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IN THE HIGH COURT OF SINDH, KARACHI
(Original Civil Jurisdiction)

SUIT No. 1764 /2014

1-181
22/9/14
ghafar

1. **Muhammad Hussain s/o Kassim Habib**
Muslim, adult
r/o H.No.D-252, Navi Housing Scheme,
Zamzama, Clifton
Karachi
Bearing CNIC no.42201-6901636-7
2. **Ms. Kulsum Bai d/o Osman Kasmani**
Muslim, adult
r/o Flat No.G-6, Parsa Homes
Black House Road
Karachi Cantt
bearing CNIC no.42301-071:974-0
3. **Mr. Muhammad Bashir Kasmani s/o**
Muhammad Osman Kasmani
Muslim, adult
r/o Flat No.G-6, Parsa Homes
Black House Road
Karachi Cantt
bearing CNIC no.42301-0748705-1
4. **Ms. Yasmin d/o Muhammad Salim Abdullah**
Muslim, adult
r/o Flat No.69, Baghpura House,
Saylani Chowk, Dhoraji
Karachi Cantt
bearing CNIC no.42201-6584060-8
5. **Ms. Huma d/o Muhammad Salim**
Muslim, adult
r/o Flat no.B-405, Afshan Apartment
Garden East
Karachi
bearing CNIC no.42301-0966520-8
6. **Ms. Hajra Bai d/o Muhammad Siddiq**
Muslim, adult
r/o Flat No.5-B, Pear Heaven Apartment
Kehkashan, Block 5, Clifton
Karachi
bearing CNIC no.42301-1223634-6
7. **Ms. Afshan Asif Moton d/o Asif Ahmed Moton**
Muslim, adult
r/o Flat No.A-5, Dault Square
Block 13-B, Gulshan-e-Iqbal
Karachi
bearing CNIC no.42201-3516663-0

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17/11/14

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- 8. Ms. Salma Asif Sultan d/o Muhammad Asif
Muslim, adult
r/o Flat No.36-J/3, Block 6
PECHS, Near Hill Park
Karachi
bearing CNIC no.42000-0387577-4
- 9. Ms. Sabiha Younus d/o Muhammad Younus Nawab
Muslim, adult
r/o H No.24-B, Central Lane, Phase II, DHA
Karachi
bearing CNIC no.42301-5179678-2
- 10. Ms. Nasima Latif d/o late Abdul Latif
Muslim, adult
r/o 15/2, 7th Zamzama Street, Phase V
DHA,
Karachi
bearing CNIC no.42301-3053821-4
- 11. Mrs. Shahnaz A. Saleem w/o Ahsan Muhammad Saleem
Muslim, adult
r/o H.No.E-11, Cosmopolitan Society
Ansari Road
Karachi
bearing CNIC no.42201-0571902-8
- 12. Asian Securities Limited
Having Corporate/Registered office at
Suite # 101, Mezzanine Floor
Marine Point, Block 9
Clifton
Karachi
Through its authorized representative
- 13. Muhammad Bashir Kasmani Securities (Pvt) Ltd
Having registered office at
Office # 35, Karachi Stock Exchange Building
Stock Exchange Road
Karachi
Through its authorized representative.....Plaintiffs

Plaintiffs nos. 1 to 11 through their duly constituted Attorney and Plaintiffs nos. 12 and 13 through their Authorized representative i.e. Liaquat Ali Sarani s/o Fida Hussain Sarani, Muslim, adult r/o Flat 102, Raheen Residency, Jinnah Quarters, Karachi bearing CNIC no.42000-0431467-3

Versus

- 1. Pakistan
the Secretary Revenue Division and
Ex-Officio Chairman, Federal Board of Revenue
Islamabad

Li

2. (a) Commissioner of Inland Revenue
Zones I, Regional Tax Office-I
Karachi
- (b) Commissioner of Inland Revenue
Zones III, Regional Tax Office-I
Karachi
- (c) Commissioner of Inland Revenue
Zones IV, Regional Tax Office-I
Karachi
3. Commissioner of Inland Revenue
Zones I, Regional Tax Office-III
Karachi
4. Security Papers Limited
Jinnah Avenue, Malir Halt,
Karachi - 75100
Through its Principal Officer
5. Famco Associates (Pvt) Ltd
8-F, next to Hotel Faran Nursery
Block 6, PECHS
Shahrah-e-Faisal
Karachi
Through its Principal Officer
6. Central Depository Company of Pakistan Ltd
CDC House, 99-B, Block 'B', S.M.C.H.S.,
Main Shahrah-e-Faisal,
Karachi - 74400
Through its Principal Officer.....Defendants

SUIT FOR DECLARATION AND PERMANENT INJUNCTION

17/1/15

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IN THE HIGH COURT OF SINDH AT KARACHI

Before:
Mr. Justice Muhammad Shafi Siddiqui

Suit No. 1764, 2214, 2299, 2300, 2339, 2439, 2357 and
2515 of 2014 and 142, 794, 937, 1034 and 1035 of 2015

Muhammad Hussain and other plaintiffs
in above referred suits

Versus

Federation of Pakistan & others in all suits

Date of Hearing:	22.05.2015, 25.05.2015, 28.05.2015, 02.07.2015, 06.07.2015, 07.07.2015, 10.07.2015, 13.7.2015 and 15.7.2015.
Plaintiffs in Suits No.1764 and 2214 of 2014:	Through M/s Dr. Muhammad Farogh Naseem, Pooja Kalpna, Nasir Latif Khan and Aamir Raza Advocates.
plaintiffs in Suits No.2299 and 2300 of 2014:	Mr. S. Owais Ali Shah Advocate.
Plaintiffs in Suits No.2339, 2391, 2515, 2439 of 2014 and 828, 1034 and 1035 of 2015	Through Mr. Behzad Haider Advocate
Plaintiff in Suit No. 794/2014	Through Mr. Aminuddin Ansari along with Mr. Khaliq Tanvari Advocates
Defendant/Federation of Pakistan:	Through Mr. Salman Talibuddin, Addl. Attorney General
Defendant No.2(a)/ Commissioner Inland Revenue RTO-I in Suit No. 1764, 2214, 2299, 2339, 2515 of 2014, 142, 794, 937, /2015:	Through Mr. Amjad Javed Hashmi Advocate
Defendant No.2(b)/ Commissioner Inland Revenue RTO-III in Suit 2214, 794 and 1035/2015:	Through Mr. Irshad-ur-Rehman Advocate
Defendant No.4 in Suit No.2439, 2515 of 2014:	Through Mr. Khaleeqe Ahmed Advocate
Defendant No.7 in Suit No.794 of 2015:	Through Mr. Zeeshan Abdullah Advocate

J U D G M E N T

Muhammad Shafi Siddiqui, J. These are connected suits involving common question of law as to whether Section 2(29), 39(1), 236(M) and 236(N) of Income Tax Ordinance 2001 (hereinafter referred as Ordinance 2001) as inserted through Finance Act, 2014 are ultra vires the law and the Constitution. All the learned counsel agreed for disposal of all the connected suits being a short cause matter as they agreed that no evidence is required to be led by any of the parties.



2. Brief facts as contended by the learned counsel for the plaintiffs are that through Finance Act 2014 Federal Legislature has made amendment in Ordinance 2001 in order to levy income tax on bonus shares. Such amendment has in fact affected Section 2(29), 39(1), 236M and 236N etc. of Ordinance 2001. Through the instant suits plaintiffs have called in question above amendments inserted through Finance Act, 2014.

3. The notices were also issued to Attorney General for Pakistan under section 27-A CPC as well who has responded and assistance provided through Addl. Attorney General.

4. By consent the issues were framed as being short cause matter on 25.05.2015.

5. Since the question in relation to the maintainability of the suit was also framed, counsel for the defendants has argued on this point and in that regard relied upon Section 227 of Ordinance 2001 and the judgment in the case of (i) Batala Engineering v. ITO (29 Taxation 190 (Supreme Court) (ii), ITRO and 2 others v. CBR (2003 PTD 1155), (iii) Abbas S. Shroff v. ITO (78 Taxation 119).

6. The counsel has also relied upon section 113 CPC and in support thereof relied upon AIR 1971 Calcutta 368 and AIR 1971 AP 339 and

argued that Article 175(2) of the Constitution provides that no Court shall have any jurisdiction save as is or may be conferred by it on the Constitution or under any law. He further with reference to Article 212 of the Constitution submitted that suits are not maintainable. He added that section 9 CPC barred the proceedings and relied upon PTD 2167 (HC, Karachi). He also laid emphasis on section 56d of Specific Relief Act.

7. In reply to these objections touching maintainability, Mr. Farogh Naseem, submitted that insofar as section 227 of Ordinance 2001 is concerned, bar is only with reference to the proceedings where orders made under the said Ordinance 2001 and hence the available section does not preclude a challenge to the vires of law or Statute framed by the parliament. He submitted that it is now well settled principle of law that where the action by any statutory functionary is illegal or extraneous the same cannot be reckoned to be an action under the said provision of law. Learned counsel in this regard relied upon the case of Abdul Rauf v. Abdul Hamid Khan (PLD 1965 SC 671) and Hashmatullah v. KMC (PLD 1971 Karachi 514).

8. Insofar as section 9 CPC is concerned, learned counsel submitted that the ultimate jurisdiction is of Civil Court as held by Hon'ble Supreme Court in the case of Hamid Hussain v. GOWP (1974 SC 356) and HMC v. Fateh Jeans (1991 MLD 284). In relation to section 56(d) of Specific Relief Act it is contended that the law is completely misplaced as it only relates to a lawful action and relied upon the case of Shujabad v. Collector (2014 PTD 1963). Hence, learned counsel pleads that the suit is maintainable.

9. With regard to merits of the case learned counsel for plaintiffs commenced his arguments by relying upon Article 141 to 144 of the Constitution. He submitted that the above articles show the functioning

of Majlas-e-Shoora to make laws. He submitted that in essence Majlas-e-Shoora/Federal Parliament have power to make laws in relation to the subject matters enumerated in various entries detailed in Federal Legislative List contained in fourth schedule of the Constitution. He submitted that the relevant entry of the Constitution for the present matter is Entry No.47 of Part-I which relates to taxes on income other than agriculture income.

10. Learned counsel submitted that Entry 47 is in fact a constitutional mandate available to the Federal Legislature to impose tax on income. He submitted that word "income" is of wide significance since entire controversy revolves around the scope and meaning of the word "income". Insofar as interpretation of the constitutional entries are concerned, the counsel relied upon following cases:-

- i) PIDC v. Pakistan (1992 SCMR 891)
- ii) Nishat Tak v. FOP (PLD 1994 Lahore 347)
- iii) Mandviwalla Muaser v. FOP (1996 CLC 1042)
- iv) Ellahi Cotton Mills v. FOP (PLD 1997 SC 582).
- v) H.A. Rahim v. Province of Sindh (2003 CLC 649)
- vi) Sanofi Aventis v. Province of Sindh (PLD 2009 Karachi 69).

11. Learned counsel submitted that in all the above referred cases the broadest interpretation was offered to the entries. He submitted that it has been held in the most celebrated judgment of Ellahi Cotton Mills that the rule of interpretation while interpreting any entry in the legislative list is that it should be given widest possible meaning but does not mean that the parliament can choose to tax as income any item which in no rational sense can be regarded as a citizens' income. He contended that item taxed should rationally be capable of being considered as income of a citizen.

12. He submitted that the crucial question that is to be resolved is as to whether the bonus shares in the hands of the shareholder in pith and substance or in a rational sense can be considered to be income of the said shareholder within the meaning of Entry 47 of the Federal Legislative List of the Constitution.


13. As regards Section 2(29) of Ordinance 2001 which include "any amount treated as income under any provisions of this Ordinance", learned counsel submitted that such issues have already been addressed in the case of Elahi Cotton Mills referred above. He submitted that the stance taken by the defendants that the Federal Legislature is permitted to treat or deem something to be income which does not otherwise so, is bad in law and under the Constitution.

14. He submitted that in order to ascertain the real controversy one needs to understand, whether in rational sense such bonus shares could be construed as income. He submitted that the bonus shares have not been defined in the Companies Ordinance 1984 but it is defined in Section 2(9) of the Ordinance 2001 which includes the bonus-unit in a unit-trust and hence it does not provide any assistance insofar as the question involved in these suits is concerned. He submitted that the bonus shares are nothing but shares of a company. The word 'share' has been defined in Ordinance 1984 as a share which in fact is a share in the capital of the company, which is a moveable property, transferable in the manner provided by the Articles of the Company. He thus concludes that the bonus share is nothing but a share of company and therefore it falls within the ambit of Section 89(1) of Ordinance 1984. He also relied upon Sales of Goods Act in terms of Section 2(7) whereof goods include shares and therefore considered as a moveable property or an asset. He questioned that such definitions can hardly forward a case of anybody

that such asset or property could be equated with income and that in rational sense bonus share could be construed as income.

15. Learned counsel further argued that the company upon making profits pays income tax thereon and there is no dispute in this regard. At this stage the amount is either distributed to the shareholders as dividend or instead the same is taken by the company to its capital reserves from where the company issues bonus shares to its existed shareholders in the proportion of their shareholding as existed in the company register. In case the shareholders are paid dividends they are liable to pay income tax but does not liable to pay such taxes on receipt of bonus shares since same is not income in any rational sense but construed as an asset and moveable property in the hands of the shareholders.

16. He argued that tax payer under the law is permitted to arrange the tax affairs in the best tax efficient manner which may be called as tax avoidance but permissible under the law. He argued that it is only tax evasion, which entails consequence of concealment and suppression of income and transaction, which is not permissible and is prohibited under the law. Hence, if the tax payer has taken any action to avoid payment of taxes he has committed no crime. In this regard learned counsel relied upon

- i) Jiyajeerao Cotton Mills Ltd. v. CIT reported as (1958) 34 ITR 888 (Supreme Court)
 - ii) CIT v. Calcutta Discount Co. Ltd reported as (1973) 91 ITR 8 (Supreme Court)
 - iii) Aruna Group of Estates v. State of Madras reported as (1965) 55 ITR 642 (Madras)
 - iv) CIT v. Jai Narain Ram Chander reported as (1981)128 ITR 179 (Calcutta) and
 - v) CIT v. Fisher's Executor reported as (1926) AC 395.
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17. He thus submitted that any interpretation where the dividends are equated with bonus shares would be deemed to be a complete and stark violation to corporate and fiscal jurisprudence wherein the nature and character of the dividend and their tax treatment are completely divorce to bonus shares. He submitted that a decision by company to issue bonus shares instead of dividend is essentially made when company intends to utilize undistributed profits for its use. He further submitted that the recommendation to issue dividend is made by the Board of Directors while such recommendation subsequently is ratified by the General Meeting of the company.

18. Learned counsel contended that once there was a dispute with regard to the evaluation of bonus shares in the case of CIT v. Umer Saigal (1973 PTD 450) and the learned Division Bench of Lahore High Court was pleased to held that the cost of bonus shares was its face value, which view was subsequently followed in the case of Shirin Ayub Khan v. CIT (PLD 1976 Lahore 1028) and held that the bonus shares were not received by the shareholders free of cost but on payment. These two judgments somehow vary with the view taken by this Court which controversy was ultimately resolved in the case of Ebrahim Brothers Ltd. v. CIT (1992 SCMR 1935) wherein it was held that bonus shares at the time of allotment cost nothing to the shareholders. He argued that it may have a market value but in order to calculate such value neither it could be termed as NIL nor as having a market value. It was further observed by the Hon'ble Supreme Court that the only reasonable method to calculate cost of the bonus share was that the cost of the share held by the shareholder on the basis of which bonus shares have been allotted be spread over on all shares taken together and then the average price they have, be considered as average price. Thus, issuance of bonus shares is adding of a number to the existing number of shares while total

cost of the shares are to be spread over total number of shares to get the average value. It is just held to be an accounting entry.

19. He submitted that the idea behind issuance of bonus shares is that company utilizes it after tax on profit for the purposes of its business which may inter alia include acquisition of plant, machinery, land, adjustment of debts or even expanding of its business. He argued that subsequent sale of bonus shares may entail gains but it is at that stage that at the time of subsequent sale of bonus share that it will have relevance for the tax authorities to impose tax on capital gains under section 37 of the Ordinance 2001 or under section 18 thereof, as the case may be.

20. It is further contended that in case of Ebrahim Brothers (Supra) the subject bonus shares issued and received were held as corpus i.e. the property and not as income which judgment is binding on all Courts below.

21. Counsel lastly and mainly relied upon the case of Eisner v. Macomber (252 US 189 (1920)) and submitted that in fact it is the precise question involved and settled by US Supreme Court. The aforesaid judgment of Eisner has also been cited with the approval by the Hon'ble Supreme Court of Pakistan in the case of Ebrahim Brothers (1992 SCMR ✓ 1935). Counsel submitted that the House of Lords also in consonance with the reasoning of the case of Eisner (Supra) and also the case of John Blott. It is thus the consistent approach of Courts such as Pakistani, British, American, Indian and Sri Lankan Courts which have consistently held that the bonus shares do not constitute income.

22. Thus in the light of the above counsel concludes that the bonus shares are neither income nor same can be deemed to be income. The bonus shares in no rational sense or in pith and substance can constitute

income and it is submitted that the impugned legislative amendment may be declared as ultra vires the Constitution, in particular to Entry 47 to Part I, 4th Schedule to the Constitution read with Article 52 of the Constitution and thus may be annulled.

23. On the other hand both M/s Amjad Jawed Hashmi and Irshad-ur-Rehman appearing for the departments in different suits, jointly argued as under:-

24. That income has been defined in section 2(29) of Ordinance 2001 which is inclusive of definitions as under:-

- i) Any amount chargeable to tax under this Ordinance
- ii) Any amount subject to collection or deduction of tax under various provisions of Ordinance including 236M
- iii) Any amount treated as income under any provision of Ordinance
- iv) Any loss of income (negative income)



25. It is contended that section 69 of Ordinance 2001 is in fact outcome of powers available to the legislature by virtue of Entry 52 read with Entry 47 of the 4th Schedule of the Constitution and hence they enjoy widest powers to levy tax on any amount or value susceptible to income and which for any reasonable understanding can fairly be regarded as income though no amount has been received.

26. It is argued that in terms of section 69 of Ordinance 2001 a person shall be treated as having received the amount, benefit or prerequisite, if it is, (a) actually received by the person (b) applied on behalf of person, at the instructions of the person or under any law. They further argued that under company law the value of the bonus share is implied/transferred from surplus account to the capital assets of the company in the name shareholders. Thus both conditions simultaneously are fulfilled, the taxation of issuance of bonus shares by virtue of section

236M and 236N read with section 39 of Ordinance 2001 is within the competence of legislature.

27. They argued that Section 236M begins with non-obstante clause and provides (i) for rate of deduction/correction; (ii) for determination of valuation of bonus shares on the basis of day-end price on the first day of closure of books.

28. The learned counsel defined income as increase or accretion of one's powers to satisfy his wants in a given period insofar as that power consists of (a) money itself or (b) anything susceptible of valuation in terms of money. They argued that it cannot under any stretch of imagination be considered that the "issuance of bonus shares" has been treated by the legislature against limit prescribed in the principle of "pith and substance" which means that the words in constitutional entries are to be given most liberal construction but at the same time cannot be stretched to such limit so as to occasion unfair, unreasonable or absurd construction when Entry No.47 and 52 of the 4th Schedule of the Constitution are read. They argued that the bonus share rationally is capable of being treated as deemed income. They argued that it is not denying fact that by issuing bonus shares nothing in terms of money is received by the shareholders. It increases ownership of shareholder in the company and that the bonus shares is susceptible of valuation in terms of money and thus the value of one's wealth increases by that income/accretion which increase could not have been considered without such act of issuance of bonus share.



29. Thus, they argued that the income as arisen out of the act of issuance of bonus shares to the shareholder is a presumptive income and tax levied thereon in presumptive tax. They submitted that since the capacity to earn increases capacity to tax increases. The presumptive tax is income akin to capacity tax i.e. capacity to earn under Entry

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No.52 and hence tax on capacity in lieu of tax in Entry 47 can be imposed.

30. While applying the deeming provision generally its effect in a taxing statute is that it brings within the tax net an amount or gain or benefit which "ordinarily" would not have been treated as an income. They argued that since power of taxation is contained in the Constitution, one's approach while interpreting the same must be dynamic, progressive and oriented with the desire to meet the situation which is arising effectively. They argued that the entries contained in the legislative list indicate the subject at which particular legislation is competent but they do not provide any restriction as to the power for the legislation concern. The list providing subject may be restricted/limited but the subject itself is not limited.

31. By taxing on "issuance of bonus shares" under section 236M and 236N at 5% the legislature has not eroded any fundamental right of the subject. It is argued that insofar as the Eisner's case is concerned that is not applicable as it is not existed and does not define the word "income" in all capable definitions.

32. Mr. Salman Talibuddin, learned Addl. Attorney General, appearing on behalf of Federation of Pakistan has submitted that the bonus shares declared and resolved to be issued by a company in a shareholders meeting are dividend within the meaning of term in section 2(19)(a) of the Ordinance 2001 and constitute distribution of profit of a company as they can only be issued out of free reserves pursuant to the Companies Ordinance, 1984 and free reserve comprises of profit of the company. He further argued that the bonus shares have a value on the day when they were issued to the shareholders, the tax payer or shareholders receive a fully paid up shares the consideration of which is paid by the company of

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its free reserves i.e. the only pool of fund from which dividends can be paid pursuant to Companies (Issue of Capital) Rules 1996. He concluded that on this score alone the bonus shares are termed as dividend issued out of the profit of the company in a form other than cash and hence in essence the income of the shareholder is reinvested into the stock of the company instead of being consumed for personal benefit.

33. The above background as applied to all the amendments as incorporated and inserted and challenged, it is the case of Federation as presented that the reasoning provided in support of the case of the plaintiffs through Eisner's case is not applicable as the Courts in Pakistan derive their jurisdiction under the Constitution and statutes and the principle of English common law or equity or good conscience cannot be pressed into service as having statutory force and hence the decision in Eisner, Blott and Hunser Plywood are in no way binding on this Court and cannot be relied upon to create exceptions within the statutory law.

34. The other distinguishable feature as argued by the learned Addl. Attorney General was that surplus and undivided profits of the company in Eisner's case had already been invested in plant, property and business required for the corporation, a stock dividend had been issued only in order to readjust such capitalization and therefore there was no profit that was capable of distribution whereas in the instant case the profit of the company are available.

35. He further argued that Eisner case cannot define the definition of the term "dividend" contained in section 2(19)a of the Ordinance 2001 which include the distribution of accumulated profit whether capitalized or not. In support of his arguments, learned counsel relied upon the cases reported in PLD 1976 Lahore 1028, AIR 1961 Supreme Court 1038, PLD 1997 SC 582 and 2010 PTD 1924 and submitted that with the foregoing reasons the suits are liable to be dismissed.

36. I have heard the learned counsel for the parties and perused the material available on record. Since the parties have not opted to lead the evidence, the issues, which are reproduced as under, are being discussed and answered on the basis of above arguments. Since plaintiff's counsel has requested and prayed for reframing of issue No.2, I on the basis of pleading reframed them as under since there appears to be a typing error:-

1. Whether the suit is not maintainable being barred by law?
2. Whether Section 2(29), 39(1)(M), 236-M and 236-N of the Income Tax Ordinance, 2001 as inserted through the Finance Act, 2014 are ultra vires of the law and the Constitution?
3. What should the decree be?

37. I first begin with the issue of maintainability of the suits since it has been argued that these suits are not maintainable.

38. The primary objection with regard to maintainability of the suit is initially with reference to Article 175(2) of the Constitution. Article 175 simply provides that no Court shall have any jurisdiction save as is or may be conferred by it on the Constitution or under any law. This Article does not bar any civil court from entertaining a challenge to the validity of law on the touchstone of the provisions of the Constitution itself. Since the instant suits involve the vires of law therefore in consideration of Article 175(2) this Court is competent to consider the challenge that has been thrown by the plaintiffs insofar as Finance Act 2014 is concerned.

39. Article 212 of the Constitution deals with creation of administrative courts and tribunals. This provision of the Constitution to me is not applicable at all as it pertains to creation of tribunals and administrative courts. The amendments which are impugned passed by

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the Parliament levying tax and hence any challenge by taxpayer to the said law/ amendment could only be availed through civil Court.

40. Section 113 CPC is regulated by order 46 CPC which empowers a Court to answer a question of law through a Reference which could only be made where the Court hearing such issues where an appeal is not permitted and where for execution of such decree, questions of law or usage is in question and there are certain reasonable doubt on a point which needs to be thrashed out and for resolution of such issues it could be referred to High Court for its opinion, which is not the subject here.

41. With reference to section 9 CPC read with section 227 of Ordinance, 2001, it is now a settled law that such bar is only inter alia with regard to the proceedings or orders made under Ordinance 2001. Thus, ex facie it does not preclude a challenge to the vires of law or statute framed or the amendment inserted therein by the parliament. If any reference is required the case of *Abbasia Cooperative Bank v. v. Hakeem Hafiz Muhammad Ghaus* (PLD 1997 SC 03) is the most appropriate decision to resolve the controversy. The civil Courts are the courts of ultimate jurisdiction and therefore this jurisdiction that is being enjoyed by the Court is sufficient to dispel any challenge of the defendants with regard to the maintainability of the present suits. If any reference is required the case of *Hamid Hussain v. GOWP* (1974 SC 356) and the case of *HMC v. Fateh Jeans* (1991 MLD 284) could be seen. Similarly the case of *Sanofi Aventis v. Province of Sindh* (PLD 2009 Karachi 69) decides the aforesaid question by observing that the superior Courts are not ousted in respect of executive or legislative actions which are claimed to be completely illegal under Constitution and without jurisdiction.


42. Similarly Section 56(d) of Specific Relief Act 1877 is not applicable where the impugned action done is claimed to be unlawful. Insofar as

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the judgments cited by defendants' counsel regarding maintainability of the suit is concerned, none of the issues as highlighted by the plaintiffs were discussed in these judgments. The rationale and the reasoning behind the judgments referred were that the orders were passed under the law which could only be remedied under the hierarchy whereas in the instant case no such situation is involved. The vires of law could be challenged by the persons aggrieved as has been done in the instant case. Hence, the judgments relied upon by learned counsel for defendants are not applicable to the facts and circumstances of the instant case.

43. Insofar as the judgment reported in 2006 PTD 2167 in relation to section 9 CPC is concerned, the same is self-explanatory as it is observed by the learned Single Judge that such provisions would be attracted to impugned action/order if the same was neither malafide nor without jurisdiction but found to be within the four corners of the statute whereunder the same was taken.



44. Similarly the case reported in PLD 1992 Peshawar 76 in terms of section 56(d) of the Specific Relief Act provides for the prohibition for grant of injunction so as to interference with the public duty of any department of central and provincial governments, which is not the case here.

45. On this issue case of Abbasia Cooperative Bank v. Hakeem Hafiz Muhammad Ghaus (PLD 1997 SC 03) is the most authoritative judgment in which it has been held as under:-



"5. The next question which arises for consideration in the cases is, whether the Civil Court was competent to examine the validity of the auction conducted by the authorities? The Civil Court under section 9 of the Code of Civil Procedure are competent to try all suits of civil nature except those or which their jurisdiction is barred either expressly or by necessary implication. It is a well-settled principle of interpretation that the provision

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contained in a statute ousting the jurisdiction of Courts of general jurisdiction is to be construed very strictly and unless the case falls within the letter and spirit of the barring provision, it should not be given effect to. It is also well-settled law that where the jurisdiction of the Civil Court to examine the validity of an action or an order of executive authority or a special tribunal is challenged on the ground of ouster of jurisdiction of the Civil Court, it must be shown (a) that the authority or the tribunal was validly constituted under the Act; (b) that the order passed or the action taken by the authority or tribunal was not mala fide; (c) that the order passed or action taken was such which could be passed or taken under the law which conferred exclusive jurisdiction on the authority or tribunal; and (d) that in passing the order or taking the action, the principles of natural justice were not violated. Unless all the conditions mentioned above are satisfied, the order or action of the authority or the tribunal would not be immune from being challenged before a Civil Court. As a necessary corollary, it follows that where the authority or the tribunal acts in violation of the provisions of the statutes which conferred jurisdiction on it or the action or order is in excess or lack of jurisdiction or mala fide or passed in violation of the principles of natural justice, such an order could be challenged before the Civil Court in spite of a provision in the statute barring the jurisdiction of Civil Court. In the case before us, the action of the Cooperative Authorities in auctioning the suit property for recovery of the loan against respondent No.1 was challenged in the suit as contrary to the provisions of the Ordinance and M.L.O. 241."

46. Same principle was highlighted in the cases reported in 2001 YLR 2542, PLD 1997 Karachi 541 and PLD 1965 SC 671 and PLD 2009 Karachi

69.

47. Hence in view of above facts and circumstances I am of the view that the suits as framed and filed by the plaintiffs are maintainable. The issue No.1 is answered accordingly.

Merits of Case

48. It is essential to first understand the powers available in terms of Article 141 to 144 of the Constitution which for convenience are reproduced hereunder:-

141. *Extent of Federal and Provincial laws. Subject to the Constitution, Majlis-e-Shoora (Parliament) may make laws (including laws having extra-territorial operation) for*

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the whole or any part of Pakistan, and a Provincial Assembly may make laws for the Province or any part thereof.

142. Subject-matter of Federal and Provincial laws. Subject to the Constitution-

(a) *Majlis-e-Shoora (Parliament)* shall have exclusive power to make laws with respect to any matter in the Federal Legislative List;

(b) *Majlis-e-Shoora (Parliament)* and a Provincial Assembly shall have power to make laws with respect to criminal law, criminal procedure and evidence.

(c) Subject to paragraph (b), a Provincial Assembly shall, and *Majlis-e-Shoora (Parliament)* shall not, have power to make laws with respect to any matter not enumerated in the Federal Legislative List."

(d) *Majlis-e-Shoora (Parliament)* shall have exclusive power to make laws with respect to all matters pertaining to such areas in the Federation as are not included in any Province.]

143. Inconsistency between Federal and Provincial law. If any provision of an Act of a Provincial Assembly is repugnant to any provision of an Act of *Majlis-e-Shoora (Parliament)* which *Majlis-e-Shoora (Parliament)* is competent to enact, then the Act of *Majlis-e-Shoora (Parliament)*, whether passed before or after the Act of the Provincial Assembly, shall prevail and the Act of the Provincial Assembly shall, to the extent of the repugnancy, be void.]

144. Power of *Majlis-e-Shoora (Parliament)* to legislate for ⁸⁴[one] or more Provinces by consent. (1) If ⁸⁵[one] or more Provincial Assemblies pass resolutions to the effect that *Majlis-e-Shoora (Parliament)* may by law regulate any matter not enumerated in ⁸⁶[the Federal Legislative List] in the Fourth Schedule, it shall be lawful for *Majlis-e-Shoora (Parliament)* to pass an Act for regulating that matter accordingly, but any act so passed may, as respects any Province to which it applies, be amended or repealed by Act of the Assembly of that Province

49. The above articles of the Constitution provides power to *Majlis-e-Shoora/Federal Parliament* to legislate and make laws for whole or any part of Pakistan whereas provincial assemblies are permitted for their respective provinces. Article 142 distribute such powers to the federation and provinces vide (a) and (b) for federation and provinces Article 142(c) in addition provides powers to the provincial assemblies to

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make laws with respect to any matter which is not enumerated in federal legislative list whereas 142(d) provides power to the federal parliament to make laws with respect to all matters pertaining to such areas in federation as are not included in any province. Article 143 confers the precedent on federal parliament over provincial assemblies in case of inconsistency. Lastly, Article 144 permits the Majlis-e-Shoora/federal parliament to make law in respect of subject not mentioned in the federal legislative list provided that the provincial assemblies through resolution grant such permission to Majlis-e-Shoora/federal parliament.

50. Insofar as subject matter of this suit is concerned the relevant entry in the federal legislative list contained in 4th Schedule of the Constitution i.e. Entry No.47 of Part-1 which deals with taxes on income other than agricultural income. Thus, Entry No.47 provides a constitutional sanction to the federal legislature to impose any tax on income. As argued by all the learned counsel that word "income" is a vital and decisive tool and its interpretation could set the controversy at rest. In order to interpret it, the provisions of law including other constitutional entries, numerous guidelines which were provided by our superior Courts while deciding the cases, are essential.

51. One of the most celebrated judgment in this regard is the case of Ellahi Cotton Mills (Supra) where after discussing plethora of judgment (including foreign judgment), some basic principles and guidelines were deduced. In view of wide variety of diverse economic criteria which are to be considered by the formulation of fiscal policy, legislature enjoys a wide latitude in the matter of selection of persons, subject matter, events etc. for taxation. But with all this latitude certain irreducible desiderata of equality shall govern classification for differential treatment in tax laws. Hon'ble Supreme Court deduced that Court while

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interpreting laws relating to economic activities, view the same with greater latitude than laws relating to civil rights such as freedom of speech, religions etc. It has been observed in clause 10 of paragraph 31 of the cited case that word "income" means a thing that "comes in" which in normal understanding means any profit or gain which is actually received. However, while construing the above word used in an entry in a legislative list the above restricted meaning cannot be applied keeping in view that the allocation of the subject to the list is not by way of scientific or logical definition but by way of mere simplex enumeration of broad categories. It was further canvassed that which is not "income" under the Income Tax Act (as it then was) can be made "income" by a Finance Act and any exemption granted by the tax laws can be withdrawn by Finance Act or the efficacy of that exemption may be reduced by imposition of new charge, of course, subject to constitutional limitation.

52. The principle as laid down is, of course qualified as such interpretation should be such that if stretched to its maximum elasticity it should not cross the limits of rationality. Thus, in essence the Hon'ble Supreme Court while interpreting the constitutional entries has broadly emphasized that very wide, elaborate and broad interpretation be provided and no narrow or pedantic approach be followed. The rationale sense and the pith and substance of the word be seen and considered. Thus, it trickles down to a point where interpretation of bonus share on the touchstone of "income" is required either to consider it as an income or otherwise within the meaning of Entry 47 of the Federal Legislative List of the Constitution.

53. The case of Ellah Cotton Mills further provides the principles of interpreting constitutional entries vis-à-vis pertaining to the interpretation of taxing statute as deemed income to be within the four

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corners of principles as highlighted in the Ellahi Cotton Mills, it may be a legal fiction but within the deemed income. The word deemed income, as highlighted and discussed by Hon'ble Supreme Court, to me is the most striking factor in this determination involving determination of bonus shares. The use of this word "deemed" thus encompass all possible things that could have been received but not received by a person. I do not agree with the contention of learned counsel for plaintiffs that the case of Ellahi Cotton Mills provides the principles of interpretation of taxation statute and not as to the principles of interpretation of constitutional entries. The broadest and the widest meaning that could be attributed to any word in the list of such entries could be given only in Constitution and not in any other statute. Hence, the horizon and spectrum of such interpretation and its elasticity increases while interpreting the constitutional entries and hence the arguments of learned counsel for the plaintiffs are not convincing that the case of Ellahi Cotton Mills is only in relation to interpretation of taxing statute.

54. The Hon'ble Supreme Court of Pakistan while concluding the judgment in the Elahi Cotton Mills' case observed that the combined effect of the aforesaid provision was that three kinds of payments made to the shareholders of a company to which the said provisions applied were treated as taxable dividend to the extent of the accumulated profit held by the company which three kinds of payments are as under:-

- i) Payment made to the shareholders by way of advance or loan;
- ii) payment made on his behalf;
- iii) payment made for his individual benefit.

55. The second and third category would cover the word bonus share in comprehending it within the definition of income. It has been now universally recognized principle that the law should be saved rather than

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be destroyed and the Court must lean in favour of upholding the constitutionality of the legislation keeping in view that the rule of constitutional interpretation is that there is a presumption in favour of constitutionality of the legislative enactments unless ex-facie it is violative of Constitution.

56. Let us now consider another characteristic of bonus shares. The word bonus share has not been defined in Companies Ordinance 1984 but it is used in section 2(9) of Ordinance 2001. The bonus share and share at occasions and at certain events are distinguishable. A simple meaning of share is defined in section 2(35) of the Ordinance 1984 which is a share capital of company. The arguments that the bonus shares are to be treated at par with the original shares, in these peculiar facts and circumstances are not acceptable. It may not be a dispute under Companies Ordinance but is under Ordinance 2001. A share which is capital of a company may be considered as a moveable asset but while interpreting bonus share, in consideration of the amendment under challenge and the background is different characteristic altogether. It is always beneficial to keep in mind that the interpretation of the word income is required while considering the "deeming or treated" clause of the statute to be alive. We would be misguided if a normal definition through any decision involving a share or a capital issue, is applied. This is not simple dispute of share or bonus share rather dispute involving income under deeming or treated clause.

57. The judgments referred by learned counsel for plaintiffs in providing definition of the word bonus share that it could only be treated as a movable property or asset would be an irrelevant factor as the judgments cited by plaintiffs have not considered the said word "income" under any deeming provision. The case of Standard Chartered Bank v. Custodian another reported in AIR 2000 SC 1488 cited by

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plaintiffs' counsel provides that a bonus share is an accretion while it is issued when the company capitalizes its profit by transferring an amount equivalent to the face value of the shares from its reserves to the normal capital. Thus what plaintiffs' counsel emphasized was that an undistributed profit of the company is given to the company by the shareholders or retained by company under head of capital against issue of further shares to themselves. This is to be seen in conjunction with section 69 of Ordinance 2001 which provides that a person shall be treated as having received an amount, benefit or prerequisite of its:

- a) Actually received by the person;
- b) Applied on behalf of the person, at the instruction of the person or under any law; or
- c) Made available to the person



58. Insofar as the calculation formula provided by the plaintiffs' counsel is concerned no doubt the formula so applied is exclusive of the amount of bonus share but that could hardly be attracted to the definition of bonus shares under the umbrella of deeming clause.



59. A company after making profit pays income tax thereon. It then either distributes profit as dividend or if required the company consumes the profit as capital reserves by issuing bonus shares to its existing shareholders in proportionate of their respective shareholding. Such decision taken by Board of Directors of the company is an implied authority of shareholders. The decision of Board of Directors in utilizing profit as company capital could hardly need any explanation that the amount of profit from the pool wherefrom dividend is to be given was bartered with the bonus shares under implied authority of shareholders, as these decision could always be overturned by majority in General Body Meeting. This can hardly be termed as tax avoidance. It is only tax evasion whereby income was suppressed and disguised in the transaction

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of bonus shares which may not be prohibited but taxable in terms of the impugned amendment.

60. An argument was raised that a decision by a company to issue bonus shares and not dividend is essentially made when company intends to utilize undistributed profit for its use. Although a simple answer is provided in above para however this is neither established through a document that the company intends to utilize entire profit for its use nor it is the case of the plaintiffs. On the contrary there are documents available on record whereby the prerogative was given to the shareholders either to receive dividend or the bonus shares and they opted for bonus shares. This is only fictional argument as it is only after decision of Board of Directors that profit was utilized as its capital which decision is an implied authority on behalf of shareholders, which often read as a money received, it is in fact a gain, benefit received by the shareholder.



61. Plaintiffs have heavily relied upon Eisner's case. It is well established principle that our courts derive jurisdiction under Constitution and the statutes. The Eisner's case may have been considered as a path breaking but distinguishable from facts and circumstances of the instant case as the undivided profit of the company in Eisner's case had already been invested in and stock dividend/share had been issued only in order to readjust such capitalization and hence there was no profit that was capable of distribution and on this reasoning it was ruled out that it was nothing but a share/capital asset. In the instant case the profits of the company stand to the credit of free reserves account and hence are capable of distribution.



62. The Eisner's case does not have the benefit and privilege of section 2(19)(a) of Ordinance 2001 which is wide enough to include any distribution of accumulated profit whether capitalized or not, if such

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distribution entails the release by the company to its shareholder of all or any of its asset.

63. Furthermore in the Eisner's case and another case that of Blott's the word "income" is interpreted on the basis of commonly understood meaning of the word and not under deeming or treated provision and/or in the context of its definition and usage in income tax legislation. In Eisner's case the decision was heavily based on the taxability based on bonafide stock dividend and it was acknowledged in the judgment that there may be instances or circumstances in which the Eisner's decision would not apply. The horizon and scope available while the judgment was written in Eisner's case was limited or was not as broad as it is in the instant case.



64. Another significant judgment cited by learned Addl. Attorney General against Eisner's case is the case of Swan Brewery Co. v. The King (1914) AC 231 which is decision of Privy Council that has been distinguished by the Court in Blott case on the ground that the taxing statute in that case was couched in different language i.e. the Dividend Duties Act 1902 of Western Australia which imposed a duty on the amount or value of every dividend declared by the company and bonus shares were held to be included therein. This case is perhaps closest to the facts and circumstances of the instant case.

65. In the case of Shirin Ayub Khan v. CIT (PLD 1976 Lahore 1028) learned Division Bench of Lahore High Court held that issuance of bonus shares is result of distribution of profit of that year or the accumulated profit of the company. The face value thereof would be a dividend out of the definition of term in section 2(6-A) of Income Tax Act, 1922 as an income of the shareholder. Section 2(6-A) of the Income Tax Act, 1922 is identical to section 2(19)(a) of Ordinance 2001.

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66. Similarly in the case of Kantilal Manilal v. The Commissioner of Income Tax (AIR 1961 Supreme Court 1038) it was observed as under:-

"This is an appeal from a decision of the Bombay High Court (reported as AIR 1956 Bom.391) which held that the ordinary meaning of dividend is the receipt by the shareholder of part of the profits of the company of which he is a shareholder, and the distribution of a right to acquire shares is dividend within such ordinary meaning. The Supreme Court of India upheld the High Court's view and held that dividend need not be distributed in money; it may be distributed by delivery of property or right having a monetary value."

67. Generally the effect of a deeming provision in a taxing statute is that it brings within the tax net a gain or benefit which ordinarily would not have been treated as cash income. In other words, it brings within the chargeability income not actually accrued but which supposedly to have accrued notionally.



68. Faced with the presumptive taxation of imports, supplies, contract, exports etc. under section 80-C and 80-CC of the Income Tax Ordinance, 1979, where tax payers challenged the constitutionality of presumptive taxation, the Supreme Court of Pakistan in its landmark judgment of Ellahi Cotton Mills (Supra) held that section 80C and 80CC (Section 148 and 153 and 154 in Ordinance 2001) provides for presumptive taxation of income within the category of presumptive tax as under the same the persons covered by them pay a pre-determined amount of presumptive tax in full and final discharge of their tax liability in respect of the transactions on which above tax is levied. If Entry 47 is read in isolation without reference to Entry No.52 one can urge that Entry 47 does not admit the imposition of presumptive tax as the expression "tax on income" employed therein should be understood as to the working out of the same on the basis of computation as provided in the various provisions of Ordinance. Thus, it can be held that presumptive tax is in fact akin to capacity tax i.e. capacity to earn.

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69. Hence, the subject item i.e. Entry 47 is not something which in rational sense cannot be regarded as income or could not be interpreted within the four corners of the word income as required in pursuance of Entry No.47 of Constitution of Islamic Republic of Pakistan. In the rational sense it is valuable and gain and hence considered within the frame of income. Even the general meaning of income is not limited to money. It is in fact valuables that comes in.

70. The subjects available in the list of 4th Schedule Part I may be limited to certain numbers but spectrum of those subjects themselves are not limited as long as it does not break the circumference of income as defined above and the boundary provides protection to consider it in regarding the subject as citizen's income.

71. In the case of Navnit Lal C. Javeri v. K.K. Sen reported in AIR 1965 Supreme Court 1375 the Indian Supreme Court while facing challenge vires of Section 2(6A)(e) and 12(1B), which was introduced by Finance Act 15 of 1995 held that the aforementioned provision did not contravene Article 19(1)(f)&(g) of the Indian Constitution as they were saved by clauses (5) and (6) thereof. Each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehend in it.



72. Thus, list only provides the areas and fields covered by the said entries but those entries themselves have a circumference to cover all or ancillary or subsidiary matters so long it does not violate the touchstone of rationale sense.

73. In view of the above reasoning and findings, the bonus shares, under the impugned amendment, are lawfully considered as taxable. Hence, after the insertion of 236(M) and 236(N) of Ordinance 2001 the Modabarba, pension funds etc. which are the subject matter/claim in

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some of the suits, are now not exempted but taxable. The exemption, as provided by virtue of Clause 99/100 Part I Second Schedule and Clause 57(I)(viii), Part I Second Schedule to the Ordinance 2001, is not available to the entities as the provisions taxing issuance of bonus shares are to be prevailed over the exemption. Exemption is not a right to concession and can be lifted/withdrawn by the legislature at any time expressly or impliedly. Consequently, Issue No.2 is answered in negative.

74. In view of the above reasoning and findings I do not see any merit in the subject suits which are accordingly dismissed along with pending applications however with no orders as to costs.

Dated: 08.09.2015

8.

Self = M. Smagi Sikkiriyis
Judge

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