IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

Mr. Justice Iftikhar Muhammad Chaudhry
Mr. Justice Rana Bhagwandas
Mr. Justice Mian Shakirullah Jan

CR. ORIG. P. NO. 15 OF 2002 & Cr. Misc. A.179/2002
IN CIVIL REVIEW PETITION NO. 80 OF 1999.

Fecto Belarus Tractor Limited … … *Petitioner*

Versus

Govt. of Pakistan through M/o Finance Economic Affairs and others. … … *Respondents*

For the petitioner	:	*Mr. Khalid Anwar, Sr. ASC* *Mr. M. A. Zaidi, AOR*
For respondent No.1	:	*Mr. Makhdoom Ali Khan,* *Attorney General for Pakistan.* *Mr. Faisal Hussain Naqvi, Advocate.* *Mr. Suleman Afridi, Advocate.* *Mr. M. Ramzan Bhatti, Member Customs.* *Mr. Shahid Ahmed, Member Sales Tax.*
For respondents(2-10)	:	*Mr. Abdul Hafeez Pirzada, Sr. ASC.* *Mr. Afzal Siddiqui, ASC* *Mian Gul Hasan Aurangzeb, Advocate.* *Mr. Arshad Ali Chaudhry, AOR*
Dates of hearing	:	*11th to 14th January 2005.*

JUDGMENT

IFTIKHAR MUHAMMAD CHAUDHYR, J. – *Petitioner seeks indulgence of the Court for initiating suitable action for contempt of Court in accordance with law against the persons or any other person is mentioned in the list appended with the application or against any one else, who is involved for violating the judgment dated 19th February 2001 passed in Civil Review Petition No. 80 of 1999 by this Court.*

2. In view of the importance of the matter, we consider it appropriate to look into the background of the case. It is significant to note that as far back as 1994 the Government of Pakistan launched a scheme for providing tractors to the agriculturists/farmers under the Awami Tractor Scheme, through Agricultural Development Bank of Pakistan, at subsidized rates. To achieve the object, the payment of Customs Duty and Sales Tax was exempted in terms of SRO No.921(1)/1994 dated 22nd September 1994 and SRO No.1189(1)/1994 dated 11th December 1994. Accordingly the scheme was implemented and on the accomplishment thereof , the SROs referred to herein before were substituted with SRO No.388(1)/1996 and SRO 414(1)/1996 dated 13th June 1996 respectively in pursuance whereof 10% Customs Duty and 18% Sales Tax on the import of Tractors were imposed. Subsequent thereto the Government of Pakistan launched Awami Tractor Scheme No.II for importing 10,000 Tractors. As the petitioner succeeded in fulfilling the specified conditions for the import of Tractors including the one to sell a Tractor at a price of Rs.2,30,000/-, therefore, the letter of authorization was issued to it on 26th June 1996 by the Ministry of Food, Agriculture and Livestock Government of Pakistan [herein after referred to as 'MINFAL']. The contents of letter expressly provided that all concession provided under the first phase of scheme would be available to the petitioner as well and directions were issued to it to open letter of credit before 30th June 1996. This letter was followed by another letter dated 27th June 1997, issued by the "MINFAL", by way of a corrigendum, stating therein that the authorization letter issued in favour of the petitioner for the second phase of Awami Tractor Scheme was subject to amendment to the extent that the fixed price of the Tractor would be enhanced in the event of any fluctuation in the Exchange rate of US Dollars over Rs.35.72.

Furthermore, it was clarified that price of Rs.230,000/- as agreed upon by the petitioner, was on the assumption that no Sales Tax had been imposed and that concession provided under SRO No. 921(1)/1994 dated 22nd September 1994 would continue in favour of petitioner for the import of the Tractors. It was the case of the petitioner that despite clear directions noted herein above Ministry of Finance imposed upon it Sales Tax at the rate of 18%, Customs Duty at the rate of 10% and the Service Charges at 2% respectively, therefore, it invoked the jurisdiction of learned Lahore High Court for the redressal of its grievance, by filing Constitution Petition No. 21972 of 1996, but could not get relief as the petition was dismissed having become infructuous in view of the statement made by learned Deputy Attorney General, representing the Government of Pakistan that the matter in issue was examined by the Economic Co-ordination Committee (herein after referred to as "ECC") and the attention of the Court was drawn towards the approval granted by the competent authority whereby certain adjustment had taken place for the Awami Tractor Scheme. Leaving the petitioner at liberty to file fresh petition to question the adjustment made by the ECC, the High Court disposed of the petition vide order dated 24th February 1997.

3. Petitioner preferred ICA, which was allowed on 4th August 1997 declaring that petitioner was entitled to avail all concessions like exemption from the payment of Customs Duty and Sales Tax, in the same manner and to the same extent, which were made available under the original Awami Tractor Scheme qua the import of 10,000 Tractors by I t under the authorization letter dated 26th June 1996 and respondents Nos.1 and 2 were restrained from withdrawing or amending the same to the disadvantage of the petitioner.

4. Against the order of ICA Bench, the respondents approached this Court by filing petition for leave to appeal being No.1084-L of 1997 wherein on 9th October 1997, leave was granted and finally the appeal was accepted on 1st September 1999. Contents of the concluding para read as under thus:-

> *"In the result, there appears to be force in the contentions raised by the learned Attorney General. Resultantly, the appeal is allowed and the judgment of the High Court is set aside. There will, however, be no order as to costs in view of the questions raised by the parties"*

5. Petitioner preferred a Civil Review Petition being No.80 of 1999 wherein following prayer was made:-

> *"It is, therefore, respectfully prayed that the order and judgment dated 01.09.1999 may graciously be reviewed and the appeal of the Respondents may kindly be dismissed.*

The above noted review petition was allowed vide judgment dated 19th February 2001. Concluding para therefrom reads thus:---

> *"37. To sum up, it is crystal clear that withdrawal of SRO exempting the payment of customs duties and the sales tax would not be applicable to the second phase of the scheme for the import of tractors because the Government itself after the withdrawal of notification had resiled from it to the extent of the import to be undertaken by the petitioner. Secondly, relying upon Al-Samrez case referred to herein above, the sales tax like the customs duty could not be levied upon the import by the petitioner because the petitioner is protected on the doctrine of estoppel as well as under the Economic Reforms Act, 1992.*
>
> *For the foregoing reasons, we would review the judgment with the result that the judgment of the Lahore High Court dated 4th August 1997 is restored, earlier judgment of this Court dated 1st of September 1999 rendered in CA No.1176 of 1997 recalled and appeal dismissed with costs."*

6. It appears that during pendency of the petition for leave to appeal, a request was made by the official respondents that the operation of the judgment 4th August 1997 passed by the learned High Court in ICA No.84 of 1997 may be suspended. Request so made was allowed by way of granting interim relief in chamber on 1st September 1997. However, while granting leave to appeal on 9th October 1997 the condition of interim order was modified, thereby directing the petitioner to furnish Bank Guarantee or Bank Guarantees of a Scheduled Bank to the satisfaction of the Collector Customs concerned within a period of one month or earlier. Accordingly, on acceptance of their Appeal No. 1176 of 1997, the Bank Guarantees were got encashed by them.

7. However, after the decision of Civil Review Petition No. 80 of 1999 vide judgment dated 19th February 2001, petitioner approached the Central Board of Revenue [herein after referred to as 'CBR'] for refund of the amount, paid towards the Customs Duty as well as Sales Tax and Service Charges. As needful was not done, therefore, petitioner filed instant petition for initiating action for contempt of Court against the respondents.

8. From the above facts following question emanates for consideration:----

> ***Whether respondents have committed contempt of Court by not refunding the Customs Duty, Sales Tax and the Service Charges to the petitioner in view of the judgment dated 19th February 2001 in C.R.P. No.80 of 1999?***

9. Learned counsel contended that as a matter of right petitioner was entitled for refund of Customs Duty, Sales Tax and Service Charges amounting to Rs.493,467,838/- (four hundred ninety three million, four hundred sixty seven thousand and eight hundred and thirty eight) which were illegally recovered from it by encashing its unconditional bank

guarantees furnished by it in pursuance of order of this Court dated 9th October 1997 but instead of doing needful the Customs Department vide letter dated 11th May 2001, asked the petitioner to submit a certificate from a Chartered Accountant, confirming whether the incidence of Sales Tax has not been passed on to the consumers and reiterated this demand knowing well that the bank guarantee had been furnished unconditionally. However, petitioner without prejudice to its case in good faith obtained a certificate from their Chartered Accountant and submitted the same clarifying that during the period from 1st July 1996 to 30th June 2000, the Sales Tax has not been charged on the invoices raised by the company but surprisingly instead of fulfilling the requirement as aforesaid, the CBR, while defying the order of this Court dated 19th February 2001, declined to accede to the request of the petitioner on the plea that it had set up a committee to look into the issue i.e. whether the burden of Sales Tax has been passed on or not by the petitioner vide letter dated 9th April 2002. According to him this device was adopted with a view to flout/violate/reverse the judgment of this Court. He emphasized that the CBR had no legal authority to raise such objection for the first time. Though this plea was available to them at the time of hearing of CRP No.80 of 1999, thus the respondents were estopped from raising this plea.

10. He argued that petitioner furnished bank guarantee equal to the amount of Customs Duty, Sales Tax and Service Charges in pursuance of leave granting order dated 9th October 1997 in Civil Petition No.1084-L/1997, therefore, as soon as the judgment passed in Civil Appeal No.1176 of 1997 dated 1st September 1999 was recalled on 19th February 2001, the petitioner as a matter of right was entitled to the refund of the amount but CBR on one pretext or the other deferred the payment in clear

violation of the judgment passed in Civil Review Petition No.80 of 1999, dated 19th February 2001. According to him the CBR could not be allowed on any ground, whatsoever, to non-implement the judgment, including the questions which are now being raised for the first time.

11. On the other hand learned Attorney General for Pakistan assisted by Mr. Muhammad Afzal Siddiqui, ASC contended that at the time of hearing of the Review Petition before this Court and even in the earlier litigation there was no question before the Court for determination "whether incidence of Sales Tax has passed on to the consumer of Tractors or not". He emphasized that the burden of Sales Tax has to be shared ultimately by the purchaser, therefore, to ascertain the correct position a committee was constituted by the CBR, who had no intention to flout/violate/severe the judgment of the Court, although judgment dated 19th February 2001 contained no directions for the refund of Customs Duty, Sales Tax and Service Charges. Besides, in the meantime, respondents had received evidence that Tractors had been sold by the petitioner at higher rate ranging between Rs.399,000/- to Rs.435,000/-, inclusive of Sales Tax, etc. qua the price fixed by the "MINFAL" i.e. Rs.230,000/-, therefore, it had become all the more necessary to probe into the matter.

12. Learned Attorney General also contended that the principle of unjust enrichment is fully invoked in the judicial system of this country notwithstanding the fact whether adjustment of the tax has got the statutory backing or not because if it is established that incidence of Customs Duty and Sales Tax have been assed on to the consumers by the importer, then latter is not entitled to the refund of the same.

13. It may be noted that instant proceedings have been instituted for initiating action for contempt of Court against the CBR and its officers. A

careful perusal of the judgment dated 19th February 2001, reveals that on accepting the review petition, the judgment in Civil Appeal No. 1176 of 1997, dated 1st September 1999 was recalled as a result whereof the judgment dated 4th August 1997 of Lahore High Court stood restored. These two judgments do not contain any direction that petitioner would be entitled to refund of Customs Duty and Sales Tax etc. automatically. For convenience sake concluding para from the judgment of High Court dated 4th August 1997 is reproduced herein below:---

> *"18. For the foregoing reasons, we accept this appeal, set aside order dated 24.02.1997 passed by the learned Single Judge and hereby declare that the appellant is entitled to avail all these concessions as regards exemption from the payment of the customs duty, sales tax, service charges and other taxes in the same manner and to the same extent which were made available under the original Awami Tractor Scheme in relation to import of 10,000 Tractors by it under the authorization dated 26.6.1996 and respondents 1 and 2 are hereby restrained from withdrawing or amending the same to the disadvantage of the appellant. The parties are however left to bear their own costs."*

14. Learned counsel for petitioner in order to substantiate his plea relied upon the following judgments:--

1. Hadkinson v. Hadkinson
[(1952) 2 All E.R. 566]

> *In this case it is observed that it was the plain and unqualified obligation of every person against, or in respect of, whom an order was made by a Court of competent jurisdiction to obey it unless and until it was discharged.*

2. The State v. Muhsin Tirmizey
(PLD 1964 (WP) Lahore 434)

> *In this case Court observed that the remarks made by an authority in its administrative function amounts to contempt of gross kind. In this case respondent Muhsin Tirmizey, the then District and Sessions Judge, Dera Ghazi Khan wrote a*

letter to the Chief Secretary to the Government of West Pakistan Lahore containing objectionable remarks against the High Court which were not only read by the Chief Secretary but it was also read by the others who dealt with it in the course of their duties, as such respondent was found guilty for the contempt of Court.

3. Dr. A.N.M.Mahmood v. DR. M.O. Ghani VC.
(PLD 1967 Dacca 67)

In this case, the High Court of East Pakistan (Dacca) has held that the object of the discipline enforced by Court in case of 'contempt' is not to vindicate the dignity of the Judge in person, but to prevent undue interference with the administration of justice or the doing of an act the tendency of which is to deprive the Court of an unfettered course with a view to dispense even handed and impartial justice in accordance with law. It is a part of our legal system that the Court should call upon the delinquents, if so found, to answer for the impediment which they have caused to the steady course of judicial administration…."

4. Ekka Tonga Mazdoor Union v. The Aligarh Municipal Board
(AIR 1967 Allahabad 93)

In this case it is held that the orders of Courts are to be implemented and acted upon with promptitude. If their implementation is unduly delayed, it would amount to showing scant respect to the Court concerned and its judicial process, which would obviously be a serious contempt of that Court, even though the person sought to be injuncted or restrained might have had no intention to flout the order of the Court, for in many cases the very object of obtaining the order of stay or restraint would be rendered nugatory and the thing sought to be enforced or restrained by the Court might be accomplished or completed such as in the case of stay demolition etc. Moreover, considerable delay in carrying out an order of a Court after notice, without adequate explanation for laches, would by itself constitute serious contempt of Court inasmuch as it tends to undermine the prestige and authority of a Court- of law and the efficacy of its judicial process. A person who has obtained an order in his favour from a Court is entitled to instant relief and its delayed implementation would discredit the administration of justice.

5. Syed Aftab Ejaz v. The State
(PLD 1978 Lahore 361)

In this case the learned High Court held that in a case of contempt of Court the plea of intention, however, good it may be, cannot provide defence for flouting the order of the Court, because the order of the Court is to be strictly complied with and its compliance is a matter of strict liability.

6. Sri Krishna Singh v. Mathura Ahir
[(1981) 4 SCC 421]

In this case a decree was passed against the petitioner for delivering the possession of the property to the plaintiff which was maintained ultimately by the Indian High Court, adjudging that the petitioner Sri Krishna Singh and others were trespasser and were directed to be evicted from the property in question but despite of it, possession was not delivered in utter disregard of Supreme Court's order and trying to delay or defeat the Court's decree for delivery of possession by adopting ingenious devices and subterfuges, therefore, proceedings were ordered to be taken against him for contempt of Court.

7. Isaaca v. Robertson
[(1984) 3 All E.R. 140]

It is observed in this case that order made by the Court of unlimited jurisdiction in the course of contentions between orders that are 'void' in the sense that they can be ignored with impunity by those persons to whom they are addressed, and orders which are 'voidable', in the sense that they may be enforced until set aside, since any order must be obeyed unless and until it is set aside and there are no orders which are void ipso facto without the need for proceedings to set them aside.

8. X. Ltd. and another v. Morgan Grampian (Publishers) Ltd. and others.
[(1990) 1 All E.R. 616]

In this case it is held that right of audience can be declined to contemnor who not only refused to obey the order made by the Court but also rejected the authority of the Court to make an order binding on him.

9. Rana Muhammad Akram Khan v. The State.
(1993 P. Cr. L.J. 2044)

In this case it is held that Disobedience or non-compliance of an order passed by the High Court whether intentionally or negligently and that too by a public functionary amounts to a contempt of Court.

10. Anil Sharma v. Virmani
(1996 Cr. L.J. 3137)

Learned counsel contended that in this case the Court has held that it is settled proposition of law that the Contempt Court cannot go behind the order. The opposite parties cannot be permitted to judge the merits themselves of an order quashed by the High Court or they cannot be permitted to defy the Court's order on the ground that the order is not correct. If this is to be permitted, the entire judicial structure will fall down and every person will defy the orders on the ground that the order is not correct."

Therefore, learned counsel's submission was that in instant case, the CBR had absolutely no authority to appoint a Committee for the purpose of ascertaining as to whether the incidence of burden of Sales Tax has been passed on or not.

11. M.F.M.Y Industries Ltd. v. Collector of Customs
(PLD 1996 Karachi 542)

Learned counsel contended that in this judgment it has been held that it is totally un-precedented that a department would await the advice from the administrative agency before the implementation of the order, as it had happened in the instant case that the concerned Collector instead of refunding the amount, approached the CBR to avoid the effect of the judgment, therefore, strictly in accordance with the observation made in this reported judgment instant application has been filed for the proceedings of contempt of Court.

12. Abhijit Tea Company Ltd. v. Terai Tea Co. (P) Ltd.
[(1996) 1 SCC 589]

In this case the Court observed that the arms of the Court are long enough to reach in justice wherever it is found, which should be dealt with appropriately.

13. Naveed Nawazish Malik v. Ghulam Rasool Bhatti
(1997 SCMR 193)

It is held in this case that to disobey or disregard an order, direction or process of Court which a person is legally bound to obey, willful breach of any undertaking given to a Court, any act intended to or which tends to bring the authority of the Court or the administration of law into disrespect or disrepute and to obstruct, interfere, interrupt or prejudice the process of law or the due course of any judicial proceeding fall within the category of contempt of Court.

14. Al-Jehand Trust v. Federation of Pakistan.
(PLD 1997 SC 84)

In this case this Court held that if all the Executive and Judicial authorities in Pakistan are unable to act in aid of the Supreme Court and judgment is not implemented, then such situation would be open to be construed as impasse or deadlock and would amount to very unhappy situation reflecting failure of Constitutional machinery …

15. Government of Sindh v. Muhammad Hussain
(2000 SCMR 1241)

In this case the concerned Officer instead of implementing the order thought that filing of review operates automatic stay but this Court observed that the officials concerned, prima facie, found guilty for contempt of Court for having failed to implement the order of this Court.

16. M.Adil Hayat Khan v. Government of Sindh.
(PLD 2002 Karachi 131)

It is held in this case that the act of justifying the disobedience of the Court's Order, which is vary clear and can be understood by any person who has passed the High School Examination in Pakistan reflects his stubborn and unreasonable attitude.

17. Wyatt Tee Walker et al v. City of Birmingham
[US Supreme Court Reports (388 US 307)]

In this case it is held that as a general rule, an unconstitutional statute is an absolute nullity and may not form the basis of any legal right or legal

> *proceedings., yet until its unconstitutionality has been judicially declared in appropriate proceedings, no person charged with its observance under an order or decree may disregard or violate the order or the decree with immunity from a charge of contempt of Court; and he may not raise the question of its unconstitutionality in collateral proceedings on appeal from a judgment of conviction for contempt of the order or decree…….."*

15. Learned Attorney General contended that in absence of a specific direction to refund Sales Tax to petitioner or for that matter Customs duty, no criminal liability of contempt of Court can be imposed upon the CBR or its Officers. He referred to the following judgments:----

1. ***Hayat Ahmed Khan v. Bashir Sadiq***
(PLD 1952 Lahore 48).

> *In this case during pendency of a suit, an order was passed on 14th March 1951 by a learned subordinate Judge, directing to the respondents to take the delivery of the machinery which had arrived at Karachi in presence of the petitioner or his representative or at any rate, after giving sufficient opportunity to the petitioner or his representative to be present. If, in spite of it, the petitioner was not present or represented the delivery should be taken after informing the Court. Allegedly, respondent took delivery of the machinery on 25th April 1951, without the order of the Court. Thus it was alleged that the order dated 14th March 1951 had been contravened. Ultimately, a petition was filed on original side before the Lahore High Court under Section 3 of the Contempt of Court Act, praying that the respondents be proceeded against and adequate punishment according to law for having committed contempt of Court of the sub-ordinate Judge be passed. In view of these facts, the Court formulated a question "whether in these circumstances can it be said that there was a contravention of any direction made by the learned Judge, such as, could invite penalties of the nature applicable in contempt? The learned Judge answered the question as follows:-*
>
> *" ----------In my opinion answer must be in negative. Firstly if contravention of an order is to be visited with*

penalties of a criminal nature that order may be in clear and precise terms, setting out the obligations resting upon the person affected in clear and unmistakable language. The obligation must not rest upon any implication to be derived from any words used in respect of other matters by the Court, it must be couched in express terms and must be brought directly to the notice of the party"

2. ***State of Pakistan v. Mehrajuddin***
[PLD 1959 SC (Pak.) 147]

In this judgment it has been held as follows:-

> *"It is true that the usual method of enforcing a judgment granting an order of mandamus is by commitment for contempt but such a mandamus must be of an absolute nature. An order directing the reinstatement of a person in a great public Department is not one which can be executed on the instant. It involves a great many considerations such as seniority, suitability, salary, and treatment of the period of absence etc., which are exclusively within the competence of the relevant executive authorities and can only be decided by those authorities after a good deal of examination and care, involving the exercise of discretion and judgment in regard to many complex matters. Therefore, an order directing the reinstatement of a person cannot be regarded as an absolute order of mandamus, non-compliance with which may peremptorily be visited by a proceeding in contempt. In the present cases, the orders of mandamus were themselves incompetent and therefore for that reason as well, the High Court should have hesitated before issuing the notices in contempt which they did. ……."*

Learned Attorney General in view of above observation stated that firstly neither this Court nor the High Court had issued absolute direction for the refund of the Customs Duty and Sales Tax, etc., therefore, the CBR acted within its jurisdiction and was competent in law to ascertain as to whether incidence of Sales Tax had been passed on or not.

3. ***Qadeer Ahmad v. Punjab Labour Appellate Tribunal***
(PLD 1990 SC 787)

In this case petitioner got an order from the High Court at Bahawalpur in Writ Petition No. 185/1979-BWP, in pursuance whereof the order of his dismissal from service was set aside, leaving upon the respondents to take fresh action against the petitioner in accordance with law. However, he was not reinstated. Consequent upon the order of the High Court, respondent issued him an inquiry notice and suspended him for four days and after holding inquiry, he was dismissed from service. Before passing of the fresh order of dismissal, the petitioner moved an application before the Lahore High Court, Bahawalpur bench, seeking implementation of the order dated 25th February 1980, reinstating him with back benefits. It was further prayed that the respondent be proceeded against under contempt of Court Act, for deliberately avoiding the compliance of the order of this Court or any other appropriate order may be passed. The High Court dismissed the petition filed by him, as such appeal was filed before this Court. Arguments were heard and judgment was reserved. In the meantime, petitioner filed a Misc. Application against the dismissal order dated 27th March 1990 with the Labour Appellate Court, who set aside the same vide order dated 18th September 1990 and directed his reinstatement into service with certain observation made therein. Against such order, two appeals were filed which were disposed of by Labour Appellate Tribunal on 30th January 1984. Meanwhile, when the appeal came up for arguments with reference to the contempt of Court, this Court observed as under :-

> *"…….In order to make out a case for contempt, it was necessary to establish a specific direction and its breach by the party. In the case in hand no express order was passed in the judgment which was being utilized by the appellants for claiming payment of back benefits. Therefore, in fact no breach had taken place for which the respondent could be held in contempt."*

Learned Attorney General heavily placed reliance on this judgment and argued that comparative study of the

judgment of Lahore High Court dated 4th August 1997 as well as the judgment of this Court in Review Petition, clearly demonstrate that no directions were made for the refund of the Customs Duty, Sales Tax and Service Charges by any of these Courts.

4.***Muhammad Sadiq Leghari Registrar High Court of Sindh*** *(PLD 2002 SC 1033)*

In this case a larger bench of this Court dealt with the case of contempt of Court wherein it was alleged that the appellant being the Registrar of High Court of Sindh (as then he was) violated the order of this Court dated 28th March 2002 by submitted a report whether Constitution Petition No.D-1062/94 (Feroze Akbar Khan v. Government of Pakistan) was heard by a Division Bench as reflected in the order, because ambiguity surfaced on having seen the cause list of High Court of Sindh, according to which the case noted therein was fixed before the learned Chief Justice of the High Court and the detailed order showed that the same had been signed by two Hon'ble Judges as it was heard by a Division Bench. When the case was taken up on 15th May 2002, it was found that the report had not been submitted by the Registrar of the High Court of Sindh. Although in addition to the original communication, a reminder was also issued vide letter dated 4th May 2002 to submit the report compliance of the order. However, on 15th May 2002 a Bench of this Court passed an order directing personal appearance of the Registrar to appear in person and explain as to why proceedings of contempt of Court may not be initiated against him for non-compliance of the order. He submitted requisite report and also filed a reply to the notice and sought time to further probe into the matter, as desired by this Court. The learned Bench of this Court on having taking into consideration his reply, concluded that he had committed contempt of Court and had also interfered in the proceedings of administration of justice, for which no sincere regrets or unconditional apology had been tendered by him, therefore, on the basis of such findings, he was held guilty of contempt of Court and was accordingly punished and awarded sentence. With this background, ICA was filed and this Court formulated a question

"whether the conduct of the appellant, if considered with the attending circumstances and the facts established on record, did constitute an act of contempt of Court, as envisaged under Article 204 of the Constitution of Islamic Republic of Pakistan and the provisions of Contempt of Court Act, 1976? and the answer was as follows:---

> *"We may observe here at the very outset that a distinction has to be made between a case of contempt of Court based on defiance or violation of a judicial order in the nature of temporary injunction by a party whereby such party was restrained from acting in a particular manner but in spite of service of notice or having come to know of the passing of such order, acts in a manner to alter the position to his advantage so as to frustrate the temporary injunction and an act of mere non-submission of a report called for by the Court by an Officer of the Court. In the former case, the Court would take strict view and mere act of defiance of the judicial order would by itself justify raising of presumption that the doer of the act was guilty of contempt of Court unless he proves otherwise whereas in the latter case, it has to be determined on application of judicial mind as to whether the appellant deliberately did not submit the report on account of having personal interest in any of the parties to cause damage to the other party in the case in which the report was called or had any personal interest which, if proved or established would make the act of non-submission of the report mala fide. In the absence of any of these factors and element of contumacy, his conduct could not be held to have suffered from mala fides or contempt of Court. It has been held in the case of Behawal v. The State PLD 1962 SC 476 that mere non-compliance of an order, in the absence of contumacy, would not amount to contempt of Court."*

16. From the judgments relied upon by both the sides, inter alia, following principles emanate:---

1. *Orders made by a Court of unlimited jurisdiction in the course of continuous litigation are either regular or irregular. It is misleading to draw distinction between orders that are*

"void", in the sense that they can be ignored with impunity by those persons to whom they are addressed, and orders which are "voidable" in the sense that they may be enforced until set aside, since any order must be obeyed unless and until it is set aside and there are no orders which are void ipso facto without the need for proceedings to set them aside. [1984 (3) AllER 140 (Issacs v. Roberton)].

2. *If a contravention of an order is to be visited with penalties of a criminal nature that order must be in clear and precise terms, setting out the obligations resting upon the person affected in clear and unmistakable language. The obligation must not rest upon any implication to be derived from and words used in respect of other matters by the Court; it must be couched in express terms and must be brought directly to the notice of the party. [**Hayat Ahmed Khan v. Bashir Sadiq** (PLD 1952 Lahore 48)].*

17. In view of the principles discussed in above judgments, it is contended by the learned Attorney General that without prejudice to his other pleas, in absence of any specific directions to refund Sales Tax and Customs Duty etc. and for lack of contumacious acts by the CBR or its officers, no proceedings for contempt of Court can be initiated against them, therefore, he prayed for the rejection of the application.

18. We have considered the arguments of both the sides, keeping in view the relevant record maintained by this Court, pertaining to CPSLA No. 1084-L/1997, CA.1176/1997 and CRP. No.80/1999 as well as judgment of Lahore High Court, Lahore passed in ICA No.84 of 1997 in Writ Petition No.1972 of 1996, concluding paras wherefrom have already been reproduced herein above. A careful perusal of above orders indicates that

vide order dated 9th October 1997, passed by this Court at the time of granting leave to appeal, Bank Guarantee was furnished by the petitioner but in the decision of Civil Review Petition No.80 of 1999 dated 19th February 2001, no directions were made to refund Customs Duty or sales Tax, therefore, it is held that the amount received by the respondents on encashment of Bank Guarantee was not refundable automatically.

19. Learned counsel for petitioner vigorously insisted for initiating contempt proceedings against the officers of CBR as according to him they are responsible for violating the judgment dated 19th February 2001, but we are not persuaded to subscribe to his view point; firstly for the reason that the CBR or its Officers, in the letters, addressed to petitioner from time to time including 10th, 11th May 2001, 9th April 2002, had not denied the refund of Customs Duty, Sales Tax and Service Charges to petitioner; secondly in the judgment passed Civil Review Petition No. 80 of 1999, dated 19th February 2001, no directions were made to the respondent-government as well as CBR for the refund of the amount immediately, as observed herein above that on accepting the review petition, the judgment of the Lahore High Court dated 24th August 1997 was restored wherein it has been held that petitioner is entitled for exemption of Customs Duty, Sales Tax and Service Charges in view of authorization letter dated 26th June 1996. It is important to note that before the Lahore High Court the petitioner had not furnished any bank guarantee for the purpose of release of Tractors nor the said Court as well as this Court in the judgment passed in Civil Review Petition, dilated upon the question whether the burden of Customs Duty and Sales Tax has been passed on or not by the petitioner to end consumer of Tractors; thirdly; the CBR had been insisting the petitioner to furnish its accounts, enabling it to make the refund if permissible under the law but petitioner, instead of

doing so, approached the Court with contempt proceedings for the purpose of causing harassment to the CBR or its Officers; fourthly, entitlement of the petitioner for the refund would be determined in accordance with law as well as practice invoked, which have attained the status of law; fifthly power of punishment for contempt is not used to cast slander or to ridicule any person, but essentially to devise ways and means for doing complete justice with utmost impartiality for the general benefit thereby, promoting public good; so that aggrieved party could fearlessly invoke the jurisdiction of the Court to avail all remedies which are permissible under the law, and to have complete satisfaction of redress as regards wrong done to him. ***[Masroor Ahsan v. Ardeshir Cowasjee*** *(PLD 1998 SC 823)****]****.*

20. Now it remains to be examined as to whether the CBR after the decision of Civil Review Petition No.80 of 1999 could legally ask the petitioner to explain as to whether the incidence of Sales Tax had been passed on to the end user of the Tractors or not?

21. Learned counsel having narrated the above facts contended that the CBR or any other Officer, in law, is not competent/empowered to re-open the issue, which had already been settled namely that petitioner being importer of the Tractors is exempted from the payment of the Sales Tax, in pursuance of letter dated 26th June 1996, which had been equated with a notification in the judgment dated 19th February 2001, thus in view of principle of constructive res judicata, the CBR was legally estopped to demand details from the petitioner in respect of passing on the burden of the Sales Tax.

22. In order to substantiate his plea learned counsel placed reliance on the judgments reported in the cases of, ***Noor Muhammad v. Assistant Commissioner Vehari*** *(1986 SCMR 292),* ***Pardool v. Gulzada*** *(PLD*

1995 SC 410), ***Amanul Mulk v. Mian Ghafoor-ur-Rehman*** *(1997 SCMR 1796) and* ***Bashir Ahmed v. Allah Jawai*** *(2000 SCMR 1112).*

23. On the other hand learned Attorney General for Pakistan, assisted by Mr. Muhammad Afzal Sidiqui, ASC contended that the argument so raised on behalf of the petitioner is not available to it at all, in view of the fact that in the earlier round of litigation, this Court had never decided the question of passing on the burden, as it had never arisen at that time.

24. We have considered the arguments put forward by both the sides. In this behalf, first of all it is to be noted that petitioner is claiming relief of the refund of Customs Duty and Sales Tax as well as Service Charges, in pursuance of the judgment dated 19th February 2001. A careful perusal of the judgment persuades us to hold that no order has been passed for the refund of these amounts. The relief, regarding exemption from the Customs Duty and Sales Tax, has been given to petitioner, considering the letter dated 26th June 1996, to be a notification, issued under Section 19 of the Customs Act. There is no doubt in holding that this Court had not dilated upon the question of refund of Customs Duty and Sales Tax, on taking into consideration whether the burden of the Customs Duty and Sales Tax had been passed on to the consumers or not? As it has been noted during the arguments put forward by the Attorney General that even prior to passing of the judgment by this Court, the question relating to passing on the burden by the petitioner was never agitated by either of the parties before this Court as well as before the High Court, where proceedings of ICA and Writ Petition, filed by the petitioner, were pending. It is a well settled principle of law that under the provisions of Section 11 Explanation IV CPC, any matter which might or ought to have been made ground of

defence or attack, in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

25. A careful perusal of the judgments relied upon by the learned counsel for petitioner reveals that:-

1. *In **Pardool**'s case (ibid) it was held that if a plea was available to a party in an earlier round of litigation but the same was not agitated then in subsequent proceedings said party would be debarred to raise the same question in view of the provisions of Section 11 and Order II Rule (2) CPC, whereas in instant case, the respondents had no occasion to plead the question relating to incidence of passing on the burden of Sales tax as at that time altogether a different question was before the Court, particularly in view of the fact that they were respondents before the High Court in the Writ Petition and in ICA as well as in proceedings in Civil Review Petition No.80 of 1999. However, so far as the proceedings in Civil Appeal No.1176 of 1997 are concerned, they were the appellants and their grievance was only to the extent of judgment of the High Court passed in ICA No. 84 of 1997, therefore, it was not legally possible for the respondents to agitate this point.*

2. *In **Amanul Mulk**'s case this Court has held that the rationale behind the constructive res judicata is that if the parties have had an opportunity of asserting a ground in support of their claim or defence in a former suit and have not done so, they shall be deemed to have raised such ground in the former suit and it shall be further deemed that such ground had been heard and decided as if such matter had been actually in issue. Thus, such parties shall be precluded from raising these grounds in a subsequent suit.*

3. *In **Bashir Ahmed**'s case, petitioner failed to establish that mutation entry No.172 dated 30th July 1962 was violative of MLR-64 and had been obtained and sanctioned through fraud and misrepresentation and in second round of litigation the same question was raised, therefore, in this context it was held that the petitioner at this stage cannot dare out to re-agitate the plea which they out to have proved in the first round of litigation.*

26. In this context it is to be noted that this Court in the case of ***Province of Punjab v. Ibrahim and Sons*** *(2000 SCMR 1172),while examining the question of constructive res judicata in accordance with Section 11 CPC has laid down the following five principles :---*

1. *The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue either actually or constructively in the former suit.*

2. *The former suit must have been a suit between the same parties or between parties under whom they or any one of them claim.*

3. *The parties as aforesaid must have litigated under the same title in the former suit.*

4. *The Court which decided the former suit must have been a Court competent to try the subsequent suit in which such issue is subsequently raised.*

5. *The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the Court in the first suit.*

27. Applying the principles noted above, to the facts of instant case, we feel no hesitation in holding that under given facts and circumstances of the case, the query by the CBR from petitioner "whether burden of Sales Tax has been passed on to the actual consumers of the Tractors or not" is not barred under the principle of constructive res judicata.

28. Learned counsel then emphatically argued that as the question of passing on the burden of Sales Tax was not agitated during the hearing of Civil Review Petition being No. 80 of 1999, or even prior to it, at the stage when petition for leave to appeal No.1084-L of 1997 and in appeal arising out of it being No.1176 of 1997, was pending, therefore, it being a new point cannot be agitated at this stage. To substantiate his plea, he relied upon ***Postmaster General, Eastern Circle (E.P.) Dacca v. Muhammad Hashim***

(PLD 1978 SC 61), ***Crescent Jute Products Ltd. Jaranwala v. Muhammad Yaqub etc.*** *(PLD 1978 SC 295),* ***Molasses Trading & Export (Pvt.) Ltd. v. Federation of Pakistan and others*** *(1993 SCMR 1905) as well as* ***Shaheen Airport Services v. Nafees-ul-Hassan Siddiqui*** *(2001 SCMR 1307) and* ***Muhammad Hanif v. Muhammad Jamil Turk*** *(2002 SCMR 429). In all these cases it was held that if a plea was not agitated in the High Court nor there was any discussion on it, such plea cannot be allowed to be raised for the first time before the Supreme Court.*

29. In this behalf it may be noted that in order to attend this proposition, it is necessary to observe that during the earlier hearing of the matter at different stages, pointed out by the learned counsel, neither there was any occasion to attend this aspect of the case nor CBR could have been allowed to argue this point being irrelevant at that stage. As observed while attending to the question of res judicata that instant question was never agitated earlier, therefore, in view of such observation, it is held that the CBR is not precluded under Order II Rule 2 CPC, to raise this point for the reasons which will be assigned herein after.

30. It is to be noted that Sales Tax is an indirect tax, burden whereof is to be borne by the purchaser and the vendor is bound to reimburse the amount to the Federal Government in terms of Section 3-B of the Sales Tax Act, 1990. For convenience same is reproduced herein below:---

> ***3B.Collection of excess sales tax etc.*** *---*
>
> ***(1)*** *any person who has collected or collects any tax or charge, whether under misapprehension of any provision of this act or otherwise, which was not payable as tax or charge or which is in excess of the tax or charge actually payable and the incidence of which has been passed on to the consumers, shall pay the amount of tax or charge so collected to the Federal Government.*

> ***(2)*** *Any amount payable to the Federal Government under sub-section (1) shall be deemed to be an arrears of tax or charge payable under this act shall be recoverable accordingly and no claim for refund in respect of such amount shall be admissible.*
>
> ***(3)*** *The burden of proof that the incidence of tax or charge referred to in sub-section (1) has been or has not been passed to the consumer shall be on the person collecting the tax or charge.*

31. Likewise, the Customs Duty is an indirect tax, burden of which has to be borne by the purchaser, according to mandate of Section 64-A of the Sales of Goods Act 1930. Reference in this behalf may be made to the case of ***Army Welfare Sugar Mills Ltd. v. Federation of Pakistan*** *(1992 SCMR 1652). Relevant para therefrom is reproduced herein below for convenience:---*

> *"54. It may also be observed that section 64-A of the Sales of Goods Act, 1930, entitles a vendor to recover from a purchaser any duty or custom or excise or tax on any goods being imposed or increased after the conclusion of any contract for sale of such goods, if the contract does not contain any provision contrary to it."*

32. In view of above provisions of law, it may also be noted that the petitioner had no right to claim refund of Customs Duty and Sales Tax, which it had recovered from the end user as an agent of the Government, if its burden had been passed on by it, being the property owning purchasers, otherwise it will remain with the Government, who would spend it on the welfare of general public. Reference in this behalf may be made to the case of ***Orient Paper Mills v. State of Orissa*** *(AIR 1961 SC 1438). Relevant para therefrom is reproduced herein below for convenience:---*

> *"(7). Article 19(1)(f) of the Constitution prescribes the right to freedom of citizens to acquire, hold and dispose of property; but the right is by cl.(5) subject to the operation of any law, existing or prospective in so far as it imposes reasonable restrictions on the exercise of that*

right in the interest of the general public. Assuming that by enacting that refund of tax shall only be made to the purchasers from whom the tax has been collect by the dealers and no to the dealers who have paid the tax the fundamental right under Art. 19(1)(f) is restricted, we are unable to hold that the restriction imposed by S.14A of the Act is not in the interest of the general public. The Legislature by S.9B(1)of the Act authorized registered dealers to collect tax from the purchasers which they may have to pay on their turnover. The amounts collected by the assesses therefore primarily belongs not to the assesses but to the purchasers. On an erroneous assumption that tax was payable, tax was collected by the assesses and was paid over to the State. Under S.9B Cl.(3) of the Act as it stood at the material time, the amounts realized by any person as tax on sale of any goods shall notwithstanding anything contained in any other provision of the Act, be deposited by him in a Government treasury within such period as may be prescribed if the amount so realized exceeded the amount payable as tax in respect of that sale or if no tax is payable in respect thereof. As the tax collected by the assesses was not exigible in respect of the sales from the purchasers, a statutory obligation arose to deposit it with the State and by paying the tax under the assessment, the assesses must be deemed to have complied with this requirement. But the amount of tax remained under S.9Bof the Act with the Government of Orissa as a deposit. If with a view to prevent the assesses who had no beneficial interest in those amounts from making a profit out of the tax collected, the Legislature enacted that the amount so deposited shall be claimable only by the persons who had paid the amounts to the dealer and not by the dealer, it must be held that the restriction on the right of the assesses to obtain refund was lawfully circumscribed in the interest of the general public."

33. The above principle has been reiterated in ***Amar Nath Om Prakash v. State of Punjab*** *[AIR 1985 SC 218].*

34. Thus entitlement of the vendor to claim refund of Customs Duty and Sales Tax, depends upon producing evidence that burden of the same had not been passed on. In addition to it, Section 3-B of the Sales Tax Act casts a duty upon the vendor to return such amount to the Federal Government. Although under the Customs Act, 1969, there is no identical provision but on the principle of fair-play and equity, vendor having received indirect tax, cannot pocket the same. To elaborate this view point, reliance is placed on ***Mafatlal Industries Ltd. v. Union of India*** *[(1997) 5 SCC 536]. Relevant portion therefrom is reproduced herein below for convenience:---*

> ***(iv)*** *A claim for refund, whether made under the provisions of the Act as contemplated in proposition (i) above or in a suit or writ petition in the situations contemplated by proposition (ii) above, can succeed only if the petitioner/plaintiff alleges and establishes that he has not passed on the burden of duty to another person/other persons. His refund claim shall be allowed/decreed only when he establishes that he has not passed on the burden of the duty or to the extent he has not so passed on, as the case may be. Whether the claim for restitution is treated as a constitutional imperative or as a statutory requirement, it is neither an absolute right nor an unconditional obligation but is subject to the above requirement, as explained in the body of the judgment. Where the burden of the duty has been passed on, the claimant cannot say that he has suffered any real loss or prejudice. The real loss or prejudice is suffered in such a case by the person who has ultimately borne the burden and it is only that person who can legitimately claim its refund. But when such person does not come forward or where it is not possible to refund the amount to him for one or the other reason, it is just and appropriate that that amount is retained by the State, i.e. by the people. There is no immorality or impropriety involved in such a proposition.*
>
> *The doctrine of unjust enrichment is a just and salutary doctrine. No person can seek to collect the duty from both ends. In other words, he cannot collect the duty from his purchaser at one end and also collect the same*

> *duty from the State on the ground that it has been collected from him contrary to law. The power of the Court is not meant to be exercised for unjustly enriching a person. The doctrine of unjust enrichment is, however, inapplicable to the State. State represents the people of the country. No one can speak of the people being unjustly enriched."*

35. The principle of passing on burden of indirect tax has nexus with the doctrine of unjust enrichment, according to which windfalls are prohibited to a person in respect of amount which is not owned by him nor it had sustained any loss in respect thereof. In this behalf ***Prof. George C. Palmer*** *in his work "****The Law of Restitution****" [1986 Supplement, at page 255] made following comments:----*

> *"There is no doubt that if the tax authority retains a payment to which it was not entitled it has been unjustly enriched. It has not been enriched at the tax payer's expense, however, if he has shifted the economic burden of the tax to others. Unless restitution for their benefit can be worked out, it seems preferable to leave the enrichment with the tax authority instead of putting the judicial machinery in motion for the purpose of shifting the same enrichment to the taxpayer."*

36. A perusal of above para, persuades us to hold that petitioner in its own right had no legal authority to retain Customs Duty and Sales Tax with it and it was its duty to have transferred the same to the CBR . However, to resolve the controversy the CBR constituted a Committee, calling upon the petitioner to substantiate as to whether burden of Sales Tax had been passed on to the end user or not and in such situation, petitioner ought to have established to the satisfaction of the Committee that the burden of Customs Duty and Sales Tax, equal to the amount of bank guarantee, furnished by it, had been passed on to the purchaser or not but it failed to do so with the result that an adverse presumption may be drawn against it under Article

129 of the Qanoon-e-Shahadat Order, 1984 that the incidence of Sales Tax and Customs Duty had been passed on to the purchaser. Alternatively petitioner instead of instituting proceedings for contempt of Court should have invoked the equitable jurisdiction of the Courts, either by filing a suit or a writ petition in terms of Section 72 of the Contract Act, for getting the refund of Sales Tax and Customs Duty. Essentially petitioner did not invoke the equitable jurisdiction of the Courts, presumably for the reason that it had already passed on the incidence of Customs Duty and Sales Tax to a third party. This Court in such like situation in a large number of cases declined to refund the tax, burden whereof had been passed on to the consumer. In this context, reference may be made to ***M/s Abbasi Textile Mills Ltd. v. Federation of Pakistan*** *(PLD 1958 SC Pak 187),* ***Commissioner of Sales Tax Rwp. v. M/s Sajjad Nabi Dar*** *(PLD 1977 Lahore 75),* ***M/s Sajjad Nabi Dar & Co. v. Commissioner of Income Tax Rwp.*** *(PLD 1977 SC 437),* ***Commissioner of Sales Tax v. Messrs Zalin Ltd.*** *(1985 SCMR 1292),* ***M/s Army Welfare Sugar Mills Ltd. v. Federation of Pakistan*** *(1992 SCMR 1652) and* ***M/s Air Home International v. Government of Punjab*** *(2002 CLC 780). Likewise, Indian Supreme Court has also exhaustively dealt with the question of refund of Customs Duty and Sales Tax, burden whereof had been passed on, in* ***Mafatlal****'s case, keeping in view the principle discussed from time to time by Indian Supreme Court itself. However, further reference may be made to the cases of* ***Amar Nath Om Parkash v. Food Corporation of India*** *(AIR 1985 SC 218),* ***State of M.P. v. Vyankatlal*** *(AIR 1985 SC 901),* ***Entry Tax Officer, Banglore v. Chandanmal Champalal & Co.*** *[1994 (4) SCC 463],* ***Collector of Central Excise v. L.M.L. Limited*** *[2000 (3) SCC 579],* ***Union of India v. Raj Industries and another*** *[2000 (2) SCC 172],* ***S.R.F. Ltd. v. Assistant***

Collector of Central Excise *[2002 (1) SCC 480],* ***Shree Digvijay Cement Co. v. Union of India*** *[2003 (2) SCC 614] may be made. Relevant para from the last mentioned judgment for convenience reads thus:---*

> *"**28.** The next question is: whether the appellants are entitled to refund of the contribution made by them under clause 9-A of the Control Order. There is no automatic right of refund. In Mafatlal Industries Ltd. v. Union of India, the Constitution Bench has held that the right to refund of tax paid under an unconstitutional provision of law is not an absolute or an unconditional right. Similar is the position, even if Article 265 can be invoked . The principles of unjust enrichment are applicable in the claim of refund. The claimant has to allege and establish that he has not passed on the burden to another person. The Constitution Bench has held whether the claim for restitution is treated as a constitutional imperative or as a statutory requirement. It is neither an absolute right nor an unconditional obligation but is subject to the requirement as explained in the judgment. Where the burden of duty has been passed on, the claimant cannot say that he has suffered any real loss or prejudice. Real loss or prejudice is suffered in such a case by the person who has ultimately borne the burden and it is only that person who can legitimately claim its refund. But where such person does not come forward or where it is not possible to refund the amount to him for one or the other reason, it is just and appropriate that that amount is retained by the State i.e. by the people. The doctrine of unjust enrichment is a just and salutary doctrine. The power of the court is not meant to be exercised for unjustly enriching a person. The doctrine of unjust enrichment is, however, inapplicable to the State represents the people of the country. No one can speak of the people being unjustly enriched.*

37. We have thoroughly examined the record made available before us and on the basis of the same, we are persuaded to hold that there is no iota of evidence on record to substantiate that incidence of Customs Duty and Sales Tax had not been passed on to the purchasers, therefore, it would be

presumed that the burden had been passed on to the third party/end consumer, as such petitioner would not be entitled to refund of the Customs Duty and Sales Tax. Besides, in view of Section 3-B of the Sales Tax Act, petitioner was even otherwise bound to reimburse the collected Sales Tax to the Government. As far as the Customs Duty is concerned, the Government was also entitled to recover the same from the petitioner on the principle of equity as petitioner had no right to retain the same and it had also not suffered any loss in respect of the tax, which belongs to a third person, therefore, petitioner is not entitled to the same.

38. Learned counsel contended that the Government of Pakistan in utter disregard of the judgment of this Court dated 19th February 2001 in Civil Review Petition No. 80 of 1999 had promulgated two Ordinances i.e. The Customs Amendment Ordinance (No. XXIV of 20002) and Sales Tax Amendment Ordinance (No. XXV of 2002), on 7th June 2002 respectively. The petitioner has not challenged the vires of both the Ordinances separately except placing a statement on record in this behalf, in pursuance of order dated 1st August 2003.

39. Lastly in this behalf he contended that the petitioner's rights fall within past and closed transaction, therefore, the same cannot be re-opened in the absence of express language to that effect. In this behalf he relied upon ***Income Tax Officer, Central Circle-II, Karachi v. Cement Agencies.*** *[Taxation (1969 Vol. XX) 1],* ***Molasses Trading & Export (Pvt) Ltd. v. Federation of Pakistan*** *(1993 SCMR 1905) and* ***N.D.F.C. v. Anwar Zaid White Cement Ltd.*** *(1999 MLD 1888).*

40. On the other hand, Mr. Muhammad Afzal Siddiqui, learned ASC contended that Legislature can nullify or neutralize the effect of a judgment. In this behalf he relied upon the following judgments:---

1. Tafazzal Hossain v. Province of East Pakistan.
(PLD 1963 SC 251)

In this case it is held that:---

"Some other arguments were put forward which have to be noticed. It was urged that the amending Ordinance was ultra vires of the Governor because he had no jurisdiction to curtail the jurisdiction of the Supreme Court and an amendment of the Act which nullifies a decision given by the Supreme Court amounts to an interference with the jurisdiction of the Supreme Court. The argument is altogether misconceived. The jurisdiction of this Court is the jurisdiction to decide and the Ordinance does not provide that the Supreme Court shall not have jurisdiction to decide any matter which it was otherwise empowered to decide. A Legislature which has power to make laws regarding rights of persons can make such laws whether during the pendency of a proceeding before a Court or after a decision has been given by the Court and it cannot be said that the Legislature has by exercising such power affected the jurisdiction of the Court. A statute which changes rights of parties and does not relate to any procedural matter does not affect the jurisdiction of any Court. It affects only rights of parties. The power of the Legislature is not affected by the pendency of a proceeding before a Court or the existence of judgment by a Court."

2. ***Shri P.C. Mills v. Broach Municipality.***
(AIR 1970 SC 192)

In this case it has been held that when a legislature sets out to validate a tax declared by a Court to be illegally collected under an ineffective or an invalid law, the cause for ineffectiveness or invalidity must be removed before validation can be said to take place effectively. The most important condition of course is that the legislature must posses the power to impose the tax, for, if it does not, the action must ever remain ineffective and illegal. Granted legislative competence, it is not

sufficient to declare merely that the decision of the Court shall not bind for that is tantamount to reversing the decision in exercise of judicial power which the legislature does not possess or exercise. A Court's decisions must always bind unless the conditions on which it is based are so fundamentally altered that the decision could not have been given in the altered circumstances.

3. ***Tirath Ram v. State of U.P.***
(AIR 1973 SC 405)

In this case it is held that this Court has pointed out in several cases the distinction between encroachment on the judicial power and the nullification of the effect of a judicial decision by changing the law retrospectively. The former is outside the competence of the legislature but he latter is within its permissible limits. In the instant case what the legislature has done is to amend the law retrospectively and thereby remove the basis of the decision rendered by the High Court. Such a course cannot be considered as an encroachment on the judicial power.

4. ***M/s Mamu Kanjan Cotton Factory v. The Punjab Province.***
(PLD 1975 SC 50)

In this case the High Court declared the collection of the Cotton fee to be ultra virus statute i.e. West Punjab Cotton (Control) Act, 1949, which led to the promulgation of Punjab Cotton Control (Validation of Levy of Fees) Ordinance (Punjab Ordinance XIX of 1971), to undo the effect of the judgment of the High court with the plain object of enabling the Provincial Government to retain and claim, what according to the judgments of the High Court, could not have at the material time levied and collected. It was argued that the validating Ordinance on the other hand is sub-constitutional legislation, which cannot undo or destroy, what he described as the "end product" of the Constitutional jurisdiction and this Court, while rejecting the argument of the petitioner's counsel observed as under:-

> *"The argument, in my opinion, is without substance and which if accepted would indeed lead to startling results. It would strike at the very root of the power of Legislature, otherwise*

competent to legislate on a particular subject, to under take any remedial or curative legislation after discovery of defect in an existing law as a result of the judgment of a superior Court in exercise of its constitutional jurisdiction. The argument overlooks the fact, that the remedial or curative legislation is also "the end product" of constitutional jurisdiction in the cognate field. The argument if accepted, would also seek to throw into serious disarray the pivotal arrangement in the Constitution regarding the division of sovereign power of the State among its principal organs, namely the executive, the Legislature and the judiciary, each being the master in its own assigned field under the Constitution."

5. I.N.Saksena v. State of M.P.
(AIR 1976 SC 2250)

In this judgment following three principles were laid down for validating a law:-

1. *Whether the legislature possesses competence over the subject matter.*

2. *Whether by validation, the legislature has removed the defect, which the Courts had found in the previous law.*

3. *Whether it is consistent with the provisions of Part-III of the Constitution.*

6. ***Misrilal Jain v. State of Orissa.***
(AIR 1977 SC 1686)

In this case the Orissa Legislature enacted the Orissa Taxation (on Goods Carried by Road or Inland Waterways) Act, 7 of 1959, the Constitutionality of which was challenged by the appellant on the ground that the Bill leading to the Act was moved without previous sanction of the President of India, as required by the Proviso to Article 304 of the Constitution. The High Court accepted the plea but dismissed the Writ Petition on the ground that the appellants were not entitled to any relief as they had not challenged the Act of 1962 which had validated the Act of 1959. Accordingly the judgment of the High Court was implemented and after the assessment of the tax, the appellants filed another Writ Petitions challenging the Act 1962, which validated the Act, 1959. The petitions were dismissed by the High Court but in appeal, the judgment of the High Court was set aside by the Supreme Court. The Supreme Court of India held that the validity of Act, 1962

did not cure the defect from which the Act of 1950 suffered and therefore, respondents were not entitled to recover any tax from the appellants under the aforesaid Acts. Later on the Legislature of Orissa got passed a bill, imposing the same levy which it had unsuccessfully attempted to levy under the Act, 1959 and to validate under the Act of 1962. As such the persons from whom the State Government had recovered taxes after the Act of 1962, claimed refund, which were refused by the Government, therefore, again Writ Petitions were filed in the High Court challenging the validity of Act VIII of 1968. The Writ Petitions were dismissed. In this background following observations were made by the Supreme Court, which being highly instructive are reproduced herein below:---

> ***6.*** *…….Imposition of taxes or validation of action taken under void laws is not the function of the judiciary and therefore, by taking these steps the legislature cannot be accused of trespassing on the preserve of the judiciary. Courts have to be vigilant to ensure that the nice balance of power so thoughtfully conceived by our Constitution is not allowed to be upset but the concern for safeguarding the judicial power does not justify conjuring up trespasses for invalidating laws. There is a large volume of authority showing that if the vice from which an enactment suffers is cured by due compliance with the legal or constitutional requirements, the legislature has the competence to validate the enactment and such validation does not constitute an encroachment on the functions of the judiciary. The validity of a validating taxing Law depends upon whether the legislature possesses the competence over the subject-matter of the law, whether in making the validation it has removed the defect from which the earlier enactment suffered and whether it has made due and adequate provision in the validating law for a valid imposition of the tax……..”*

7. ***M/s Hindustan Gum & Chemicals Ltd. v. State of Haryana*** *(AIR 1985 SC 1683)*

In this case the Supreme Court of India has held that “a Court’s decision must always bind unless the conditions on which it is based are so fundamentally altered that the decision could not have been given in the altered circumstances.

41. Besides the above Indian Cases, this Court has elaborately discussed the validity of the laws, promulgated by the legislature in order to annul the effect of the judgment, with retrospective effect in ***Molasses Trading & Export*** *(ibid), wherein the principles discussed in the above judgments have been summarized.*

42. Learned Attorney General also relied upon the judgments reported as ***M/s Abbasi Textile Mills Ltd. v. Federation of Pakistan*** *(PLD 1958 SC Pak 187),* ***Commissioner of Sales Tax Rwp. v. M/s Sajjad Nabi Dar*** *(PLD 1977 Lahore 75),* ***M/s Sajjad Nabi Dar & Co. v. Commissioner of Income Tax Rawalpindi,*** *(PLD 1977 SC 437),* ***Commissioner of Sales Tax v. Messrs Zalin Ltd.*** *(1985 SCMR 1292),* ***M/s Army Welfare Sugar Mills Ltd. v. Federation of Pakistan*** *(1992 SCMR 1652),* ***M/s Air Home International v. Government of Punjab*** *(2002 CLC 780), and* ***Federation of Pakistan v. Metropolitan Steel Corporation*** *(2002 PTD 87). For convenience relevant para from* ***Commissioner of Sales Tax v. Messrs Zalin Ltd.*** *'s case is reproduced herein below:---*

> *"…… The second question is relatable to the principle underlying the present controversy namely, whether an assessee of sales tax after realization of the tax, which admittedly was not realizable or was in excess of the tax payable, could retain the same or claim refund thereof; notwithstanding his position of an agent only for deposit of the amount with the assessing authority. Prima facie he cannot claim any right over the same, on any principle. This also seemed to the learned counsel for the respondent as the ratio in the two judgments of this Court in the cases of Messrs Sajjad Nabi Dar & CO. and Messrs Abbasi Textile Mills Ltd."*

Similarly, in ***M/s Army Welfare Sugar Mills Ltd.*** *(ibid) this aspect of the case has been dilated upon in the following terms:---*

> *"55. In the present case, there is nothing on record to indicate, whether factually the appellants had passed on the additional burden to the purchasers under the above section or otherwise. The amount of the public revenue*

> *involved is very heavy. We are, therefore, of the view that it is a fit case in which the appeals are to be allowed but the cases are to be remanded to the Central Board of Revenue with the direction to inquire into the following aspects:---*
>
> ***(i)*** *How much quantity of sugar manufactured by the appellants in the financial year in question upto the date of rescission of SRO 560(1)/82 on 3.6.1989, exceeded the average production for the preceding two years of the factories under reference.*
>
> ***(ii)*** *Whether the appellants had passed on the additional amount of the excise duty or part thereof, which became due and payable on the above excess quantity of sugar on account of the rescission of SRO 560(1)/82, to the purchasers and/or to any other person or persons.*
>
> *If the answer to the above second question is in the negative, the Board of Revenue shall not charge any excise duty on the excess quantity of sugar, as determined in terms of above sub-para (i) of para 55."*

43. It may be noted that in the judgments relied upon by the learned counsel for petitioner, power of the Legislature to remove the basis on which the judgment has been founded, has not been disputed as would be evident from the perusal of the judgments, which have been relied upon by him.

44. Before dilating upon the respective contentions of parties counsel, concerning the validity or otherwise of above noted Ordinances it is necessary to point out that during pendency of instant petitions, on 30th May 2002 following order was passed, which reads thus : -

> *"Raja Irshad Ullah ASC has entered appearance on behalf of respondents and seeks a short adjournment to enable him to receive the comments from the Port Qasim Authority because according to him the matter is being looked into and the comments are essential for the determination of the controversy.*
>
> *We are afraid that this is merely a lame excuse because what is to be complied with is crystal clear i.e. the refund*

> *of sales tax and customs duty. The bank guarantee furnished by petitioner has been encashed and no steps are beign taken for refund. There seems to be force in the contention of Mr. Khalid Anwar ASC that attempt is being made to frustrate the orders of this Court. In this view of the matter, last opportunity is given to the Departments to refund the dues before 10th of June positively. On the said date Member Customs and Sales Tax shall appear before this Court.*

45. However, in the meantime petitioner filed Criminal Misc. Application No.179/2002, alleging a fresh cause for contempt of Court, merits whereof will be dealt with later on.

46. Learned counsel questioned the validity of the above Ordinances for following reasons : -

i) Petitioner's claim of refund would remain un-affected despite promulgation of the Ordinances because they have created a bar based on promissory estoppel whereas petitioner is claiming refund on the basis of Judgment in Civil Review Petition No.80 of 1999 dated 19th February 2001.

ii) The Ordinances shall be applicable to the cases of exemptions which are not based on notification issued by the competent authority whereas in petitioner's case, letter of authorization dated 26th June 1996 has been treated to be as a notification, therefore, Government cannot decline claim of the petitioner for the reasons mentioned in the Ordinances.

iii) The Ordinances provide that claim of exemption would be barred if it is based on a letter issued by a Govt. Department or authority but in petitioner's case it is not the Agriculture Ministry who had issued the letter because it is based on a Cabinet decision dated 24th June 1996 as such it would be deemed to be a

Government decision for issuing authorization letter for all intents and purposes.

iv) *Petitioner's case is also not hit by these Ordinances, being a past and closed transaction, therefore, it can not be re-opened, in view of the judgments reported as* ***Molasses Trading & Export (Pvt). Ltd.*** *(ibid),* ***Income Tax Officer, Central Circle-II, Karachi*** *(ibid) and* ***N.D.F.C.*** *(ibid).*

In support of his above submissions he also relied upon the following judgments:-

1. ***Municipal Corporation of the City of Ahmedabad v. The New Shrock Spg. And Wvg. Co.***
(AIR 1970 SC 1292)

In this case it was held that the Legislatures under our Constitution have, within the prescribed limits, power to make laws prospectively as well as retrospectively. By exercise of all those powers, the Legislature can remove the basis of a decision rendered by the competent Court, thereby rendering that decision ineffective.

2. ***Madan Mohan Pathak v. Union of India***
[1978 (2) SCC 50]

Same principle has been discussed in this judgment.

3. ***Arcot N. Veeraswami v. M.G. Ramachandran***
(AIR 1988 Madras 192)

In this judgment it has been held as under:---

> *"It is also now a well settled proposition that once a competent Court has exercised its jurisdiction and rendered a decision determining the rights of parties, that decision cannot be interfered with or nullified by the Legislature and the same can be got rid of only by an appeal or a revision to a higher court or by review or re-opening by the Court which rendered the decision, even through with reference to persons not parties to the decision, the legal basis on which the decision was*

rendered can be altered by the legislature by amending the law with retrospective effect. That is to say, the basis of the decision could be nullified as to its applicability to other cases. But so far as the rights and obligations flowing from that case are concerned, unless the legislature specifically provides for re-opening of that decision by the Court which decided it, it will be binding on the parties. That is, while the legislature can nullify the basis of a decision, it cannot override the decision of the Court. Vide M.M. Patthak v. Union of India AIR 1978 SC 803 and the decision of a Division Bench of this Court in W.P. Nos.2341 to 2344 of 1970 dated 20.07.1979. Thus, the judicial power is not merely a power to decide or adjudicate cases and controversies by the methods established by the usages and principles of law, but it also includes certain incidental and inherent attributes of such power namely the ability to interpret the Constitution and the other Acts of Parliament and legislature, and the precedents and the proper exercise of judicial precedents and the proper exercise of judicial power is inseparable from the appropriate procedure. Therefore, whenever an act undertakes to determine a question of right or obligation and property as the foundation on which it proceeds, such act is to that extent a judicial one and it is not a proper exercise of legislative power. Gathering of facts for the purpose of the legislature is for the purpose of determination of a policy and it could not be equated to the judicial process of ascertaining facts for the purpose of deciding a case. Similarly, as held by the Supreme Court

> *in Smt. Indira Nehru Gandhi v. Raj Narain AIR 1975 SC 2299, even if it records a finding that cannot take the place of a judicial finding as it lacks the expertise and the apparatus to decide cases."*

4. R.P.S. Junior College, Maydukur v. R. Vaidyanatha Iyer
(AIR 1989 Andhra Perdesh 96)

The principle discussed in above judgment has been reiterated in this case.

5. D.Cawasji & Co. v. State of Mysore
ITR 648 (Vol.150)

In this judgment by means of an amendment the judgment of the High Court was sought to be nullified and with this background following observation was made:---

> *"Thus, the only object of enacting the Amendment Act was to nullify the effect of the judgment and enable the State Government to retain the amount wrongfully and illegally collected as sales tax and this object was sought to be achieved by the Amendment Act, which did not even purport to remedy or remove the defect or lacuna but merely raised the rate of sales tax from 6½ per cent. to 45 per cent. and further proceeded to nullify the judgment and order of the High Court. The enhancement of the rate of tax was, therefore, clearly arbitrary and unreasonable. To the extent that the Act imposed the higher levy with retrospective effect and sought to nullify the judgment and order of the High Court, the Act was invalid and unconstitutional."*

47. Conversely, learned Attorney General contended that :----

i) Both the Ordinances have removed the basis on which judgment dated 19th February 2001 (CRP.80/99) was founded, therefore, petitioner could not claim relief of refund of tax etc. as of right.

ii) The Legislation is competent to legislate such law with a view to nullify effect of a judgment, thus on promulgation of the Ordinances the Government had achieved the object therefore, judgment dated 19th

February 2001 cannot be implemented for the purpose of refund of Sales Tax and Customs Duty.

iii) The authorization letter dated 26th June 1996 which has been deemed to be a notification in the judgment dated 19th February 2001 does not fulfill conditions of its being published in official gazette and this Court in the judgment dated 19th February 2001 has said nothing in this behalf, therefore, for the purposes of the Ordinances, authorization letter shall not be deemed to be notification under Section 19 of the Customs Act and Section 6 of the Sales Tax Act for grant of exemption of Customs Duty and Sales Tax.

iv) The decision of the Cabinet does not create a right for exemption of Customs Duty or Sales Tax, unless Government's Executive Branch had not implemented the same by issuing a Gazette Notification.

v) The Ordinances refer distin0ctly to two rights i.e. exemption and refund whereas judgment dated 29th June 2000 only deals with exemption. The claim of refund was not subject matter of the judgment passed as such this question must be dealt with independently keeping in view facts and circumstances of the case under the law on the subject.

48. It may not be out of context to observe that petitioner has not challenged the vires of both the Ordinances in any independent proceeding. However, learned counsel filed a statement on 14th January 2003 in pursuance of order dated 8th January 2003 which may be reproduced herein below:----

"That the total mount of Customs Duty and Sales Tax received from the petitioner Fecto Belarus Tractors Limited, on account of Import of 6981 Belarus MTZ-50 tractors is Rs.493,467,838. This amount in its totality was deposited with the Registrar of this Honourable Court on 09.07.2002 through crossed Cheque No.B970917 for

> *Rs.152,070,111, Cheque No.B939834 for Rs.69,151369. Cheque No.B939835 for Rs.38,956,338 and Cheque No.B977916 for Rs.233,290,020 =all dated 8th June 2002. This deposit was made pursuant to and in accordance with the orders dated 30.05.2002 and 09.07.2002 of this honourable Court.*
>
> *That out of the aforesaid amount, the Customs Duty received from the petitioner is Rs.19,10,26,449 and the Sales Tax so received is Rs.30,24,41,389."*

49. It is equally important to note that prior to above statement, learned counsel on 9th July 2002 got recorded following statement in Court proceedings:----

> *"To the contrary, Mr. Khalid Anwar ASC has very ably drawn our attention to the case reported as 1993 SCMR 1905 and it is contended that in the reported case as well an Ordinance was promulgated to nullify the effect of the judgment and the language of the Ordinance is pari materia to the language of the two Ordinances issued in this case. It was further argued by the learned counsel that in the case reported above, the said Ordinance was held to be inapplicable although it was made applicable retrospectively, because it was held by this Court that transaction was past and closed. It was thus argued that in the case two Ordinances, which have been promulgated would not bring about any change, inasmuch as in the light of dictum laid down in Molasses case, (1993 SCMR 1905), these Ordinances would not help the petitioner."*

50. Perusal of above statement clearly demonstrates that petitioner raised sole argument that in view of the judgment in the case of ***Molasses Trading & Export*** *(ibid), its claim falls within the category of past and closed transaction, therefore, the Ordinances would not be applicable to its case, whereas during the course of arguments he has expanded the scope of his objections.*

51. In this behalf, it may be noted that in principle, without challenging the Ordinances before the Court, having jurisdiction, the implications of the Ordinances cannot be examined. Nevertheless, we have decided to do so, firstly for the reason that while hearing instant petition on 9th July 2002 and 8th January 2003, notices were issued to learned Attorney General for Pakistan to address the Court on the vires and applicability of the Ordinances; secondly for the reason that presumably Federation had promulgated these Ordinances with a view to defend the contempt petitions.

52. It is to be observed that the President of Pakistan issued both the Ordinances on 7th June 2002 competently in exercise of powers conferred upon him by the Constitution and the law, prevailing at that time. In addition to it after passing of Constitution 17th Amendment Act, 2003 by the Parliament vide Article 270-AA of the Constitution, both the Ordinances have been saved and declared to be valid and legal for all intents and purposes, thus their vires cannot be questioned for this reason as well.

53. A perusal of both the Ordinances indicates that they are declaratory in nature and have been promulgated to remove certain doubts which have been created by the authorization letter dated 26th June 1996 issued by the "MINFAL" whereby exemption of Sales Tax and Customs Duty was granted to petitioner contrary to the provisions of Section 6 of the Sales Tax Act, 1990 and Section 19 of the Customs Act. 1969. It is well settled that whenever there is any ambiguity or doubt, in respect of a law, promulgated either by law makers or by the authority in exercise of delegated powers to make subordinative legislation, such declaratory legislation can be made. Reference in this behalf may be made to ***Abdul Hamid and another v. The State*** *(PLD 1963 Karachi 363). It is equally important to note that the statutes of declaratory nature ordinarily operate*

*retrospectively as laid down in the following para by renowned jurist Bindra on "**Interpretation of Statutes"** 7th Edition (page 857):---*

> ***7. Presumption against retrospectivity.----*** *As a general rule every statute is deemed to be prospective, unless by express provision or necessary implication it is to have a retrospective effect. Whether a statute is to have retrospective effect depends upon its interpretation having regard to well settled rules of construction. Retrospection is not to be presumed; but many statutes have been regarded as retrospective without declaring so. Remedial statutes are always regarded as prospective, but declaratory statutes, retrospective. The statute would operate retrospectively when the intent that it should so operate clearly appears from a consideration of the Act as a whole, or from the terms thereof, which unqualifiedly give the statute a retrospective operation or imperatively require such a construction or negative the idea that it is to apply only to future cases. If the Court is in doubt whether the statute was intended to operate retrospectively, it should resolve the doubt against such operation……."*

*54. Besides, the language used in both the Ordinances manifests clear intention of the law giver that it would apply with retrospective effect and shall be deemed always to have been so inserted in respective statutes. Identical language was used in Section 5 of the Finance Act 1988 in pursuance whereof Section 31-A was inserted in the Customs Act, 1969 with retrospective effect. This Court had occasion to examine this provision of law in **Molasses Trading & Export** (ibid). Relevant paras therefrom read as under :----*

> *"……Before considering this question it would be appropriate to make certain general observations with regard to the power of validation possessed by the legislature in the domain of taxing statutes. It has been held that when a legislature intends to validate a tax declared by a Court to be illegally collected under an invalid law, the cause for ineffectiveness or invalidity must be removed before the*

validation can be said to take place effectively. It will not be sufficient merely to pronounce in the statute by means of a non-obstante clause that the decision of the Court shall not bind the authorities, because that will amount to reversing a judicial decision rendered in exercise of the judicial power which is not within the domain of the legislature. It is therefore necessary that the conditions on which the decision of the Court intended to be avoided is based, must be altered so fundamentally, that the decision would not any longer be applicable to the altered circumstances. One of the accepted modes of achieving this object by the legislature is to re-enact retrospectively a valid and legal taxing provision, and adopting the fiction to make the tax already collected to stand under the re-enacted law. The legislature can even give its own meaning and interpretation of the law under which the tax was collected and by "legislative fait" make the new meaning binding upon Courts. It is in one of these ways that the legislature can neutralise the effect of the earlier decision of the Court. The legislature has within the bounds of the Constitutional limitations, the power to make such a law and give it retrospective effect so as to bind even past transactions. In ultimate analysis therefore the primary test of validating piece of legislation is whether the new provision removes the defect which the Court had found in the existing law and whether adequate provisions in the validating law for a valid imposition of tax were made. ……..……..…… ……..……..……..……..……..……..……..……..……..……..……..……..……..…… ……..……..…..It is clear from the provisions of Section 5 of the Finance Act, 1988 that by the device of the deeming clause the newly-inserted Section 31-A is to be treated as part and parcel of the Act since its enforcement in 1969. Undoubtedly, therefore, the section is retrospective in operation. It is agreed on all hands that the well-settled principles of interpretation of statutes are that vested rights cannot be taken away save by express words or necessary intendment. It also cannot be disputed that the legislature, which is competent to make a law, has full plenary powers within its sphere of operation to legislate retrospectively or retroactively. Therefore, vested rights can be taken away by such a legislation and it cannot be struck down on that ground. However, it has also been

> *laid down in Province of East Pakistan v. Sharafatullah PLD 1970 SC 514 that a statute cannot be read in such a way as to change accrued rights, the title to which consists in transactions past and closed or any facts or events that have already occurred. In that case the following postulation has been made:*
>
> > *"In other words liabilities that are fixed or rights that have been obtained by the operation of law upon facts or events for or perhaps it should be said against which the existing law provided are not to be disturbed by a general law governing future rights and liabilities unless the law so intends."*

This is an important principle which has to be kept in mind in the context of the present case. Reference may also be made to another principle followed in several decisions but to quote from ***Mehreen Zaibun Nisa v. Land Commissioner, Multan*** *(PLD 1975 SC 397) where it was observed:*

> *"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) AC 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."*

However, in that case aforesaid principle was subjected in its application to a given case to a condition that the Court has to determine the limits within which and the purposes for which the legislature has created the fiction. It has been quoted from an English decision that "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.

55. It may be noted that in above judgment the effect of Section 31-A was examined by this Court in view of the background that in ***Al-Samrez*** *(ibid) [1986 SCMR 1917], it was held that the rate of duty will be assessed with reference to the date on which bill of entry was presented; and similarly benefit of exemption, if any, was also to take effect on the same date because the liability is wiped of by virtue of exemption at the same time. It is further held that the rights and liability of the importers attained fixity on the said crucial date, therefore, Section 31-A was enacted in the Customs Act 1969 by means of Finance Act 1988, and while examining its vires, this Court observed that the language of Section 31-A of the Customs Act clearly envisages and stipulates that the act of withdrawal or modification of exemption notification shall take effect with reference to the date of its issue, irrespective of the fact that contract for the import of goods and LCs had come into existence prior to such date. However, it was further observed that the insertion of Section 31-A of the Customs Act though operating retroactively, it does not have the effect of destroying or re-opening the past and closed transaction. It may be noted that in* ***Molasses Trading & Export*** *(ibid), bills of entry were presented on the dates prior to 1st July 1998, therefore, it was held that all these cases were the cases which pertained to past and closed transaction and were not affected by the provisions of Section 31-A of the Customs Act. With a view to apply the test laid down in the judgment of* ***Molasses Trading & Export***

(ibid) on the question of retrospective effect of the Ordinances, the test laid down therein is reproduced herein below for convenience :---

> *"……..It also cannot be disputed that the legislature, which is competent to make a law, has full plenary powers within its sphere of operation to legislate retrospectively or retroactively.……..……"*

In this behalf learned counsel also relied upon the following judgments:---

1. Hotel Industries Ltd. v. Province of West Pakistan
(PLJ 1977 Lahore 237)

> *In this case the learned Single Judge of the Lahore High Court relied upon Maxwell on the Interpretation of Statutes, 1962 Edition, page 213, wherein it is held that "whenever the intention is clear that the Act should have a retrospective operation, it must unquestionably be so construed., even though the consequences may appear unjust and hard".*

2. Barkat Ali v. Administrator Thal Development Bhakkar
(PLD 1978 Lahore 867)

> *In this case it is held that in so far as affecting vested rights, a statute will be construed as prospective only and not as operating retroactively unless that intention is made manifest either by express words or by a clear, distinct, and unmistakable implication.*

3. Muhammad Hussain v. Muhammad
(2000 SCMR 367)

> *In this judgment it is held that "the Legislature is competent to give retrospective effect to a legislation and in that process even it could take away vested rights of the parties but for that it must use clear words in the statute, or such a consequence must arise as a necessary implication from the language of the legislation.*

*56. It may be noted that this Court in **Molasses Trading & Export** (ibid), while examining the identical provisions of Section 31-A of the Customs Act, which is in pari materia with Ordinances (No. XIV and XV of*

2002), has held that it would be applicable retrospectively. Applying the same principle and also taking into consideration the discussion made by the other Courts in the judgments referred to herein above, we feel no hesitation in holding that in the Ordinances under discussion the Legislature has shown its intendment in clear terms that they would be applicable with retrospective effect.

57. It may be noted that learned counsel for petitioner has heavily relied upon the judgment in the case of ***Income Tax Officer, Central Circle-II, Karachi v. Cement Agencies.*** *[Taxation (1969 Vol. XX) 1]. The Facts in brief of this case are as under:--*

> *That initially Income Tax Department issued notices to the respondent-company for not filing of the returns but ultimately in view of order of the Appellate Tribunal, the proceedings were dropped. However, later on, in view of the judgment pronounced by this Court in the case of Octavius Steel and Company Limited v. The Commissioner of Income-Tax Dacca (PLD 1960 SC 371), the case of respondent was re-opened which was resisted by them on the ground of being barred by time. However, these proceedings were challenged in the Writ Petition and the High Court found that notices issued against them on 11th December 1962 were beyond time, therefore, the assessment orders were made without jurisdiction. Against this order, the Income Tax Officer Central Circle-II, Karachi preferred Civil Appeals which were dismissed in view of two principles:---*
>
> > ***(1)*** *On the basis of judgment of this Court in Octavius Steel 's case (ibid), past and closed transactions could not be re-opened as they were finally disposed of in their favour and until they are set aside in accordance with law, no fresh proceedings could be initiated.*
> >
> > ***(2).*** *That even a legislative measure like an Ordinance expressly given retroactive effect could not operate so as to annul a valid and existing judgment as*

> *between the parties whose rights had been duly determined and according to the law which existed before the new Ordinance was passed.*

58. A perusal of above principles tends to hold that there can be no cavil with the proposition. As far as later principle is concerned, it may be observed that unless the basis for judgment in favour of a party is not removed, it could not affect the rights of a party in whose favour the same was passed, but in the instant case, as discussed herein above that the Legislature has promulgated two Ordinances in order to remove the basis on which the judgment dated 19th February 2001 was founded, therefore, this judgment has no bearing on the instant case.

59. It may be noted that the petitioner itself relied upon the case of ***Molasses Trading & Export*** *(ibid), the affect whereof has already been discussed.*

60. Learned counsel for petitioner also relied upon ***N.D.F.C. v. Anwar Zaib White Cement Ltd.*** *(1999 MLD 1888), which being entirely distinguishable on facts of the case needs no discussion.*

61. Admittedly letter of authorization was issued on 26th June 1996 with permission to petitioner to open LC upto 30th June 1996, whereas in the ***Molasses Trading & Export*** *(ibid) bills of entry were presented in all the cases before 1st July 1988 when Section 31-A was enacted and enforced, therefore, for such reason it was pleaded that these cases fall within the category of past and closed transaction.*

62. It may also be noted for the purpose of quantification or assessment of the Tax under Section 30 of the Customs Act, the date of submission of bill of entry is considered crucial as held in Molasses case (ibid). Thus it is held that date of opening of LCs would not be crucial under Section 30 of the Customs Act to assess Tax as such examining from this angle as well, it

can safely be concluded that, merely for the reason of opening LCs upto 30th June 1996, the case of petitioner would not fall within the category of past and closed transaction.

63. Now stage is set to analyze both the Ordinances to ascertain whether Legislature has achieved its object to nullify/dilute the effect of judgment dated 19th February 2001. Both the Ordinances contain non-obstante clauses, raising presumptions that the provisions of the Ordinance shall prevail over any other law for the time being in force and including but not limited to the Protection of Economic Reforms Act 1992 (XII of 1992) and notwithstanding any decision or judgment of any forum, authority or Court, no person shall in the absence of :----

> ***a.*** *A notification by the Federal Government published in the official Gazette expressly granting and affirming exemption from customs duty, be entitled to or have any right to any such exemption from or refund of Customs duty on the basis of*
>
> *i. The doctrine of Promissory Estoppel; or*
> *ii. On account of any correspondence; or*
> *iii. Admission; or*
> *iv. Promise; or*
> *v. Commitment; or*
> *vi. Concessionary order made or understanding given whether in writing or otherwise; or*
> *vii. By any government department or authority.*

64. It is to be noted that the contents of the Ordinance No.XXV of 2002 are identical to that of Ordinance XXIV 2002 reproduced herein above, except incorporation of the provisions of Section 31-A(I) of the Customs Act 1969 with retrospective effect in the Sales Tax Act, 1990.

65. A careful perusal of the judgment dated 19th February 2001 indicates that petitioner got relief on the following basis:---

1. *Protection of Economic Reforms Act, 1992.*
2. *Authorization letter dated 26th June 1996 issued by 'MINFAL'.*
3. *Promissory Estoppel against Federal Government as its Ministry of Food and Agriculture had issued authorization letter.*

66. Apparently the authorization letter was deemed to be a notification granting exemption of Customs Duty and Sales Tax, etc., whereas fact remains that it was not issued by the Federal Government with the consultation of Finance Division.

67. At this very juncture it is considered appropriate to dispose of contention of learned counsel that authorization letter dated 26th June 1996 had been issued on the basis of decision of Cabinet dated 24th June 1996, therefore, it may be held that this letter was issued by the Federal Government but actually no notification in terms of Section 19 of the Customs Act 1969 and Section 6 of the Sales Tax Act, 1990, has been issued. So far MINFAL is concerned it had no jurisdiction under the law to issue such notification. Therefore, argument raised by the learned counsel in this behalf has no substance.

68. The second reason for not granting relief to the petitioner is lack of publication of authorization letter dated 26th June 1996 in official gazette as held in ***Province of East Pakistan v. Hasan Askary*** *(PLD 1971 SC 82) and* ***Moosa and Co. v. Collector of Customs Karachi*** *(PLD 1977 Karachi 710). Thus it can be conveniently held that authorization letter dated 26th June 1996 was not issued by the relevant executive authorities of the Federal Government in accordance with the provisions of Article 90 of the Constitution of Islamic Republic of Pakistan read with Rule 12 of the*

Rules of Business 1973, coupled with the reasons that authorization letter was not gazetted in order to make it public in light of the judgments noted herein above, therefore, it could have not furnish basis for granting relief to the petitioner vide judgment dated 19th February 2001. Besides it, learned counsel himself conceded that the petitioner is not claiming relief on the basis of promissory estoppel but in view of the judgment of this Court. Suffice it to observe in this behalf that if the basis of the judgment i.e. authorization letter has been successfully removed, how can the petitioner be entitled to the relief on the basis thereof. So far as Protection of Economic Reforms Act, 1992 is concerned, it would not provide any relief to petitioner in the face of non-obstante clause therein.

69. It may further be noted that without prejudice to the earlier arguments, there is yet another important thing which is to be borne in mind i.e. the judgment dated 19th February 2001 has decided the question of exemption of Customs Duty and Sales Tax but it has nothing to do with the question of refund, therefore, for this additional reason as well, on the basis of the judgment, the petitioner could not claim relief of refund of the amount and for that matter it ought to have chosen another equitable remedy as discussed herein above.

70. So far as the commission of Contempt of Court by the respondents during the pendency of the proceedings, as alleged in Criminal Misc. Application No.179 of 2002 is concerned, the respondents have submitted a reply, explaining therein two reasons for non-compliance of the order dated 30th May 2000, i.e.; firstly, two Ordinances were issued in the meantime being No. XXIV and XXV of 2002 by the Legislature and; secondly they had complied with the order of the Court by depositing the amount by means of cheques in this Court, therefore, under these

circumstances, prima facie, we are of the considered opinion that the respondents, in view of the given facts and circumstances of the case, cannot be charged for the contempt of Court, arising out of Criminal Misc. application No.179 of 2002, as well.

71. There is yet another important point for consideration i.e. as to whether petitioner is entitled to refund of the Service Charges because in ***Collector of Customs v. Sheikh Spinning Mills*** *(1999 SCMR 1402), this Court has held that the imposition of Service Charges as imposed under Section 18-B of the Customs Act 1969, towards the pre-shipment inspection is ultra vires of the powers of the Federal Legislature. It is to be noted that respondents have placed on record sufficient material which indicates that the petitioner had neither deposited indirect tax i.e. Sales Tax and Customs Duty nor had sold the Tractors at the agreed rate of Rs.230,000/-. They had been selling the same at a much higher rate, ranging between Rs.399,000/- to Rs.435,000/- and in this manner, they had been earning profit of more than Rs.200,000/- per unit. This fact has not been denied by the petitioner as no reply of Civil Misc. Application No.168 of 2000 was filed, as such applying the principle of unjust enrichment, the petitioner is not found entitled for the same as well. However, if upon furnishing documentary evidence, petitioner satisfies the concerned authorities of the CBR that the Tractors were sold by it at the agreed rate of Rs.230,000/- per unit, inclusive of Customs Duty and Sales Tax, then it would be entitled to the refund of Service charges, otherwise it would also be liable to pay the balance of the amount acquired by it by selling the Tractors at a price higher than Rs.230,000/- contrary to commitment made by it with the Government.*

72. Above discussion persuades us to hold that petitioner is not entitled to the refund of Customs Duty and Sales Tax. However, Service Charges are refundable subject to observations made herein above.

Thus for the foregoing reasons, petition for contempt of Court as well as Criminal Misc. Application No. 179 of 2002 are dismissed. Office is directed to refund the amount of Rs.493,467,838/- (four hundred ninety three million, four hundred sixty seven thousand and eight hundred and thirty eight) to Collector of Customs concerned, in accordance with Supreme Court Rules, 1980, alongwith accrued mark up, if any.

J.

J.

J.

Announced in Court on

_____ day of May 2005.

J.

APPROVED FOR REPORTING.

*Irshad/**

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

Mr. Justice Iftikhar Muhammad Chaudhry
Mr. Justice Rana Bhagwandas
Mr. Justice Mian Shakirullah Jan

CR. ORIG. P. NO.15 OF 2002 & Cr. Misc. A.179/2002
IN CIVIL REVIEW PETITION NO.80 OF 1999.

Fecto Belarus Tractor Limited … … *Petitioner*

Versus

Govt. of Pakistan through M/o Finance Economic Affairs and others. … … *Respondents*

For the petitioner	:	*Mr. Khalid Anwar, Sr. ASC* *Mr. M. A. Zaidi, AOR*
For respondent No.1	:	*Mr. Makhdoom Ali Khan,* *Attorney General for Pakistan.* *Mr. Faisal Hussain Naqvi, Advocate.* *Mr. Suleman Afridi, Advocate.* *Mr. M. Ramzan Bhatti, Member Customs.* *Mr. Shahid Ahmed, Member Sales Tax.*
For respondents(2-10)	:	*Mr. Abdul Hafeez Pirzada, Sr. ASC.* *Mr. Afzal Siddiqui, ASC* *Mian Gul Hasan Aurangzeb, Advocate.* *Mr. Arshad Ali Chaudhry, AOR*
Dates of hearing	:	*11th to 14th January 2005.*

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Kindly fix the above titled case for announcement of judgment before the Court on 11th May 2005, as directed by HJ(1).

P.S. TO HJ(1).

CA(FIXTURE)