clause will not eclipse the decision in the case of Al-Samrez Enterprise, loses all force.

My conclusion therefore is that **section 31-A has effectively achieved the purposes for which it was enacted as explained above....**”

[emphasis supplied]

6. Section 8 of the Act of 2012 would have been read and interpreted, if the Authority was taken to have been established w.e.f 1<sup>st</sup> July 2012, while determining the challenge to the acts, proceedings, decisions or order of the Authority, or by its committee, due to defect in constitution of Authority or existence of vacancy. The Section 8 is reproduced for facility:-

“8. Validity of Proceedings.\_\_\_ No act, proceedings, decision or order of the Authority or a committee of the Authority shall be invalid by reason only of the existence of vacancy or any defect in the constitution of Authority or a committee.”

The Apex Court has already held such provisions as protective in Dr. Kamal Hussain V. Muhammad Sirajul Islam (PLD 1969 SC 42); absence of a valid Chairperson was construed as defect in constitution of the Bar Council or its committee, which took decision with regard to elections, and the defect was declared as inconsequential in view of coverage provided by a similar provision under relevant law.

It may be added that protection of the Section 8 shall be available for future, only in presence of a *bona fide* defect in

constitution of Authority or a vacancy. The protection cannot allowed to be misused by Executive by keeping the defect or not filling the vacancy without a justifiable excuse. The excuse, explained by respondent's side, of creating completely new set up appears justified to some extent, which led towards mistakes and omissions, some of which may be deliberated, but such omission or inaction by one person cannot and should not jeopardise a larger interest of the society, which in instant case was levy, charge and collection of tax under PSTS Act, 2012.

Despite the provisions of Section 8, the actions, including framing of rules, and appointments, subject matter of the judgment in Institute of Architects' Case, have been validated by inserting subsection (4) in Section 5 and through Clauses (a) and (b) of the Section 36. Through Section 36(b), actions taken by the Chairperson till establishment of the Authority are validated, by legislative *fiat*, as if these were taken by Authority. However, Section 5(4) is giving power to the Chairperson to perform functions and discharge duty of the Authority till the time it is constituted under the Act of 2012. The provisions under Section 5(4), in this Court's opinion, are susceptible to misuse. As suspected *ibid*, instead of rectifying the defect in constitution of Authority, the executive might prefer that its functions be performed and duties be discharged by the Chairperson. It can defeat the intent of the Legislature, reflecting in the Section 3(2) and (4). It is mandatory that the Authority, being a body corporate, should consist of the Chairperson and not less than four members, as is held in Institute of Architects' Case. The method of validation by inserting subsection (4) to Section 5, without amending Section 3(2) and (4), amounts to legislative judgment, therefore, is violative of the doctrine of 'Separation of Powers' entrenched in the Constitution of the Islamic Republic of Pakistan, 1973 ("**Constitution of 1973**"), hence is declared *ultra vires*. Legislature cannot assume role of an appellate court by merely pronouncing in the statute that the decision shall not

be binding, as is done by inserting subsection (4) to Section 5. Apex Court observed in *Molasses Trading Case:-*

“... It will not be sufficient merely to pronounce in the statute by means of a non obstante clause that the decision of the Court shall not bind the authorities, because that will amount to reversing a judicial decision rendered in exercise of the judicial power which is not within the domain of legislature. It is therefore necessary that the conditions on which the decision of the Court intended to be avoided is based, must be altered so fundamentally, that the decision would not any longer be applicable to the altered circumstances....”

The scheme and basic structure of the Constitution of 1973 secures freedom for Judicature from political, legislative and executive control.

In *Liyanage and others v. Reginam* [1966] 1 All ER 650, Privy Council quashed appellant's conviction, accepting the plea that retroactive law relating to his trial was void, holding that '*legislature could not pass a law which usurped judicial powers of the Judicature*'.

A legislation aimed at specific factual situations, determined by a court, may amount to “Legislative Judgment”. Indian Supreme Court in *State of Tamil Nadu v. State of Kerala and another* [(2014) 12 Supreme Court Cases 696], while deciding a dispute between two States, determined that water level of Dam would be 142 ft, whereas the legislature, through a subsequent legislation, limited the height of water level to 136 ft. On challenge to the legislation it was held that the findings of fact arrived at by the Court could not have been changed by applying doctrine of fiction or through Validating Act. Relevant portion is as under:-

“83. It is argued by the learned Senior Counsel for Tamil Nadu that the test for determining whether a judgment is nullified is to see whether the law and the judgment are inconsistent and irreconcilable so that both cannot stand together. The finding of fact by this Court in the 2006 judgment that the Dam is safe can never deemed to be

imaginary by legal fiction which then proceeds to deem the opposite to be real, namely, that the Dam is endangered. The provision limiting the height of water level to 136 ft, enacted within 15 days after the judgment of this Court finding the Dam to be safe and allowing the water level to be raised to 142 ft, shows the true purpose of the legislation, the situation to which it was directed and the clear intention to defy and act as a judicial authority sitting in appeal over the judgment of this Court.”

7. Crux of the arguments by petitioners is that the defects and lacunas have not effectively been addressed for cure and validation, whereas the Legislature, through Section 36 (a) and (b), has endeavored to nullify the consequences of inactions not permissible under the law and to validate the actions declared not in accordance with law.

To validate any action or omission, declared not in accordance with law, retroactive laws are enacted to supply validity through Legislative *fiat*. The terms ‘*retroactive*’ and ‘*retroactive law*’ are defined in 8<sup>th</sup> Edition of Black’s Law Dictionary in following words:-

“**Retroactive**, *adj.* (Of a statute , ruling, etc.) extended in scope or effect to matters that have occurred in the past. Also termed retrospective. \_ **retroactivity**, *n.*

- ‘**Retroactivity**’ is a term often used by lawyers but rarely defined. On analysis it soon becomes apparent, moreover, that it is used to cover at least two distinct concepts. **The first**, which may be called ‘**true retroactivity**’, consists in the application of a new rule of law to an act or transaction which was completed before the rule was promulgated. **The second concept**, which will be referred to as ‘**quasi-retroactivity**’, occurs when a new rule of law is applied to an act or transaction in the processes of completion ... The foundation of these concepts is the distinction between completed and pending transactions.

- ‘**Retroactive law**’ A legislative act that looks backward or contemplates the past, affecting acts or facts that existed before the act came into effect. A retroactive law is not unconstitutional unless it (1) is in the nature of an **ex post facto** law or a bill of attainder, (2) impairs the obligation of contracts, (3) divests vested rights, or (4) is constitutionally forbidden.\_\_\_\_ Also termed **retrospective law**.”

An *ex post facto* law is one which operates upon a subject not liable to it at time the law was made. Its prohibition to criminalise a past action, beside distinguishing it from retrospective laws, was first recognised by Supreme Court of United States of America in *Calder v. Bull* [3 U.S. (3 Dall.) 386 (1798)]. An appeal, with delay of 18 months, was prohibited through retroactive law. Question before the Supreme Court was, whether the legislation was a violation of Article 1, Section 10, of the American Constitution, which prohibits *ex post facto* laws. Through a unanimous decision, the Court held that the legislation was not an *ex post facto* law. A distinction was drawn between “*criminal rights*” and “*private rights*”, the restrictions against *ex post facto* laws were, declared, not designed to protect citizens’ contract rights. Justice Chase noted, ‘while all *ex post facto* laws are retrospective, all retrospective laws are not necessarily *ex post facto*’. It was observed, as general rule that a law should not be retrospective, yet there are cases in which laws may justly be retrospective for the benefit of the community and individuals. An *ex post facto* law or retroactive law is which retroactively changes the legal consequences of acts committed or the legal status of facts and relationships that existed prior to enactment of the law. It is still a good law in United States that the *ex post facto* provision of the Constitution applies solely to criminal cases, not civil cases.

In the Constitution of 1973, similar prohibition, barring competence of the Legislature, is available in Article 12. Superior Courts, exercising power of judicial review, can declare a law as *ultra vires*, if the competence is lacking or the legislation is violative of a prohibition under the Constitution of 1973, like under Article 8. Though general rule is that legislation shall be prospective, but there is no prohibition for the Legislature to change the consequence, under the law, of an act or omission, giving it retrospective effect. Amnesty and Pardon are the examples, whereby an act or omission is

decriminalized, which when committed were liable to a different legal consequence.

Similarly a subordinate legislation, not following the relevant provisions and so declared by a Court, can be validated by the same Legislature, which had delegated such powers, to be exercised in a particular manner under the relevant provisions. If a condition can be imposed by the Legislature for exercise of delegated power, it can also be waived by same Legislature for a particular subordinate legislation, and such waiver cannot said to be a Legislative Judgment. In Wijay Mills Company Limited v. State of Gujarat [(1993) 1 Supreme Court Cases 345], the purpose validation was held to be ascertain by the Courts and can be upheld if it is found to meet the exigency of a situation to regulate the affairs of the society. Relevant excerpt is reproduced:-

“23. The contention that the Validating Act cannot validate rules made or acts done prior to the date it was enacted, if accepted, will strike at the very root of the concept of retrospective validation. Law is an instrument which is forged to regulate the affairs of the society. Society can mould it to meet the needs felt from time to time. Society cannot be a slave of the instrument. The device of validating a statute is forged precisely to adopt the law to meet the exigencies of the situations. The validation, therefore, may be done in the manner required by the needs of the time. **All that is required is that the agency which validates the statute must have the power to do it. The manner and method of doing it is to be left to the authority. If the intentions are clear, the validation has to be interpreted according to the intentions.** The courts have in fact upheld such validation regarding it to be an important weapon in the armoury of legislative devices. It is to emphasise this aspect that we have endeavoured to summarise the law on validation as above, at the cost of lengthening the judgment.”

[Emphasis Supplied]

In Mehreen Zaibun Nisa v. Land Commissioner, Multan and others (PLD 1975 SC 397), it is held that:-

“When a statute contemplates that a state of affairs should be deemed to have existed, it clearly proceeds on the assumption that in fact it did not exist at the relevant time but by a legal fiction we are to assume as if it did exist. The



classic statement as to the effect of a deeming clause is to be found in the observations of Lord Asquith in *East End Dwelling Company Ltd v. Finsbury Borough Council* (1952 A C 109) namely:

"Where the statute says that you must imagine the state of affairs, it does not say that having done so you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

This observation has been referred to with approval in a large number of cases decided by the Courts in this sub-continent, as mentioned by the learned Judges in the High Court. (See *Commissioner of Income-tax, Bombay Presidency v. Bombay Trust Corporation Ltd.* (AIR 1930 P C 64), *Agha Shaukat Ali v. Settlement and Rehabilitation Commissioner, Lahore* (P L D 1965 Lah. 445), *Begum B. H. Sayed v. Mst. Afzal Jahan Begum* (P L D 1965 Lah 967), *Begum B. H. Sayed v. Mst. Afzal Jehan Begum* (P L D 1970 S C 29) and *Abdul Hakim Khan v. Mrs. Doreen Barkat Ram* (P L D 1973 Lah. 566).

At the same time, **it cannot be denied that the Court has to determine the limits within which and the purposes for which the Legislature has created the fiction.** As stated by James, L. J. in *Levy Ex parte Walton*, (17 Ch. D 756), a statement approved by this Court in *Begum B. H. Sayed v. Mst. Afzal Jahan Begum* when a statute enacts that something shall be deemed to have been done which in fact and in truth was not done, the Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to."

[Emphasis Supplied]

8. Language of validating provisions and Section 36(a) shows the purpose. After the judgment in *Institute of Architects' Case*, charging and collection of tax levied under PSTS Act, 2012 from 01<sup>st</sup> July, 2012 till the date of judgment was required to be validated for public welfare and in the interest of society. Since composition and establishment of the charging and collecting Authority was declared illegal, therefore, to achieve the purpose of validation, all actions, including framing of rules, defective appointments and constitution of Authority was required to be validated as well. Single handed performance of functions by Chairperson on behalf of the Authority were validated, by invoking doctrine of fiction, under Section 36(b). In this Court's opinion, the purpose in favour of society exists and no

prohibition under the Constitution of 1973, to pass a retrospective law to validate such action and decision exists, hence the provisions of Section 36(a) and (b) are held to have been enacted competently.

9. For the sake of brevity, arguments by learned counsel for the parties are not discussed in the judgment, but the Court remained mindful that all relevant arguments are addressed. Contribution of the learned counsel of the parties, through arguments and supply of material is acknowledged.

10. The judgment has dealt with the only question of validation under the First and Second Amendment Acts. Other grounds raised in these petitions, but not addressed, can be raised by the petitioners through independent petitions, if so advised.

11. For the reasons and legal position discussed, hereinabove, this and connected petitions are **dismissed**.

**(Shahid Jamil Khan)**  
Judge

**APPROVED FOR REPORTING.**

Judge

SAJJAD

**Schedule “A”**

<b>Sr. No.</b>	<b>Case No.</b>	
1.	W. P.	26693-2013
2.	W. P.	11856-2014
3.	W. P.	19130-2014
4.	W. P.	30844-2014
5.	W. P.	33932-2014
6.	W. P.	34138-2014
7.	W. P.	21517-2015
8.	W. P.	24143-2015
9.	W. P.	26417-2015
10.	W. P.	27207-2015
11.	W. P.	30303-2015
12.	W. P.	38823-2015
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14.	W. P.	4563-2016
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507.	W. P.	250965-2018
508.	W. P.	252670-2018
509.	W. P.	254419-2018
510.	W. P.	256129-2018

511.	W. P.	256529-2018
512.	W. P.	258551-2018
513.	W. P.	259043-2018
514.	W. P.	259044-2018
515.	W. P.	259048-2018
516.	W. P.	259050-2018
517.	W. P.	259051-2018
518.	W. P.	259052-2018
519.	W. P.	259152-2018
520.	W. P.	259169-2018
521.	W. P.	257-2019
522.	W. P.	342-2019
523.	W. P.	361-2019
524.	W. P.	818-2019
525.	W. P.	976-2019
526.	W. P.	1525-2019
527.	W. P.	2696-2019
528.	W. P.	2704-2019
529.	W. P.	2711-2019
530.	W. P.	2723-2019
531.	W. P.	4899-2019
532.	W. P.	6387-2019
533.	W. P.	6403-2019
534.	W. P.	6407-2019
535.	W. P.	6543-2019
536.	W. P.	7146-2019
537.	W. P.	7639-2019

538.	W. P.	7640-2019
539.	W. P.	7816-2019
540.	W. P.	8333-2019
541.	W. P.	9284-2019
542.	W. P.	9290-2019
543.	W. P.	9616-2019
544.	W. P.	9670-2019
545.	W. P.	10003-2019
546.	W. P.	10312-2019
547.	W. P.	10401-2019
548.	W. P.	10791-2019
549.	W. P.	11535-2019
550.	W. P.	11874-2019
551.	W. P.	11999-2019
552.	W. P.	42650-2019

**(Shahid Jamil Khan)**  
Judge

SAJJAD