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IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT

Mr Justice Abdul Kadir Shaikh
Mr Justice Naimuddin
Mr Justice Ajmal Mian
Mr Justice Sajjad Ali Shah
Mr Justice Nasir Aslam Zahid

CIVIL APPEALS NOS:137-K to 145-K of 1976
(On appeal from the judgement/order of High Court of
Sind and Baluchistan, Karachi dated 2nd July, 1975
in High Court Appeal No.61 of 1974)

Province of Sind			Appellant
			Versus
Haji Razzaq & another			
Mat Jama Bai & 9 others			
Abdullah Haji Mehd & another			
Shaukat Ali Khan & 2 others			
Muhammad Farooq & others			
Mohammad Farooq & others			
Hamidul Haq Chaudhury & others			
M/s Haji Mohammad Zakaria and another			
M/s Burney Estate & others			
			Respondents (respectively)
For the appellant			Mr J.H. Rehmatoola, A.S.C. Mr Abdul Ghafoor Mangi, Asstt Advocate-General, Sind. Mr A.A. Dastagir, A.O.R.
For the respondents			Mr A. Aziz Khan, A.O.R.
CA 137-K of 1976			Mr S. Irteza H. Zaidi, A.S.C.
CA 139 of 1976			Mr Ahmedullah Fareeqi, A.O.R.
CA 140 & 144-K of 1976			Mr Ali Akbar, A.O.R.
CA 143-K of 1976			
Dates of hearing			24th & 25th February, 1991.

JUDGEMENT

ABDUL KADIR SHAIKH, J. The question of law for determination in these appeals is whether upon proper interpretation of Sections 3 and 4 of the Court Fees Act, 1870, any court-fee is payable on the suits filed in the original side and on the appeal filed against the judgements and orders passed on the original

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side of the then Sind & Baluchistan High Court, now the High Court of Sind. In order to appreciate the respective points of view, it is only appropriate to reproduce Sections 3, 4 and 6 of the Act. These read:

"3. Levy of Fees in High Courts on their original sides. The fees payable for the time being to the clerks and officers (other than the sheriffs and attorneys) of the High Courts;

or chargeable in each of such Courts under No. 11 of the first, and Nos. 7, 12, 14, 20 and 21 of the Second Schedule to this Act annexed;

shall be collected in manner hereinafter appearing.

4. Fees on documents filed, etc. in High Courts in their extraordinary jurisdiction. No document of any of the kinds specified in the first or Second Schedule to this Act annexed, as chargeable with fees, shall be filed, exhibited or recorded in, or shall be received or furnished by, any of the High Courts in any case coming before such Court in the exercise of its extraordinary original civil jurisdiction;

or in the exercise of its extraordinary original criminal jurisdiction;

in their appellate jurisdiction; or in the exercise of its jurisdiction as regards appeals from the judgments (other than judgments passed in the exercise of the ordinary original civil jurisdiction of the Court) of one or more Judges of the said Court, or of a division Court;

as Courts of reference and revision. or in the exercise of its jurisdiction as regards appeals from the Courts subject to its superintendence;

or in the exercise of its jurisdiction as a Court of reference or revision;

unless in respect of such document there be paid a fee of an amount not less than that indicated by either of the said schedules as the proper fee for such document.

6. Fees on documents, filed etc., in Mufassal Courts or in public offices. Except in the Courts hereinafter mentioned, no document of any of the kinds specified as

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chargeable in the first or Second Schedule to this Act annexed shall be filed, exhibited or recorded in any Court of Justice, or shall be received or furnished by any public officer, unless in respect of such document there be paid a fee of an amount not less than that indicated by either of the said schedules as the proper fee for such document."

The precise question firstly is whether the original civil jurisdiction exercised by Sind High Court is the ordinary original civil jurisdiction of the High Court in the meaning of Section 4 of the Court Fees Act. This question firstly arose in the case of Firdous Trading Corporation Vs. Japan Cotton and General Trading Co. Ltd (PLD 1961 Karachi 565) on the objection raised by the office of the then High Court of West Pakistan, Karachi Bench, that a court-fee of Rs 4/- paid on the memorandum of appeal filed by the appellant in that case was insufficient. It was, however, contended on behalf of the appellant that since the appeal was "a Letters Patent Appeal against the judgment passed in exercise of the ordinary civil jurisdiction of the High Court, Section 4 of the Court Fees Act does not apply and no court-fee is payable thereon".

In order to appreciate the legal position, it would be pertinent to mention, at this stage, that originally Chapter-II of the Court Fees Act, 1870 applied only to the Chartered High Courts and it had no application whatsoever to the Courts which were deemed as High Courts within the meaning of Section 210 of the Government of India Act, 1935. This position is clear from section 3 of the Courts Fees Act, 1870, as it originally stood prior to 1949 which is in the following terms:

"The fees payable for the time being to the clerks and officers (other than the sheriffs and attorneys) of the High Courts established by letters Patent, by virtue of the power conferred by (section 15 of the Indian High Courts Act, 1861, or section 107 of the Government of India Act, 1915), or section 229 of the Government of India Act, 1935;

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or chargeable in each of such Courts under No. 11
of the First and Nos. 7, 12, 14, 20 and 21 of the
Second Schedule to this Act annexed; shall be
collected in manner hereinafter appearing."

It would be seen from the language of the section above, that the Chief Court of Sind was not one of the Courts contemplated under section 3. Therefore, it is quite plain that section 4 of Chapter II also had no application to cases referred therein in respect of the matters coming before the Chief Court of Sind. The history of the establishment of the High Courts in the Sub-Continent of India shows that there were only three Courts which were conferred ordinary original civil jurisdiction within the certain limits under their Letters Patent. No other High Court established under the High Courts Act of 1861 or under the Government of India Act, 1915 or under the Government of India Act, 1935, was invested with powers of ordinary civil jurisdiction.

Dorab Patel, J., (as he was then) in the impugned judgement has traced the history of judicial institution in the Sub-Continent of India as under:

"I pointed out earlier that the Presidency High Courts had an original civil jurisdiction. They also had a similar criminal jurisdiction, and this was because they were the successors of the Supreme Courts which had been created under the Regulating Act of 1773. The first of the chartered Supreme Courts to be set up under this Act was the Supreme Court of Calcutta, and Setalvad in 'The Common Law in India' writes at page 19:

'In 1774 came the establishment of the first of the Supreme Courts at Calcutta envisaged by the Act of 1773. It was to be a Court of record and was to have such jurisdiction and authority as the Court of King's Bench had in England by the Common Law of England (Clause IV). It was also to be a Court of equity (Clause XVIII). It was also to be a Court of byer and terminer, and gaol delivery at

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Calcutta and was to inquire into offences with the help of juries (Clause XIX). Like the Court of King's Bench in England it was authorised to issue writs of mandamus, certiorari, precedents or error (Clause XXI). It was to exercise ecclesiastical jurisdiction in Bengal, Bihar and Orissa such as was exercised in the diocese of London (Clause XXII). It had authority to appoint guardians of infants and of insane persons and of their estates (Clause XXV). It was also to be a Court of Admiralty. The jurisdiction of the Court extended to all British subjects residing in the whole of Bengal, Bihar and Orissa. It also extended to all persons employed in the service of the company and in certain cases over other Indian inhabitants also. The Court was modelled entirely on the English pattern with jurisdiction over a large population in the Presidency Towns and other areas.'

The Supreme Courts of Madras and Bombay were set up in 1801 and 1823 respectively, and the jurisdiction exercised by them were the same as those of the Supreme Court of Calcutta, and, like that Court, these Courts also were set up by royal charters. Now, because the Supreme Courts administered English law and were on the English pattern, they had no institution fee whatsoever, and this practice was continued by the Presidency High Courts, which levied a fee which was not more than a charge for serving process. But the position outside these three privileged Presidency Towns was very different. There, the Courts which emerged with the extension of British rule were not the Courts of the Crown, but the Courts set up by the East India Company. Once again, I may, with advantage, quote from Setalvad. This eminent jurist observes at page 22:

'We may now turn to the administration of justice and law in the mofussil. The administration of civil justice outside the Presidency Towns was associated with the management of revenue and the Company'

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took a considerable time to evolve a regular system of administration of justice, after it had by the grant of Diwani of Bengal, Bihar and Orissa become virtually the sovereign of these territories. It established two Superior Courts; the Sadar Diwani Adalat, a final Court of appeal in civil matters, and the Saddar Nizamat Adalat, the final Court of criminal appeal which was empowered to revise and confirm sentences awarded by the criminal courts. Subordinate to these superior courts were the District Diwani and Foujdari Adalats."

Dorab Patel, J., also referred to the history of Courts set up by East India Company in these words:

"The structure of the Courts set up by the Company in the other Regulation Provinces outside the Presidency Towns was similar, although not identical. It is, however, sufficient to state here that, in these provinces also, the Sadar Diwani Adalat was the highest Court of civil appeal with an exclusively appellate jurisdiction, and a Sadar Diwani Adalat was set up in 1832 for the North-Western Provinces, to which the High Court of the North-Western Provinces set up at Agra in 1866, was the successor. And, like the Court to which it succeeded, the High Court of the North-Western Provinces (which became the Allahabad High Court in 1875) did not have any ordinary original civil or criminal jurisdiction. The result was that, when the Court Fees Act was promulgated in 1870, there were two types of High Courts: High Courts whose normal jurisdiction was an appellate jurisdiction only, like the High Court of the North-Western Provinces, and the Presidency High Courts. And because the Presidency High Courts were the successors both to the Supreme Court of the Presidency Towns as well as to the Sadar Diwani Adalats of the three Regulation Provinces, these High Courts combined original and appellate jurisdiction..... Almost from the time when he had commenced organising the Company's Courts,

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Warren Hastings had, in 1780, imposed court-fees on suits, which ranged from two per cent to five per cent of the value of the subject matter of the suit. These fees were abolished by his successor, Lord Cornwallis, on the ground that a tax on justice was a disgrace to a civilized power. However, two years later in 1795, after the retirement of Lord Cornwallis, court-fees were re-introduced and enhanced later. I state this from Jain's Outlines of Indian Legal History, to which Mr. S. Sharifuddin Pirzada referred me. However, the learned author has not stated whether the court-fees thus introduced in the Provinces of Bengal, Bihar and Orissa were also extended to the other Regulation Provinces, and it is unlikely that they would have been extended to the Non-Regulation Provinces. Be that as it may, these fees were never extended to the Supreme Courts, because they were the King's Courts."

Dorab Patel, J., then referred to section 4 of the Court Fees Act in the light of historical background as under:

"Now, the amendment of section 4 of the Court Fees Act in 1922 has to be examined in this background. As I explained, the effect of the amendment was to apply the Court Fees Act to civil appeals in the High Courts, except those which fell within the said exception, but, on the date of the amendment, only the Presidency High Courts had an ordinary original civil jurisdiction; therefore, the object of the amendment was to protect the privilege which the citizens of the Presidency Towns had enjoyed for many generations. However, the year 1922 was a year of ferment. The Legislature was aware that new High Courts would be created, and in the very next year the benefit of the said exception became available to appeals in the Rangoon High Court, because the Letters Patent of this High Court was on the lines of the Letters Patent of the Presidency High Courts."

It is the admitted position before us that the Chief Court of Sind, at the time of Partition, did not come within the ambit of section 3 of the Courts Fees Act, and therefore court-fee was

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recovered under Section 6 which is a charging section in respect of any Court of Justice not covered by sections 3 and 4 of the Court Fees Act. The original civil jurisdiction exercised by the Sind and Baluchistan High Court, now the High Court of Sind, has historical background in the Sind Courts Act, 1926. This Act was passed on 21st August, 1926 as Bombay Act VII of 1926, but came into force on 15th April, 1940. Dorab Patel, J., has traced the history of this Act as under:

"Sir Charles Napier had set up Military Courts in the Province after the conquest of Sind. These Courts were substituted in 1849 by civil and criminal Courts, which were required to dispense justice in the spirit of the Bombay Regulations. This discretion was given because Sind was a Province of the Presidency of Bombay. Now, because Sind was a Province of the Presidency of Bombay, the Letters Patent of the Bombay High Court becomes relevant, and I would only refer to the Letters Patent of 28th December 1865. Clause 16 of this Letters Patent read:

'And we do further ordain that the said High Court of Judicature at Bombay shall be a Court of appeal from the civil Courts of the Presidency of Bombay.....'

Similarly, clause 27 read:

'And we do further ordain that the said High Court of Judicature at Bombay shall be a Court of appeal from the Criminal Courts of the Presidency of Bombay.....'

These clauses may be contrasted with clauses 16 and 26 of the Letters Patent of the Calcutta High Court. Under clause 16, the civil appellate jurisdiction of the Calcutta High Court was limited to 'the civil Courts of the Bengal Division of the Presidency of Fort William,' and, under clause 26, the criminal appellate jurisdiction of the Calcutta High Court was limited in the same manner. Clearly, therefore, the Bombay High Court must have entertained civil and criminal appeals from Sind.


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However, by Bombay Act XIII of 1856, a Saddar Court was set up in Sind. Was this Court independent of the Bombay High Court? This is suggested by the word "Saddar", and, for example, appeals from the Saddar Court of the North Western Province had been to the Privy Council. Unfortunately, the statute creating this Saddar Court is not available with us, and the Advocate-General now informs me that he is also not able to supply a copy. In these circumstances, I can only observe that, as Sind was a part of the Bombay Presidency, the Bombay High Court must have exercised its appellate jurisdiction over all Courts in Sind, including the Saddar Court, under clause 16 of its Letters Patent, until the position was altered by the High Courts Jurisdiction (Sind) Act, 1872, and even the terms of this statute support me in my conclusion that the Bombay High Court exercised appellate jurisdiction over our Saddar Court.

I now turn to the High Courts Jurisdiction (Sind) Act, 1872. It reads:-

'An Act to remove doubts as to jurisdiction of the High Court of Bombay over the Province of Sind.'

Whereas it is expedient to remove doubts which have arisen as to the jurisdiction of the High Court of Bombay over the Province of Sind; It is hereby enacted as follows:-

- (1) The High Court of Bombay has not, and shall be deemed never to have had, jurisdiction over the Province of Sind.
- (2) Nothing herein contained shall be deemed to affect the Administrator General's Act, 1874.'

It is not necessary to quote the other two sections of this statute, and it would be sufficient to state that section 3 saved grant of Probate and Letters of Administration by the Bombay High Court, whilst section 4 expressly preserved the criminal jurisdiction of the Bombay High Court 'so far as regards European British subjects of her Majesty'. As this jurisdiction was derived from the Letters Patent, it seems to me that

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the Saddar Court was under the control of the Bombay High Court, hence this Act of 1872.

Additionally, as Sind was a part of the Presidency of Bombay, the Governor of Bombay had extended to Sind several sections of the Bombay Civil Courts Act, 1869, and I would briefly refer to a few of the provisions thus extended to Sind. The Governor of Bombay in Council was entitled under section 3 to alter the limits of the District Courts of Sind and to create new districts. The Government of Bombay in Council appointed Joint Judges and Assistant Judges in Sind under sections 12 and 16 respectively. Similarly, the Governor of Bombay in Council could confer appellate jurisdiction on Assistant Judges and even invest them with the powers of a District Judge. The control of the Governor of Bombay in Council was so extensive that, under section 40-A, it extended to the transfer of Court Clerks from one civil Court to another. Further, whilst the District Judges had control and superintendence over the Courts subordinate to them, section 9 empowered District Judges to 'refer to the (Bombay) High Court all such matters as appears to require that the rules of that Court should be made thereon.' Finally, section 10 of the Bombay Civil Courts Act read:

'(10) The District Judge shall obey all writs, orders or processes issued to him by the High Court, and shall make such returns or reports thereto under his signature and the seal of the Courts as the exigencies of the case require."

I have referred to these provisions and to this historical background in order to show that, at a crucial stage of our history, when judicial institutions were in the process of being built up, they were controlled by the Bombay High Court, so that the traditions of our judicial system have followed the traditions of that Court, and the original jurisdiction of this Court is the legacy of these traditions.

But reverting to our history, Bombay Act XII of 1866 was amended in 1906 and the Court of the Judicial Commissioner, Sind, was set up by this amendment. As

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a result of this amendment, section 1 of Bombay Act XII of 1866 read as follows:-

'There shall be for the province a Court of the Judicial Commissioner of Sind (hereinafter called the Court of the Judicial Commissioner) which shall be the highest Court of appeal in civil and criminal matters in the said Province and which shall be the District Court and Court of Session of Karachi.'

To difference between this provision, and the provision setting up the Courts of the Judicial Commissioners in Lahore, Allahabad, etc., is obvious. These other Courts did not have any original civil or criminal jurisdiction, but the Court of the Judicial Commissioner, Sind, had this jurisdiction, both because its traditions were shaped by those of the Bombay High Court, and because, like Bombay and Rangoon, Karachi was a port. But the Court, thus set up, was not a High Court, and because of the language in which its original jurisdiction was defined, it could be said that this original jurisdiction was a District and Sessions Court Jurisdiction."

It was this historical background that Sind Courts Act, 1926 was passed on 21st August, 1926 which, however, came into force on 15th April, 1940 as stated earlier. The relevant provisions of this Act contained in Sections 3, 4, 7, 8, 14 and 22 of the Act as these stood until the High Court of West Pakistan was established may now be reproduced here-under.

These are -

"3. Establishment of Chief Court. On and from the commencement of this Act there shall be established for Sind a Chief Court hereinafter referred to as "the Chief Court".

"4. Constitution of Chief Court. The Chief Court shall consist of a Chief Judge and other Judges.

"7. Rank and precedence of Chief Judge and Judges of Chief Court. The Chief Judge whether permanent or acting shall have rank and precedence before the other judges of the Chief Court.

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(2) Save as aforesaid and subject to any general or special direction by the Provincial Government the judges shall have rank and precedence according to the seniority of their appointment as such judges:

Provided that a permanent judge shall be deemed to be senior to, and shall have rank and precedence before, an acting judge.

"3. Civil and criminal jurisdiction of Chief Court.

The Chief Court shall be the highest civil court of appeal and revision and the highest court of criminal appeal and revision for Sind and the principal civil court of original jurisdiction for the civil district of Karachi and shall be the Court of Session and shall exercise the powers and perform the duties of a Sessions Judge in the Sessions Division of Karachi.

"14. Appeal from original civil jurisdiction of Chief Court. (1) Except as otherwise provided by any enactment for the time being in force, an appeal from any original decree or from any order against which an appeal is permitted by any law for the time being in force made by a single judge of the Chief Court, shall lie to a Bench consisting of two other judges of the Chief Court.

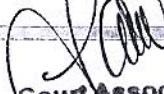
(2) Appeals from appellate civil jurisdiction of a single judge. Except as otherwise provided by any enactment for the time being in force an appeal from any appellate decree made by a single judge of the Chief Court shall lie to a Bench consisting of two other judges of the Chief Court, if the Judge who made the decree declares that the case is a fit one for appeal.

"22. District Courts. (1) There shall be in each civil district other than that of Karachi a district court and the Provincial Government shall appoint a district judge to each such court.

(2) Original jurisdiction of district court. The district court shall be the principal court of original civil jurisdiction in the civil district."

At this stage, it may be mentioned that the Chief Court of Sind had acquired the status of a High Court within the meaning

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of Section 219 of the Government of India Act, 1935, but again with the establishment of West Pakistan High Court on 1955, it was constituted as Karachi Bench of the West Pakistan High Court. The changes thus effected have been narrated in details by Wahiduddin Ahmad, J., in Firdeus Trading Corporation Vs. Japan Cotton and General Trading Co. Ltd (PLD 1961 Karachi 565) in these words:

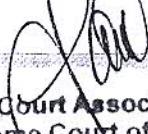
"But the next question arises whether any change was effected in this respect on the establishment of West Pakistan High Court in 1955. It will be noticed that under the Establishment of West Pakistan Act, 1955, not only the Provinces of Sind, Punjab, N.-W.F. and Baluchistan were integrated into West Pakistan Province but Karachi, the then Capital of the Federation, also forms part of it with this exception that its administration was left with Governor-General. Under section 290-A of the Government of India Act the Governor-General and the Parliament were empowered to legislate for this area except in respect of matters relating to the High Court. It will be further observed that the Governor-General was also empowered under section 7 of the said Act to establish the West Pakistan High Court to replace the High Court of Lahore, the Chief Court of Sind and the Judicial Commissioners' Courts in the North West Frontier Province and Baluchistan, but its jurisdiction on establishment extended to the territories of Karachi. Provision was also made in section 7(1) that on establishment this High Court will exercise the same powers and authority as used to be exercised by the Lahore High Court and under subsection (5) all proceedings which immediately before the appointed day were pending in the High Court of Lahore, the Chief Court of Sind and the Judicial Commissioners' Courts in N.-W.F.P. and Baluchistan and in any other Court functioning as High Court for any other specified territory, stood transferred to the High Court of West Pakistan and continued as proceedings instituted in the High Court of West Pakistan. As regards laws, section 10 provided that except as otherwise provided in the Act, and subject to any order made by the Governor-General

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under section 5 of this Act and to the power of any competent legislature, all laws in force in West Pakistan immediately before the integration of West Pakistan shall continue to apply to the areas and the persons to whom they would have applied if the said enactment had not been passed. Accordingly the Governor-General by G.G. Order No.19 of 1955 created the West Pakistan High Court with its seat at Lahore and Benches at Karachi and Peshawar and Circuit Courts at other places within the Province consisting of such Judges as may from time to time be nominated by the Chief Justice. Para 3 of this Order provided that the High Court shall have such original, appellate and other jurisdiction and such powers and authority in respect of the territories included in the Province of West Pakistan as the High Court of Judicature at Lahore had immediately before the commencement of this Order, in respect of the territories in relation to which it exercised appellate jurisdiction. The Letters Patent of the Lahore High Court was also applied to West Pakistan High Court subject to such modification and alteration as the provisions of the Establishment of West Pakistan Act, 1955 or any order made thereunder or any other law for the time being in force may warrant. Under para 5 of the said Order it is laid down that notwithstanding anything in this or in any other law for the time being in force, the Bench of the High Court at Karachi shall have the same original civil jurisdiction for the civil district of Karachi and the same criminal jurisdiction and powers of the Court of Sessions for the Sessions Division of Karachi, as were exercisable, immediately before the commencement of this Order, by the Chief Court of Sind under section 8 of the Sind Courts Act, 1926, subject to the power of the Governor-General to direct that, as from a specified date such jurisdiction and powers shall cease to be exercisable by that Bench and as from that date that Bench shall cease to exercise that jurisdiction and powers. Under para. 12 of the said Order the High Court Judges Order, 1937 was applied to the West Pakistan High Court but the definition of "Chartered High Court" was omitted.

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Simultaneously the West Pakistan (Adaptation of Courts Act) Order, 1955 was also promulgated, which provided in para.3 that as from the date of commencement of this Order all references in any existing law or in any instrument to any Court existing in any of the territories or areas included in the Province of West Pakistan which is a High Court within the meaning of sub-section (1) of section 219 of the Government of India Act, 1935, or to the Court of the Judicial Commissioner, Baluchistan, or to the High Courts of Bahawalpur and Khairpur or to the High Court of any other territory or area included in the province of West Pakistan shall be deemed to be references to the High Court of West Pakistan and the references to a Judge of any such Court or to the Judicial Commissioner, Baluchistan, shall be deemed to be references to a Judge of the High Court of West Pakistan. Under paragraph 5 of the said Order the laws mentioned in this schedule were adapted. Amongst them Sind Courts Act of 1926 also finds place. According to this paragraph sections 3, 4, 7, 8, 10, 11, 12, 14, 16, 19 and 20 were omitted and section 28 of the Sind Courts Act was amended in certain aspects which is not relevant for the decision of the matter under consideration. Immediately thereafter in April 1956 President's Order No.2-1956 also known as Karachi Courts Order 2 of 1956 was also promulgated. By this Order the Court of the District Judge and Courts of Subordinate Judges were established in Karachi. Sind Courts Act of 1926 as applicable to Karachi was amended in several respects. Section 8 of the Sind Courts Act of 1926 was amended and for the words 'and shall be a Court of Session and shall exercise the powers and perform the duties of a Sessions Judge in the Sessions Division of Karachi' the words 'in respect of suits and proceedings wherein the subject-matter in amount or value exceeds twenty-five thousand rupees or such sum as the Central Government may by order under the proviso to sub-section (2) of section 22 prescribe' were substituted. It will be important to note here that section 14 of the Sind Courts Act as applicable to Karachi was not amended.

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and was preserved in its original shape. As a result of this Order the original jurisdiction exercised by the Karachi Bench up to the limit of Rs.25,000 was entrusted to the newly created District Court and the Karachi Bench of the West Pakistan High Court now exercises original jurisdiction only in civil suits over the value of Rs.25,000."

Wahiduddin Ahmad, J., then examined the nature of original jurisdiction exercised by the Karachi Bench of West Pakistan High Court in civil suits in the civil district of Karachi as under:

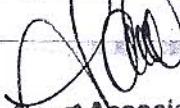
"Is it the ordinary civil jurisdiction of the High Court or some other jurisdiction? This depends on the interpretation of para.5 of the Establishment of West Pakistan High Court Order, 1955. It reads as under:

"Original civil and criminal jurisdiction of the Bench at Karachi.- Notwithstanding anything in this Order or in any other law for the time being in force, the Bench of the High Court at Karachi shall have the same original civil jurisdiction for the civil district of Karachi and the same criminal jurisdiction and powers of the Court of Session for the Sessions Division of Karachi, as were exercisable, immediately before the commencement of this Order, by the Chief Court of Sind under section 8 of the Sind Courts Act, 1926 (Sind Act VII of 1926):

Provided that the Governor-General may by notification in the Official Gazette direct that, as from a specified date such jurisdiction and powers as are mentioned therein shall cease to be exercisable by that Bench and as from that date that Bench shall cease to exercise that jurisdiction and powers."

It is therefore perfectly clear that this jurisdiction is of a special nature and is not the ordinary civil jurisdiction of the West Pakistan High Court, otherwise there was no necessity of saying, that

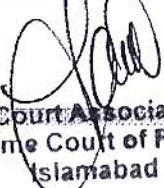
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the Karachi Bench of the High Court of West Pakistan shall have the same original civil jurisdiction for the civil district of Karachi as was exercisable by the Chief Court of Sind under section 8 of the Sind Courts Act, 1926. It will be further observed that original civil jurisdiction in respect of civil suit in Karachi was not conferred on the High Court as a whole as in the case of Calcutta, Madras and Bombay under their Letters Patent, but only to the Bench at Karachi. The nature of this jurisdiction is further clarified under para.7 of the amendments in Part A of the Schedule of President's Order No.2 of 1956. In sub-clause (4) of para.7, which replaces the original section 45 of the Sind Courts Act, 1926, it is provided that all decrees and orders in suits and proceedings wherein the subject-matter in amount or value does not exceed twenty-five thousand rupees, or such sum as the Central Government may by order under the proviso to subsection (2) of section 22 prescribe, passed before the appointed day, by the Bench of the High Court of West Pakistan at Karachi functioning or exercising the powers and performing the duties as the principal Civil Court of original jurisdiction shall be deemed for the purpose of execution to have been passed by the District Court of Karachi. It is quite plain that the Karachi Bench of West Pakistan High Court is functioning or exercising the powers and performing the duties as the principal Civil Court of original jurisdiction in the civil district of Karachi and not ordinary civil jurisdiction of the High Court understood under the Letters Patent of some High Courts in this sub-continent.

It was argued before Wahiduddin, J., that the powers exercised by the then Chief Court of Sind were nothing else, but an ordinary civil jurisdiction of the High Court, and in this connection reliance was placed upon the Letters Patent of the Calcutta High Court, Bombay High Court and Madras High Court to show that the original civil jurisdiction conferred on those

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Courts is distinct from their extraordinary civil jurisdiction and as such is called as ordinary original civil jurisdiction of those Courts. Wahiduddin, J., rejected this argument for the following reasons:

"The scheme of the Establishment of West Pakistan Act, 1955, clearly shows that as a special measure Karachi Bench was allowed to continue to perform the duties of the principal civil Court of original jurisdiction in Karachi, which is a special jurisdiction and by no stretch of argument can be considered as the ordinary original civil jurisdiction of the West Pakistan High Court as is generally known. The history of the establishment of the High Courts in this sub-continent shows that there were only three Courts which were conferred ordinary original civil jurisdiction within certain limits under heir Letters Patent. No other High Court established under the High Courts Act of 1861 or under the Government of India Act, 1915 or under the Government of India Act, 1935 was invested with powers of ordinary civil jurisdiction. The Chief Court of Sind was no doubt a High Court within the meaning of section 219 of the Government of India Act, but the jurisdiction which it exercised in the civil district of Karachi was not that of an ordinary original civil jurisdiction of the High Court but it was only performing the duties of the principal Civil Court of original jurisdiction within the district of Karachi under a special statute viz. section 8 of Sind Courts Act, 1926. It will be pertinent to refer here to the definition of "district" in section 2(4) of the Civil Procedure Code. In this definition a clear distinction is made between the local limits of the jurisdiction of a principal Civil Court of original jurisdiction and the local limits of the ordinary original civil jurisdiction of the High Court. It reads as under:

'District means the local limits of the jurisdiction of a principal Civil Court of original jurisdiction (hereinafter called a 'District Court') and includes the local limits of the ordinary original

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civil jurisdiction of a High Court.'

This distinction also appears from the definition of "District Judge" in section 3(17) of the General Clauses Act, which is in the following terms:-

'District Judge shall mean the Judge of a principal Civil Court of original jurisdiction, but shall not include a High Court in the exercise of its ordinary or extraordinary original civil jurisdiction.'

It appears to me that the expression "Principal Civil Court of original jurisdiction" is not so much a description of any particular class of Courts, as a designation thereof. But there can be no doubt that this jurisdiction is distinct from the ordinary civil jurisdiction of the High Court. In my opinion it is quite obvious that the original civil jurisdiction possessed by the Chief Court of Sind was nothing more than the district Court jurisdiction. The learned Additional Advocate-General has invited my attention to a judgment of Thadani, J. reported in Muhammad Osman Sumro (AIR 1948 Sind 89). The learned Judge in that case held that the Chief Court of Sind is not a District Court within the meaning of section 2(4) but further observed in this connection as under:

'It is not disputed that this Court is a High Court. But Mr. Khanchand contends that as under S.3, Sind Courts Act, 1926, the Chief Court of Sind is the Principal Civil Court of original jurisdiction for the civil district of Karachi, it is also a district Court within the meaning of S.2 (4), Civil P.C. But, as I have pointed out before, if this Court is a district Court, when exercising its original civil jurisdiction, by reason of S.2(4), Civil P.C., the right of appeal would also be governed by the Code of Civil Procedure from a decision of a single Judge of this Court. In view of section 14, Sind Courts

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Act, 1926, however, I do not think such an interpretation is permissible,"

and came to the conclusion that the Chief Court of Sind is not a District Court within the meaning of section 2(4) of the Civil Procedure Code. It may, however, be mentioned that Thandani, J. in an earlier decision in Elias Dadla Khan V.

Mahfeez Shah and another (AIR 1946 Sind 86), conceded the position that 'a Judge of the Chief Court of Sind is not a District Judge under section 19 of the Bombay Local Boards Act, 1923, though for the purpose of ordinary civil jurisdiction, the Chief Court of Sind may be called a District Court.' These two cases, however, are clearly distinguishable. The question involved in these two cases was whether a Judge of the Chief Court of Sind was a District Judge or whether the Chief Court of Sind was a District Court. I entirely agree that neither the Chief Court of Sind was a District Court nor could any of its Judges be called as District Judges because under section 219 of the Government of India Act the Chief Court of Sind was a High Court. But the question is what was the nature of the jurisdiction exercised by it in respect of original civil jurisdiction in the civil district of Karachi. I have not the slightest doubt on the language of section 8 of Sind Act, 1926 and the definition of 'District' in section 2(4) of the Civil Procedure Code, that it was exercising District Court jurisdiction in contradistinction to the ordinary original civil jurisdiction of the High Court. In my opinion the mere fact that the Sind Chief Court later on was included within the definition of High Court under section 219 of the Government of India Act, did not change the nature of this jurisdiction. I am fortified in this view by another circumstance. Formerly in Sind there used to be a Court of the Judicial Commissioner. It was exercising jurisdiction in civil matters within the district of Karachi under section 2 of Bombay Act No.1 of 1906. It reads as under:

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"There shall be for the Province a Court of the Judicial Commissioner of Sind (hereinafter called the Court of the Judicial Commissioner) which shall be the highest Court of Appeal in civil and criminal matters in the said Province and which shall be the District Court and Court of session of Karachi.'

This position continued till 1937 although in the Government of India Act, Judicial Commissioner's Court in Sind was deemed as a High Court. But in spite of this in civil matters it continued as District Court. In 1926 the Sind Courts Act was passed by the Bombay Legislature; which came into force in 1940. But in this enactment, instead of treating the Chief Court of Sind as District Court, it was designated as the principal Court of original civil jurisdiction. Thus the same position was maintained and it was not enacted that it will have ordinary original civil jurisdiction within the limits of Karachi and also did not change the nature of the jurisdiction in civil matters.

It will be further noticed that the Letters Patent of the Lahore High Court has been applied to the West Pakistan High Court. Under the Letters Patent there is no mention whatsoever of any original civil jurisdiction invested on the Lahore High Court or for the matter of that to the West Pakistan High Court. The West Pakistan High Court therefore under the Letters Patent possessed no ordinary civil jurisdiction. So far as the ordinary civil jurisdiction of the High Court is concerned, if it is given to a High Court it must be given to the whole Court. It cannot be said that although the West Pakistan High Court as a whole does not possess ordinary civil jurisdiction in respect of Karachi District, but all the same it is exercised by one of its Benches, it is its ordinary original civil jurisdiction. In my opinion the fact that the original civil jurisdiction in respect of Karachi is not exercised by the High Court of West Pakistan as a whole furnishes a clear indication that the Karachi Bench of the West Pakistan High

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Court is not exercising ordinary civil jurisdiction of the High Court but is exercising special original civil jurisdiction conferred on it under as special statute."

Dorab Patel, J., in the impugned judgement however did not agree with the view taken by Wahiduddin Ahmad, J., stated above. For his opinion, Dorab, J., observed as under:

"The first ground given by Waheeduddin Ahmad, J., for his view was that the original civil jurisdiction of the Karachi Bench of the West Pakistan High Court was not derived from the Letters Patent of the Lahore High Court. That is correct, but the jurisdiction was derived from the Sind Court's Act by which the Sind Chief Court was set up. And further the West Pakistan High Court was a merger of the Superior Courts of the country, three of which had been expressly given the status of a High Court under the Constitution namely section 219 of the Government of India Act, 1935. Therefore, in my humble opinion, nothing turned on the fact that the jurisdiction of the Lahore High Court was derived from that Court's Letters Patent, whilst the jurisdiction of the Sind Chief Court was derived from the statute by which it had been created, except, of course, on the assumption that there was some innate superiority in the Lahore Letters Patent.....

.....The second ground given by Waheeduddin Ahmad, J., was that the original civil jurisdiction of this Court was a District Court Jurisdiction, because this jurisdiction was to be abolished. This reasoning is supported by the proviso to paragraph 5 of the Establishment of the West Pakistan High Court Order, 1955, which envisaged the abolition of this jurisdiction. Accordingly, the learned Advocate-General submitted that, as this jurisdiction was to be abolished, it was a subordinate jurisdiction, proper only for District Courts. Now, even if the Legislature intended to abolish this jurisdiction, how can this intention lead to the

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conclusion that a jurisdiction conferred by law on a High Court was a jurisdiction unfit to be exercised by that High Court? In any case, jurisdictions, like states, do not wither away, and the original civil jurisdiction of this Court continues to flourish, whilst the Legislation, which contemplated its abolition, has, if I may say so, been itself abolished.

The third ground given by Waheeduddin Ahmad, J., for his view was that the original civil jurisdiction of the Karachi Bench was confined to that Bench. That is true, but, at the highest, this would mean that the jurisdiction thus exercised was different from that in the other Benches of the High Court. This was because the Legislature had so willed; so this cannot possibly lead to the conclusion that such a jurisdiction was only fit for subordinate Courts. To take another example, the Karachi Bench of the West Pakistan High Court had Admiralty jurisdiction, which, by the nature of things, could not be exercised by the High Court in Lahore; therefore, on the view taken by Waheeduddin Ahmad, J., this Admiralty jurisdiction would also be a subordinate jurisdiction. But, for a long time, this jurisdiction had been conferred on the Patna High Court, because the provinces of Bihar and Orrisa had a coast Line; so, on the reasoning in the case cited, the Admiralty jurisdiction of the Patna High Court was a High Court Jurisdiction, because it was conferred under the Letters Patent of that High Court, whilst the very same jurisdiction, when exercised by this High Court, became a District Court jurisdiction, because it was conferred by an Act of the Legislature. With respect, I am unable to agree with this view, but it is not necessary to discuss further these three grounds, because they all have reference to the constitution of the West Pakistan High Court which has been abolished.

The fourth ground for the view of Wahiduddin Ahmad, J., was that the original civil jurisdiction of this Court was similar to its writ

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jurisdiction, and, on the basis of certain Indian decisions, he held that this writ jurisdiction is not an ordinary jurisdiction of the High Court, and, from this, he drew the further inference that the original civil jurisdiction of the Court was not an ordinary jurisdiction. Now, the question, whether the writ jurisdiction of the Court was an ordinary or an extraordinary jurisdiction, as held by Waheeduddin Ahmad, J. was considered by the Supreme Court in Ahmad Khan's case and, as their Lordships repelled the contention that it was an extraordinary jurisdiction, the fourth ground for the view taken in the case cited is also not sound."

After having heard the respective views of the learned Counsel for the parties and gone through the history of legislation, there is no escape from the conclusion that the original civil jurisdiction exercised by Sind High Court is of the same nature as was exercisable by the Chief Court of Sind under Section 8 of the Sind Courts Act, 1926.

It would be seen from above that with the establishment of High Court of the West Pakistan under High Court of West Pakistan (Establishment) Order, 1955, the original civil jurisdiction was conferred upon the Karachi Bench of that Court under paragraph 5 which reads as under:

"5. Original civil and criminal jurisdiction of the Bench at Karachi.— Notwithstanding anything in this Order or in any other law for the time being in force, the Bench of the High Court at Karachi shall have the same original civil jurisdiction for the civil district of Karachi and the same criminal jurisdiction and powers of the Court of Sessions for the Sessions Divisions of Karachi, as were exercisable, immediately before the commencement of this Order, by the Chief Court of Sind under section 8 of the Sind Courts Act, 1926 (Sind Act VII of 1926):

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Provided that the Governor-General may by notification in the official Gazette direct that, as from a specified date such jurisdiction and powers as are mentioned therein shall cease to be exercisable by that Bench and as from that date that Bench shall cease to exercise that jurisdiction and powers."

Wahiduddin Ahmad, J., in Firdous Trading Corporation Vs. Japan Cotton and General Trading Co. Ltd (PLD 1961 Karachi 565) was very right when he observed that "it is therefore perfectly clear that this jurisdiction is of a special nature and is not the ordinary civil jurisdiction of the West Pakistan High Court, otherwise there was no necessity of saying that the Karachi Bench of the High Court of West Pakistan shall have the same original civil jurisdiction for the civil district of Karachi as was exercisable by the Chief Court of Sind under section 8 of the Sind Courts Act, 1926". The aforesaid jurisdiction was not conferred on the High Court as a whole as in the case of Calcutta, Madras and Bombay under their Letters Patents. It was as a special measure that Karachi Bench was allowed to continue to perform the duties of the principal civil court of original civil jurisdiction in Karachi - it was therefore not the original civil jurisdiction of the West Pakistan High Court as is generally known. Wahiduddin Ahmad, J., was also correct in taking the view that although the Chief Court of Sind was no doubt a High Court within the meaning of Section 219 of the Government of India Act but the jurisdiction which it exercised in the civil district of Karachi was not that of an ordinary original civil jurisdiction of the High Court but it was only performing the duties of the principal civil court of original civil jurisdiction within the district of Karachi under a special statute i.e., Section 8 of the Sind Courts Act, 1926. Sind Chief Court itself in Elias Dadla Khan V. Mahfooz Shah (A.I.R. 1946 Sind 86), had taken the view that "there is a

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civil district of Karachi consisting of the city and taluka of Karachi, and that for the purpose of the ordinary civil jurisdiction of the Chief Court, the Chief Court of Sind can be called a District Court, but it does not follow that a Judge of the Chief Court becomes a District Judge of that civil District Court".

The Federal Court of Pakistan in Ghulam Mohi-ud-Din Vs. The Crown (PLD 1953 F.C.1) had the occasion of interpreting section 8 of the Sind Courts Act with respect to the exercise of powers by the Chief Court of Sind as the Court of Sessions and the exercise of the powers and performance of the duties of a Sessions Judge in the Sessions Division of Karachi. After survey of historical background of the judicial system of the Courts in the Province of Sind before the Sind Courts Act, 1926 came into force, the Federal Court referred to the provisions of Section 8 of the Sind Courts Act, 1926, as under:

"As mentioned already the Sind Courts Act 1926 came into force in the year 1940. Section 8 of this Act lays down that the Chief Courts shall be the highest Civil Court of Appeal and Revision, and the highest Court of Criminal Appeal and Revision for Sind, and the principal Civil Court of original jurisdiction for the civil district of Karachi, and shall be the Court of Sessions, and shall exercise the powers and perform the duties of a Sessions Judge in the Sessions Division of Karachi. Section 10 of the Act lays down that, notwithstanding anything in the Code of Criminal Procedure, Magistrate exercising jurisdiction in the Sessions Division of Karachi, when committing accused persons for trial, shall commit them to the Chief Court."

The argument on behalf of the appellant in that Court was that as the Chief Court of Sind was declared to be the Court of Session for the Session Division of Karachi, and as

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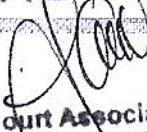
that Court was to exercise the powers and perform the duties of a Sessions Judge, the procedure applicable to such a Court was the procedure laid down in the Cr.P.C. for regulating jury trials by Sessions Judges. If the Chief Court of Sind has to be regarded as a Court of Session and has to exercise the powers and perform the duties of a Sessions Judge, it is clear that it must be regarded as a Sessions Court for all purposes under the Cr.P.C. It cannot be regarded as a Court of Session for the exercise of its powers and performance of its duties, and be given at the same time the status of a High Court in procedural matters.

On the other hand, it was canvassed on behalf of the Crown that though the Chief Court is to exercise the powers and perform the duties of a Sessions Judge in the Sessions Division of Karachi, the commitment by the Magistrate under clause (a) of Section 10 of the Act is not to the Court of Session for karachi, but to the Chief Court, being the highest Court of Criminal jurisdiction in the Province of Sind must be regarded as a High Court and the procedure that must be followed by the Chief Court is that which applies to High Courts in the exercise of their original criminal jurisdiction."

The Federal Court dealt with these arguments and held as under:

"The Sind Chief Court, according to the Code, is a Court constituted under a law other than the Code of Criminal Procedure for the time being in force. It is, therefore, a "Special Court". It happens that the words "Court of Session" are used in section 8 of the Sind Courts Act for the Sind Chief Court when it exercises the powers and performs the duties of a Sessions Judge. Nevertheless, it is not a Court of Session under the Cr.P.C., but a Court under a "Special Law". It is unfortunate that the nomenclature is such that this "Special Court" has been confused with the Court of Session constituted under the provisions of the Cr.P.C. When exercising its original criminal jurisdiction the Chief Court of Sind functions as a "Special Court" though it has been styled a Court of Session

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for the Sessions Division of Karachi. Section 5 of the Code of Criminal Procedure lays down that 'all offences under the I.P.C., shall be investigated, inquired into, tried and otherwise dealt with according to the provisions hereinafter contained.' An offence under section 302 is an offence under the I.P.C. Therefore, this "Special Court" has to try this offence in accordance with the provisions of the Cr.P.C. As this "Special Court" is a High Court, by virtue of the provisions of section 266 of the Cr.P.C., read with section 219 of the Government of India Act, the procedure applicable to this "Special Court" is the procedure that applies to trials by jury before a High Court."

It would thus be seen that the Chief Court of Sind when exercising its criminal jurisdiction under section 8 of the Sind Courts Act, 1926 was treated as a "Special Court", although it was a High Court by virtue of the provisions of Section 266 of the Code of Criminal Procedure read with Section 219 of the Government of India Act.

It was precisely this nature of jurisdiction, both on civil and criminal sides, that was conferred on the Karachi Bench of West Pakistan High Court under section 5 of the Establishment of High Court of West Pakistan (Establishment) Order, 1955 and was continued to be exercised by the Sind and Baluchistan High Court established under High Courts (Establishment) Order, 1970 and now by the High Court of Sind under Baluchistan and Sind (High Courts) Order, 1976. It appears that this point of view was not properly highlighted before the Judges of the Division Bench of the High Court who decided the case of Razak Vs. Usman (PLD 1975 Karachi 944) under these appeals, for, otherwise, the learned Judges would not have taken a different view than the one that prevailed with Wahiduddin Ahmad, J., in Firdous Trading Corporation Vs. Japan Cotton and General Co. Ltd.

In the light of the historical background of the original

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civil jurisdiction vested in the High Court of Sind, my opinion is identical to the one expressed by Wahiduddin Ahmad, J., in these words:

"I have not the slightest doubt on the language of section 8 of Sind Act, 1926 and the definition of "District" in section 2(4) of the Civil Procedure Code, that it was exercising District Court jurisdiction in contradistinction to the ordinary original civil jurisdiction of the High Court. In my opinion the mere fact that the Sind Chief Court later on was included within the definition of High Court under section 219 of the Government of India Act, did not change the nature of this jurisdiction."

For these reasons, these appeals are allowed, the impugned judgement of the High Court of Sind and Bluchistan dated 2nd July, 1975 is set aside and it is declared that the view taken by Wahiduddin Ahmad, J., in Firdous Trading Corporation Vs. Japan Cotton and General Trading Co. Ltd (PLD 1961 Karachi 565) is the correct statement of law on the questions involved in these appeals.

In the circumstances, the parties are left to bear their own costs.

Sd/- Abdul Kadir Shaikh, J
 Sd/- Naimuddin. J
 Sd/- Ajmal Mian. J
 Sd/- Sajjad Ali Shah
 Sd/- Nasir Aslam Zahid, J

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KARACHI
 25th February, 1991.

APPROVED FOR REPORTING.

