**IN THE SUPREME COURT OF PAKISTAN**
(Appellate Jurisdiction)

**PRESENT**:
MR. JUSTICE MUSHIR ALAM
MR. JUSTICE MAQBOOL BAQAR
MR. JUSTICE MUNIB AKHTAR

**CIVIL APPEAL NO.65-K TO 117-K OF 2019**
*(On appeal from the judgment dated 23.8.2018 passed by the High Court of Sindh, Karachi in CP Nos.D-7077, 3082, 3083, 3940, 4068, 4429, 4918, 5140, 6009, 6063, 6899, 6900, 6971, 7117, 7118, 7119 of 2016, 460, 461, 464, 598, 783, 855, 886, 887, 946, 1282, 1309, 1339, 1340, 1764, 2281, 2755, 2825, 2913, 3569, 4527, 4533, 1637, 4810, 4947, 5736 to 5779, 6016, 6092, 9194, 7813, 8357, 8535 of 2017, 334, 335, 336, 479, 480, 481, 482, 539, 624, 897 to 903, 1037, 1272, 1273, 1274, 1276, 1277, 1740, 1766, 2040, 2236, 2263, 2265, 2700, 2872, 2873, 3016, 3017, 3127, 3158 and 3316 of 2018)*

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| M/s Shahbaz Garments (Pvt) Ltd. vs Government of Sindh thr. Secretary Labour & Human Resource Department, Karachi etc. | CA 65-K/2019 |
| M/s ELPA Laboratories Pvt Ltd. vs Government of Sindh through Secretary Labour & Human Resource Department, Karachi etc. | CA 66-K/2019 |
| M/s Multiple Autoparts Industries Pvt. Ltd. vs Government of Sindh through Secretary Labour & Human Resource Department, Karachi etc. | CA 67-K/2019 |
| M/s Saima Packaging (Pvt.) Ltd. vs Government of Sindh through Secretary Labour & Human Resource Department, Karachi & another | CA 68-K/2019 |
| M/s ISIS Pharmaceuticals & Chemical Works, Karachi vs Government of Sindh through Secretary Labour & Human Resource Department, Karachi & another | CA 69-K/2019 |
| M/s Kassim Textile (Pvt.) Ltd., Karachi vs Government of Sindh through Secretary Labour & Human Resource Department, Karachi etc. | CA 70-K/2019 |
| M/s Fashion Knit Industries, Karachi vs | CA 71-K/2019 |

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| Government of Sindh through Secretary Labour & Human Resource Department, Karachi & another | |
| M/s Hilton Pharma Pvt. Ltd., Karachi vs Government of Sindh through Secretary Labour & Human Resource Department, Karachi etc. | CA 72-K/2019 |
| M/s Phoenix Security Services Pvt. Ltd. vs Government of Sindh through Secretary Labour & Human Resource Department, Karachi etc. | CA 73-K/2019 |
| M/s Phoenix Armour Pvt, Karachi vs Government of Sindh thr. Secretary Labour & Human Resource Department, Karachi & another | CA 74-K/2019 |
| M/s The Agha Khan Hospital & Medical Foundation, Karachi vs Government of Sindh through Secretary Labour & Human Resource Department, Karachi & another | CA 75-K/2019 |
| M/s Artistic Fabric & Garment Industries Pvt. Ltd., Karachi vs Government of Sindh through Secretary Labour & Human Resource Department, Karachi & another | CA 76-K/2019 |
| M/s The Agha Khan Maternal & Child Care Centre Hyderabad, Karachi vs Government of Sindh through Secretary Labour & Human Resource Department, Karachi & another | CA 77-K/2019 |
| M/s Ghani Glass Ltd., Karachi vs Government of Sindh through Secretary Labour & Human Resource Department, Karachi & another | CA 78-K/2019 |
| M/s Specialized Autoparts Industries Pvt. Ltd., Karachi vs Government of Sindh through Secretary Labour & Human Resource Department, Karachi & another | CA 79-K/2019 |
| M/s Descon Engineering Ltd., Karachi vs Government of Sindh through Secretary Labour & Human Resource Department, Karachi & another | CA 80-K/2019 |
| M/s. Loads Limited vs Government of Sindh, through Secretary, Labour & Human Resource Department etc. | CA 81-K/2019 |
| M/s. Syntech Fibers (Pvt.) Ltd., Karachi vs Government of Sindh, through Secretary, Labour & Human Resource Department etc. | CA 82-K/2019 |

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| M/s. Lucky Knits Private Limited, Karachi vs Government of Sindh, through Secretary, Labour & Human Resource Department etc. | CA 83-K/2019 |
| M/s. Zia Industries (Pvt.) Limited, Karachi vs Government of Sindh, through Secretary, Labour & Human Resource Department etc. | CA 84-K/2019 |
| M/s. Pakistan Cables Limited, Karachi vs Government of Sindh, through Secretary, Labour & Human Resource Department etc. | CA 85-K/2019 |
| M/s. Dollars Industries Pvt. Limited, Karachi vs Government of Sindh, through Secretary, Labour & Human Resource Department etc. | CA 86-K/2019 |
| M/s. Al-Abbas Sugar Mills Limited, Karachi vs Government of Sindh, through Secretary, Labour & Human Resource Department etc. | CA 87-K/2019 |
| M/s. Pakistan International Container Terminal Limited, Karachi vs Government of Sindh, through Secretary, Labour & Human Resource Department etc. | CA 88-K/2019 |
| M/s International Industries Ltd., Karachi vs Government of Sindh through Secretary Labour & Human Resource Department, Karachi & another | CA 89-K/2019 |
| M/s Lucky Tax Pakistan Pvt. Ltd., Karachi vs Government of Sindh thr. Secretary Labour & Human Resource Department, Karachi & another | CA 90-K/2019 |
| M/s Lottee Kolson Pvt. Ltd. vs Government of Sindh thr. Secretary Labour & Human Resource Department, Karachi & another | CA 91-K/2019 |
| M/s Institute of Business Management, Karachi vs Government of Sindh through Secretary Labour & Human Resource Department, Karachi & another | CA 92-K/2019 |
| Indus Dyeing & Manufacturing Co. Ltd. vs Government of Sindh through Secretary, Labour & Human Resource Department, Karachi & another | CA 93-K/2019 |
| M/s Anwar Textile Mills Ltd., Karachi vs Government of Sindh through Secretary Labour & Human Resource Department, Karachi & another | CA 94-K/2019 |
| M/s Quetta Textile Mills Ltd., Karachi vs Government of Sindh through Secy. Labour | CA 95-K/2019 |

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| & Human Resource Department, Karachi & another | |
| M/s Younas Textile Mills Ltd., Karachi vs Government of Sindh through Secy. Labour & Human Resource Department, Karachi & another | CA 96-K/2019 |
| M/s Askari Bank Ltd. vs Government of Sindh through Secy. Labour & Human Resource Department, Karachi & another | CA 97-K/2019 |
| M/s Anwar Chaudhry and Sons vs Government of Sindh through Secy. Labour & Human Resource Department, Karachi & another | CA 98-K/2019 |
| M/s Nova Tex Ltd., vs Government of Sindh through Secy. Labour & Human Resource Department, Karachi & another | CA 99-K/2019 |
| M/s E-square services Pvt. Ltd vs Government of Sindh through Secy. Labour & Human Resource Department, Karachi & another | CA 100-K/2019 |
| M/s Thall Ltd. vs Government of Sindh through Secy. Labour & Human Resource Department, Karachi & another | CA 101-K/2019 |
| M/s Gatron Industries Ltd., vs Government of Sindh through Secy. Labour & Human Resource Department, Karachi & another | CA 102-K/2019 |
| M/s Gadoon Textile Mills Ltd., vs Government of Sindh through Secy. Labour & Human Resource Department, Karachi & another | CA 103-K/2019 |
| M/s Citizens Public Secondary School vs Government of Sindh through Secy. Labour & Human Resource Department, Karachi & another | CA 104-K/2019 |
| M/s Nabi Qasim Pvt. Ltd., vs Government of Sindh through Secy. Labour & Human Resource Department, Karachi & another | CA 105-K/2019 |
| M/s Agri Auto Stamping Co. Pvt. Ltd., vs Government of Sindh through Secy. Labour & Human Resource Department, Karachi & another | CA 106-K/2019 |
| M/s Shabbir Tiles and Ceramics Ltd. vs Government of Sindh through Secy. Labour & Human Resource Department, Karachi & another | CA 107-K/2019 |

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| M/s Island Textile Mills Ltd., vs Government of Sindh through Secy. Labour & Human Resource Department, Karachi & another | CA 108-K/2019 |
| M/s Salfi Textile Mills Ltd., vs Government of Sindh through Secy. Labour & Human Resource Department, Karachi & another | CA 109-K/2019 |
| M/s Bukhsh Industries Pvt. Ltd., vs Government of Sindh through Secy. Labour & Human Resource Department, Karachi & another | CA 110-K/2019 |
| M/s MS Enterprises Ltd., vs Government of Sindh through Secy. Labour & Human Resource Department, Karachi & another | CA 111-K/2019 |
| M/s Medipak Ltd. vs Government of Sindh through Secy. Labour & Human Resource Department, Karachi & another | CA 112-K/2019 |
| M/s The Kidney Centre Post Graduate Training Institute vs Government of Sindh through Secy. Labour & Human Resource Department, Karachi & another | CA 113-K/2019 |
| M/s The Citizen Foundation vs Government of Sindh through Secy. Labour & Human Resource Department, Karachi & another | CA 114-K/2019 |
| M/s Borjan Pvt. Ltd. vs Government of Sindh through Secy. Labour & Human Resource Department, Karachi & another | CA 115-K/2019 |
| M/s International Steels Ltd., vs Government of Sindh through Secy. Labour & Human Resource Department, Karachi & another | CA 116-K/2019 |
| M/s Ismail Industries vs Government of Sindh through Secy. Labour & Human Resource Department, Karachi & another | CA 117-K/2019 |

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| For the Appellants | : | Mr. Zahoor ul Hassan Minhas, ASC<br>Mr. Jameel Ahmed Virk, AOR<br>(in CAs 65-K to 92-K, 96-K, 98-K to 117-K/2019)<br>Mr. Shahid Bajwa, ASC<br>(in CA 65-K/2019)<br>Nemo<br>(in CAs 93-K to 95-K, 97-K/2019) |
| For Respondent-2 | : | Mr. Jawad Akbar Sarwana, ASC<br>Mr. K. A Wahab, AOR<br>(In all cases.) |
| Date of Hearing | : | 11.03.2021 |

**JUDGMENT**

**Munib Akhtar, J.:** These appeals challenge a common judgment of the learned High Court dated 23.05.2018. The judgment is noted as *Shahbaz Garments (Pvt) Ltd. v Government of Sindh and others* 2018 PLC Note 31 (the full text being available at Pakistan Law Site). Leave to appeal was granted vide order dated 20.08.2019. At the conclusion of the hearing it was announced that the appeals stood dismissed. The following are our reasons for having done so.

2. The appeals arise under the Sindh Employees' Social Security Act, 2016 ("2016 Act"). This statute was amended by an Act of 2018 ("2018 Act"). The 2016 Act replaced certain predecessor legislation, being the Provincial Employees' Social Security Ordinance, 1965 ("1965 Ordinance") as applicable in the Province of Sindh. As will be explained presently, the present dispute relates to the period between the enactment of the 2016 Act (from 12.04.2016) up to its amendment by the 2018 Act (from 17.05.2018).

3. Before taking up the submissions of learned counsel for the parties and the point in issue it will be necessary to consider certain constitutional dimensions, starting from the promulgation of the 1965 Ordinance under the 1962 Constitution to its continuance as existing law under the 1973 Constitution first as a federal law and then, after the 18th Amendment, as provincial legislation and, ultimately, replacement in Sindh by the 2016 Act. This discussion will set the stage and help explain certain aspects of the various statutory provisions relevant for a resolution of the matter in dispute.

4. The short title of the 1965 Ordinance when promulgated was the West Pakistan Employees' Social Security Ordinance, 1965. As this indicates it started out as provincial legislation under the 1962 Constitution. When the 1973 Constitution came into force (with effect from 14.08.1973, its commencing day) the 1965 Ordinance became, like all laws as had been enacted up to that day under all previous constitutional dispensations, "existing law" within the meaning of Article 268. The question of how such laws were dealt with under the 1973 Constitution has been considered in some detail by one of us when in the High Court in certain cases, and it will be convenient to refer to the relevant extracts from those judgments. Reference may first be made to a Full Bench decision, *Dr. Nadeem Rizvi and others v. Federation of Pakistan and others* PLD 2017 Sindh 347. (We may note that this judgment has been upheld in appeal by this Court: *Government of Sindh and others v. Dr. Nadeem Rizvi and others* 2020 SCMR 1.) It was observed as follows (pg. pp. 369-70; emphasis supplied):

> "32. Every Constitution establishes its own constitutional dispensation, creating its own legislative and executive bodies, imbuing them with requisite powers and competences and, if the nature of the polity is federal, sharing the same between the two tiers of the State. *One question that needs to be addressed is the fate of laws existing on the commencing day of the new Constitution. In terms of the Constitution itself, such laws would of course not be laws at all, since they were made under a different constitutional dispensation. Yet, to discard the existing laws (a possibility that does exist in theory) would be to invite chaos. So, each Constitution provides for continuity and gives due recognition and force to existing laws*. This was done in the present Constitution by means of Article 268, but this provision is by no means unique. It had its equivalents in the 1962 Constitution (Article 225), the 1956 Constitution (Article 224), the Indian Constitution (Article 372) and even the Government of India Act, 1935 (s. 292)...."

Since existing laws were to be continued, the problem arose as to how they were to be allocated between the Federation and the Provinces. This point was considered in *Pakistan International Freight Forwarders v. Province of Sindh and another* 2017 PTD 1 (herein after "*Pakistan International Freight Forwarders*"). (We may note that this decision, whereby a number of writ petitions were disposed off, is under appeal in this Court: see CA 2312/2016 and connected appeals.) It was observed as follows (at pp. 43-44; emphasis supplied):

> "49. ... Article 268(1) provided that all laws existing on that date were to continue in force "until altered, repealed or amended by the appropriate Legislature".... For present purposes, it suffices to note that what it meant was that each "existing law" stood allocated to one or the other of the legislatures created by the Constitution (i.e., Majlis-e-Shoora (Parliament) on the one hand and the Provincial Assemblies on the other) and till such time as the relevant legislature chose to alter, repeal or amend it, the law continued in force in the form it had on the commencing day. But how was this allocation to be made? How was it to be decided that a particular "existing law" fell to the lot of the Federation or the Provinces? In our view, given the federal structure and scheme of the Constitution, the allocation could be only on the basis of the well known test of "pith and substance". *The pith and substance of each "existing law" had to be determined, and here it is important to remember that the legislative source or origin of the statute in any previous constitutional dispensation was irrelevant. In other words, it was irrelevant whether the "existing law" in question would have been regarded as a federal or provincial statute when enacted in terms of whichever constitution was then prevailing. The "existing law" had to be considered simply as a law in its own right, and its pith and substance determined*. If the pith and substance was relatable to any entry on the Federal Legislative List or the Concurrent Legislative List (both Lists of course existed on the commencing day) then the "existing law" stood allocated to the Federation. *If the pith and substance was not relatable to any enumerated power then it stood allocated to the Provinces*."

5. The allocation of an existing law exclusively to the Federation where its pith and substance related to an entry on the Federal Legislative List ("Federal List"), or exclusively to the Provinces (subject to the well known exception in the case of the

Islamabad Capital Territory) where the pith and substance was not relatable to any entry on either of the Lists presented no special problem. The question relevant for present purposes is how was the allocation to be made when an existing law, in its pith and substance, related to an entry on the Concurrent Legislative List ("Concurrent List")? Did it stand allocated to the Federation or the Provinces? It will be noted that it is stated in the last paragraph extracted above that such an existing law stood allocated to the Federation. How was it determined under the Constitution that this was the allocation? This requires some elaboration. Before doing so however, one aspect of concurrent legislative powers may be adverted to, for which reference may again be made to *Pakistan International Freight Forwarders* (pp. 23-4; emphasis supplied):

> "31. It is important to keep in mind that a legislative entry (or "field" of legislative power) exclusive to one legislature is precisely that: a legislative area made over to that legislature where it alone, subject to any incidental encroachment permissible under the "pith and substance" rule, can legislate. (Nice questions can arise where there has been a permissible incidental encroachment and the legislature exclusively empowered then also makes a law in relation to the area encroached upon (or even vice versa), and the provisions of the two statutes are in conflict. However, a consideration of such issues will take us too far afield and they must therefore be regarded as left open.) It is for that legislature alone to decide whether and if so to what extent it wishes to legislate in relation to the "field" exclusively allocated to it. Thus, the legislature may let the field lie "fallow" for years, even decades (i.e., not make a law in relation thereto at all); it may "till" (and go on "tilling") only this or that part of the field (i.e., exercise its legislative power only in part); or it may "occupy" the field in its entirety (i.e., enact one or more laws that appear to cover the entire subject matter of the legislative entry). Subject only to any permissible incidental encroachment, the other legislature cannot at all legislate in relation to a legislative field allowed to lie "fallow" or "tilled" only in part. *Where there are concurrent powers on the other hand, and the legislative field may be acted upon by either legislature, the nature of the problem changes. If the one or the other legislature has not exercised its legislative competence or has done so only in part, the other legislature may enact in relation to the portion not acted upon. However, the constitution sets up rules of*

> *precedence in this context, with the federal legislature invariably trumping the exercise of provincial legislative power to the extent of any inconsistency between the two statutes. Thus, in effect, the federal legislature has the competence to "clear" the field for its own use to any extent necessary and even, if it so desires, "occupy" the whole of it*."

6. As noted in the extracts above, Article 268 provided that the appropriate legislature for any particular existing law could alter, repeal or amend it. What then was the appropriate legislature for an existing law that, in its pith and substance, was relatable to an entry on the Concurrent List, i.e., could alter, repeal or amend it? The answer was provided in Article 243 as it stood on the commencing day of the 1973 Constitution (emphasis supplied):

> "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, *or to any provision of any existing law with respect to any of the matters enumerated in the Concurrent Legislative List*, then the Act of Majlis-e-Shoora (Parliament), whether passed before or after the Act of the Provincial Assembly, *or, as the case may be, the existing law*, shall prevail and the Act of the Provincial Assembly shall, to the extent of the repugnancy, be void."

The first point to note in relation to the Concurrent List (or any matters as are otherwise concurrent), and it is of fundamental constitutional importance, is that it is only the legislative field that is concurrent and not the laws made by the respective legislatures. Each law is distinct and peculiar to the legislature that makes it and it cannot be "acted upon", i.e., amended, substituted, altered or repealed by the other legislature. (To avoid any confusion we note, in passing, that Article 144 does not relate to concurrent powers in the sense presently under consideration.) This aspect was considered in detail by one of us when in the High Court, in *Karamat Ali and others v. Federation of Pakistan and others* PLD 2018 Sindh 8. Reference may be made especially to the

discussion at paras 25-29 (pp. 45-51). (We may note that appeals against this decision (CA Nos. 148-150/2018) were dismissed by this Court vide order dated 22.03.2018. Review petitions are pending against the order last mentioned (CRP 121/2019 and others).) As Article 243 made clear, a provincial law made under the 1973 Constitution in relation to any matter relatable to any entry of the Concurrent List was void to the extent of its repugnancy with any federal law so made or any existing law that, in its pith and substance, was so relatable. *In other words, a Provincial Assembly could not alter, repeal or amend an existing law that in its pith and substance was relatable to an entry on the Concurrent List*. It followed that only Parliament could do so, i.e., it was the appropriate legislature in relation to such existing laws. In other words, such laws stood allocated to the Federation *and this was so regardless of whether the existing law would have been regarded as a "federal" or "central" law or a "provincial" law under whatever constitutional dispensation it had been first enacted*.

7. With these constitutional principles in mind, we turn to the existing law with which we are concerned, i.e., the 1965 Ordinance. To which legislature did this law stand allocated? Now, the Concurrent List had, on the commencing day, two entries that related directly to labour. One of these, Entry No. 26, provided as follows: "Welfare of labor; conditions of labor, provident funds; employer's liability and workmen's compensation, health insurance including invalidity pensions, old age pensions". When the pith and substance of the 1965 Ordinance is considered, there can be no doubt that it related to the welfare of labour, i.e., it related to an entry on the Concurrent List. Accordingly, this

existing law stood allocated to the Federation. On and from the commencing day it became a federal law.

8. Of course, the 1965 Ordinance had started out as provincial legislation under the 1962 Constitution. Not surprisingly, it had conferred its statutory powers on the Government of West Pakistan and indeed s. 2(14), as originally enacted, specifically so defined "Government". By the commencing day of the present Constitution the Province of West Pakistan had ceased to exist and, as just noted, the Ordinance had become a federal law. How then was the matter of the statutory powers to be treated? This brings us to another constitutional principle of importance. Generally speaking, and subject to any applicable constitutional limitations or prohibitions, Parliament can when enacting any law within its domain confer powers and impose duties on a Province or any of its officers or authorities. Thus, Article 146(2) expressly provides that an Act of Parliament may, "notwithstanding that it relates to a matter with respect to which a Provincial Assembly has no power to make laws", confer statutory powers and impose duties on a Province, etc. (which would include a Provincial Government). Thus, e.g., if an Act of Parliament relates to a matter on the Federal List, which is exclusively in the federal domain, it may nonetheless confer statutory powers and impose duties on the Provinces (who of course are excluded from any legislative or executive authority with regard thereto). Clearly, what is true for matters on the Federal List would necessarily be true for a matter on the Concurrent List (or that is otherwise concurrent). An existing law that stood allocated to the Federation had also to be treated in like manner since it became a federal law. Obviously, if

the existing law had been a “federal” or “central” statute under whatever constitutional dispensation it had been originally enacted, that presented no special issue. However, and this is of course what is important for present purposes, since the 1965 Ordinance had started out as provincial legislation, even where the existing law conferred powers and duties on “provincial” authorities, that conferment could be retained and allowed to continue. However, it must be understood that this was not simply because the existing law itself so provided. It was because of the constitutional principle noted in this para. Had there been no such principle then of necessity the existing law would have had to be amended, altered or adapted to remove the references to the “provincial” authorities (such as the Provincial Government) and replace them with federal authorities or the Federal Government itself. The constitutional principle here applicable however gave the Federation the choice to do as it willed. It could at any time alter or amend the existing law that came to its share by taking away the conferment of statutory powers or duties on the Provincial Governments and/or their officers and authorities, or it could leave things as they were. In the case of the 1965 Ordinance, the Federation chose to do the latter. Thus, this existing law, though a federal law, continued to confer statutory powers and impose duties on the Provinces. It remains only to note that Article 268(3) empowered the President, by Order, to “make such adaptation, whether by way of modification, addition or omission” as deemed “necessary or expedient” to any existing law for “the purpose of bringing [its] provisions ... into accord with the provisions of the Constitution”. This power was exercised in relation to a very large number of existing laws in terms of

President's Order No. 4 of 1975. Since the Province of West Pakistan had ceased to exist but the Federation had decided to retain the conferment of statutory powers on the Provinces, the 1965 Ordinance was adapted by means of the aforementioned Order such that, inter alia, references to "West Pakistan" were removed and in its stead "Province" (or cognate expressions) were substituted. Thus, e.g., the short title of the Ordinance was suitably modified and in s. 2(14) already alluded to, "Government" stood defined as meaning the "Provincial Government".

9. With the constitutional dimensions and aspects out of the way, we can now turn to take a look at the statute itself. It may be noted that in terms of the rule-making power conferred by s. 79, the West Pakistan (now Provincial) Employees' Social Security (Contributions) Rules, 1966 ("1966 Rules") were framed. These continue (as amended) to remain in the field, including in the Province of Sindh. In order to properly appreciate the submissions made by learned counsel and put matters in perspective, it will be convenient to look at the statutory provisions at four stages: (i) the 1965 Ordinance as originally promulgated (stage I); (ii) the 1965 Ordinance as it stood up to the date on which it was replaced by the 2016 Act (stage II); (iii) the 2016 Act as originally enacted (stage III); and (iv) the 2016 Act as amended by the 2018 Act (stage IV). The main provisions have, for convenience and to the extent as presently relevant, been put in tabular form in the Annex to this judgment and reference may be made to the same.

10. Looking first at stage I (the Ordinance as originally promulgated may be found at PLD 1965 WP Statutes 149), it will

be seen that s. 2(8) defined “employee” in specific terms but then took certain categories out of the scope of the definition. In particular, clause (f) provided that any person employed on wages exceeding Rs. 500/- per month was not an employee for purposes of the Ordinance. The reason for such exclusions, and this was specifically pointed out by learned counsel for the appellants, was that the preamble to the Ordinance clarified that it was concerned with providing benefits to “certain employees and their dependents”, i.e., not to all employees. Section 20 is crucial for present purposes. It provided in subsection (1) that (in terms as stated therein) an employer had to pay “contributions” (which was itself a defined term) to the Institution “at such times, and such rate and subject to such conditions as may be prescribed”. It will be noticed that the word “such” was used thrice in this subsection, separately in relation to “times”, “rate” and “conditions”. This was clearly to relate each of these matters to the requirement of being prescribed, i.e., of being provided for in rules. The importance of this formulation will emerge later. It is also pertinent to note that, as originally conceived, “contributions” were not only to be made by employers but also by employees by way of appropriate deductions from their wages (see s. 2(5)). Subsection (2) of s. 20 provided that the share payable by the employers and that payable by the employees, and the rates thereof, would be as determined by the rules. Now the 1966 Rules as originally promulgated (see at PLD 1967 WP Statues 34) provided in Rule 3 that subject to Rule 4(3) the contributions to be made were as given in the Schedule to the Rules. This Schedule was amended from time to time and provided for the shares of the contributions to be made by the employers and the employees respectively. Rule

4(3) provided that in the case of any establishment to which the Minimum Wages Ordinance, 1961 ("1961 Ordinance") applied, and where the wages actually paid by an employer were less than as determined in terms thereof, then the contribution was to be calculated on the wages as specified therein.

11. Reverting to the 1965 Ordinance, s. 20(3) allowed the employer to deduct the employees' share of the contributions from their wages. Subsection (4) is important. It provided that subject to s. 71(2), no contribution was payable (by employers) on wages in excess of the amount stipulated (clause (a)), nor were any deductions to be made, by way of employee contributions, from employees earning less than as stipulated (clause (b)). Thus, there was an "upper" cap insofar as employers were concerned, and a "lower" one as regards employees. This brings us to s. 71. It provided, in subsection (1), that the "Governing Body" (for which see ss. 4-6) had to annually review the "wage limits" specified s. 20(4) (i.e., the upper and lower caps for employers and employees respectively) and also the rates of contributions and benefits "in the light of any changes in wage levels or living costs" and submit a report along with recommendations to the Government. Subsection (2) then conferred a discretionary power on the Government, after considering the report and recommendations, to "enhance or reduce the wage limits" or the "rates of benefits payable under this Ordinance". In other words, the exercise to be carried out by the Governing Body was cast in mandatory terms (i.e., was a statutory duty) but the power conferred on the Government was discretionary.

12. Between 1965 and 2016 both the Ordinance and the 1966 Rules were amended many times. Before moving on to consider the Ordinance as it stood prior to its replacement by the 2016 Act, it is pertinent to note two of those changes in particular, one to the statute and the other to the rules. Firstly, in 1972 (by Ordinance IX of that year), the definition of "contribution" was so altered as to omit contributions by employees. Consequent changes were made throughout the Ordinance. Thus, in s. 20 subsection (2) was omitted, subsection (3) was substituted in its entirety to take the form that it holds even up to now, and in subsection (4) clause (b) was omitted. Thus, s. 71 now referred only to the wage limit "cap" in relation to employers. Secondly, insofar as the 1966 Rules were concerned, an important change was made in 1976 by the Sindh Government. Reference has been made to Rule 3. This was substituted in its entirety. The original version and as applicable thereafter in Sindh were as follows:

| Original (continued to apply unchanged elsewhere) | As applicable in Sindh (since 1976) |
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| Subject to the provisions of sub-rules (3) of rule 4, the rates of contribution payable by the employer in respect of each employee, consisting of the employer's contributions and the employees' contributions shall be as shown in the schedule. | Subject to the provisions of sub-rule (3) of rule 4, the rate of contribution payable by the employer in respect of each employee shall be seven percent of the wages. |

At the same time, the definition of schedule, as given in Rule 2(b) was omitted. Thus, the rate of contribution in Sindh became fixed at 7 percent, subject to what is stated below. This obviously had an impact on the exercise to be carried out in terms of s. 71. Even if the Governing Body for any given year recommended that the contribution be at a rate higher (or, in principle, lower) than

seven per cent, this could not be implemented by the Provincial Government, even if it chose to do so in its discretion: the rate stood fixed at seven percent. Of course, the Provincial Government could at any time choose to alter Rule 3 in exercise of its rule making power but until it did so (and, in the event, it apparently never did), the effect was that the exercise to be carried out in terms of s. 71, insofar as the setting of the rate of contribution was concerned, ceased to be any practical relevance.

13. We now turn to consider the position of the 1965 Ordinance at the time of its replacement in 2016 (stage II). The definition of employee (in s. 2(8)) had been substituted in 2002 but, as before, continued to exclude certain categories from the scope thereof. Clause (f) now provided that any person employed on wages exceeding Rs. 15,000/- per month was not an employee for purposes of the Ordinance while a newly added proviso clarified that this exclusion was only for purposes of the 1965 Ordinance. More importantly, certain changes were made to s. 20. In subsection (1), after the word “rate” the following words had been inserted in 2008: “not more than six per cent”. The effect, in general, of subsection (1) has already been considered above. What this insertion meant was that the rules (i.e., the 1966 Rules) could not provide for contribution at a rate higher than six per cent. Two points need to be made here. Firstly, this insertion affected the change that had been made to Rule 3 in 1976 by the Sindh Government. The rate fixed there at seven per cent had, as it were, been overwritten by the “cap” now placed in the parent statute and that, ipso facto, had the effect of requiring that Rule 3 had to be suitably “read down”. But, secondly, the insertion did

not obliterate Rule 3, as in effect in Sindh, entirely. It did not result in the revival, in full, of the exercise contemplated by s. 71. The practical effect of the change made to Rule 3 in 1976 has already been considered. That effect continued to remain in place, subject to the change that the rate of contribution was now fixed at six per cent. A proviso that had been added to subsection (1) of s. 20 in 1994 may also be noted. This had the effect of reducing the amounts payable by employers by way of contributions. Finally, an amending Act of 1994 omitted subsection (4) in its entirety. This omission led also to changes in s. 71 made by the said Act. It will be recalled that that section had provided for the Governing Body to make recommendations in respect, inter alia, of the upper and lower limits set by s. 20(4), for employers and employees respectively. As a result of the changes made in 1972, when contributions by employees were omitted, s. 71 was suitably amended. Now, subsection (4) was wholly omitted in 1994 and obviously references to that subsection in s. 71 became otiose. The amending Act provided that for the words “sub-section (4) of section 20”, as appearing in both subsections of s. 71, the words “clause (f) of sub-section (8) of section 2” were substituted. In other words, so it could be argued, in terms of s. 71(1) the Governing Body could make a recommendation with regard to the wages beyond which an employee would not be regarded as such for purposes of the 1965 Ordinance under s. 2(8)(f), and s. 71(2) allowed the Government, in its discretion, to give effect to such a recommendation. However, this matter is not as such before us and we make no finding in relation thereto.

14. We now come to stage III, the repeal of the 1965 Ordinance and its replacement by the 2016 Act. We may note that learned counsel for the appellants had, in his submissions, criticised the 2016 Act as a hurried "cut and paste" effort, contending that most of its provisions were nothing other than a recycling of the 1965 Ordinance, but the whole legislation was enacted in such a slipshod manner that there were many lacunae and errors. Regrettably, we must conclude that this was a criticism that was not wholly unjustified.

15. In the 2016 Act, the definition of "employee" was given in clause (9) of s. 2, corresponding to clause (8) of s. 2 of the 1965 Ordinance. As before it excluded certain categories of employees from the definition. Clause (e) corresponded to the previous clause (f), which has been considered above. Now however, instead of giving a specific amount, it provided that "any person employed on wages as determined under section 75" stood excluded from the definition. Section 75 corresponded to s. 71 of the 1965 Ordinance. Before turning to this provision however, it is pertinent to consider s. 20, which corresponded to s. 20 of the predecessor legislation. Subsection (1) looked similar to the old version, but it had an important, and for present purposes crucial, difference. It will be noticed that the word "such" now appeared therein twice instead of, as before, three times. Under the predecessor legislation, this word had expressly qualified each of "times", "rate" and "conditions". Now, it appeared before "times" and "conditions" only. The rate of six per cent, as set out expressly in the subsection, was not so qualified. In our view, this change was deliberate and not merely a matter of semantics. What the

subsection now provided was that the rate of contribution was fixed at six per cent, which was payable at such times and subject to such conditions as might be prescribed. It will be noted that this position in fact consolidated in the parent statute the position that had prevailed in Sindh since 2008. As we have seen, Rule 3 of the 1966 Rules, as substituted in Sindh in 1976, had introduced a fixed rate of contribution of seven per cent. The amendment made to the parent statute in 2008, by placing a "cap", had resulted in the fixed rate being six per cent. This position was now incorporated in the statute. The non-use of the word "such" in relation to the rate of contribution was therefore no mere oversight or inadvertence. It had the substantive legal effect of removing the rate altogether from the scope of the rule making power.

16. Section 75 may now be considered. As before, it imposed a statutory duty on the Governing Body in subsection (1) to make recommendations to the Provincial Government and conferred a discretionary power on the latter to act on the same in terms of subsection (2). The key question is what could be recommended by the Governing Body? Insofar as wage limits were concerned, subsection (1) empowered the Governing Body to act in relation to clause (e) of subsection (9) of s. 2, whereas subsection (2) empowered the Provincial Government to act in relation to clause (f) of subsection (8) of s. 2. Clearly, there was a mismatch. Now, even the barest perusal would indicate that subsection (8) had no clause (f). This was, unfortunately, an example of the criticism levelled by learned counsel for the appellants at the drafting of the 2016 Act. Inadvertently, subsection (2) of s. 71 continued to refer to the provision which had contained the definition of employee in

the 1965 Ordinance, i.e., s. 2(8)(f). However, the problem is not insurmountable. It is so obviously an error of a typographical nature that it can be easily rectified by the Court. The reference in subsection (2) of s. 75 could only have been to clause (e) of subsection (9) of s. 2.

17. In addition to the wage limits, subsection (1) also empowered the Governing Body to make recommendations regarding the benefits to be provided under the 2016 Act, and subsection (2) conferred a corresponding discretionary power on the Government in this regard. This was unexceptionable and merely replicated the provisions previously to be found in s. 71. What is of crucial importance is that subsection (1) of s. 75 continued, as before, to empower the Governing Body to make recommendations in relation to the rate of contribution. This requires careful consideration. We have already noted the provisions of s. 20 of the 2016 Act and seen how it fixed the rate of contribution at six per cent. How then could s. 71(1) empower the Governing Body to make recommendations with regard to the rate of contribution? In our view, keeping in mind the legislative trajectory of the relevant provisions of both the 1965 Ordinance and the 1966 Rules as applicable in Sindh, and the manner in which, in particular, s. 20 of the 2016 Act was drafted, the continued presence in s. 75(1) of the power to make a recommendation in relation to the rate of contribution was anomalous. It was another example of the drafting defects to which reference has already been made. The 2016 Act gave effect in the parent statute to the position that had prevailed in Sindh since 1976, i.e., of the rate of contribution being fixed, first at

seven percent and then, since 2008, at six percent. Since the rate was fixed and unalterable in the parent statute itself, no recommendation could be made by the Governing Body of any variation in the same. There was correspondingly also no power in the Government to alter the rate fixed by the statute itself.

18. We now come to the final stage IV, the amendments made by the 2018 Act. Clause (e) of s. 2(9) was substituted so as to exclude from the definition of employee any person employed at a wage higher than the limit set in s. 75. Section 20 was amended by the substitution, in subsection (1), of the proviso already to be found there and the addition of a second proviso. We will return to the second proviso later. Section 75 was wholly substituted. It took away entirely the powers of the Governing Body to make any recommendations and of the Provincial Government to act on the same. Instead, it provided for the setting of a lower wage limit and a higher wage limit. The former was the minimum wage set in terms of the Sindh Minimum Wages Act, 2015 ("2015 Act"). We may note that this statute has replaced the 1961 Ordinance in Sindh. The higher wage limit was simply the lower wage limit plus Rs. 5,000/-. Thus, the Governing Body was wholly removed from the picture in terms of the substituted s. 75.

19. With the foregoing analysis and discussion in mind, we now turn to the grievance of the appellants. As noted, it related to stage III, i.e., the period between the introduction of the 2016 Act and the amendments and substitutions made therein by the 2018 Act. Mr. Zaheer ul Hasan Minhas appeared for the majority of the appellants and made the leading submissions. Learned counsel

submitted that the repeal of the 1965 Ordinance and its replacement by the 2016 Act brought about, in law, an entirely new set of statutory bodies and authorities. Even though they had the same names and labels as before, i.e., Institution and Governing Body, in law those bodies had to be set up afresh under the 2016 Act. The bodies and authorities, of the same name, that had been created by the 1965 Ordinance and existed under the same ceased to exist and were not, as it were, carried over into and for purposes of the 2016 Act. As pertinent for present purposes, this was especially so for the Governing Body. The saving provision contained in s. 86(2) did not "save" the earlier Governing Body and continue it under and for purposes of the 2016 Act. Under s. 5, such a body had to be constituted afresh. We may note that Mr. Shahid Anwar Bajwa, who appeared for one of the appellants, did not agree with this proposition. In his submission, the Governing Body of the 1965 Ordinance continued in terms of, and carried over into, the 2016 Act. Be that as it may, Mr. Minhas' submission was that the Governing Body under the 2016 Act was not constituted till 14.07.2017, when a notification under s. 5 was issued. However, it was contended, even prior to this date the Government sought to enforce against the appellants the changes (by way of enhancements) made by and under the 2015 Act in the minimum wage. It was submitted that no recommendations were made in relation thereto by the Governing Body under s. 75 (since that body did not exist at that time) and that therefore the demand for contributions at the enhanced rates of minimum wage were unlawful. It was also submitted that the Governing Body had in any case made no recommendations at all with regard to the rate of contribution, as required in terms of s.

75 and that too vitiated the demands made from the appellants. It was submitted that the learned High Court had erred materially in coming to the contrary conclusion in the impugned judgment. Learned counsel for the respondents (being the Institution) submitted that the impugned judgment was correct and ought to be upheld. We may note that Mr. Shahid Anwar Bajwa submitted that while he adopted (on the whole) the submissions made by Mr. Minhas, he had a further point to make in relation to the appellant whom he represented. Learned counsel submitted that that appellant was a trans-provincial organization and therefore the 2016 Act did not at all apply to it. It was submitted that this (or perhaps similar) questions were alive in various High Courts and, it seems, perhaps also in this Court. Learned counsel submitted that for purposes of the present proceedings he would be satisfied to only have this contention recorded in order to preserve his position. It is so noted.

20. When the submissions made by Mr. Minhas are considered in light of the analysis and discussion carried out in the first part of this judgment we are, with respect unable to agree with the same. We have carefully mapped out the trajectory of the law since the inception of the 1965 Ordinance and the various stages the provisions of the parent statute and the rules have gone through. We have seen how the definition of employee, the shape of s. 20 (in both versions of the law) and the working of s. 71 (now s. 75) have changed over time. In our view, the position that inescapably emerges is as follows. Insofar as the rate of contribution was concerned, it became unalterably fixed at six percent in the 2016 Act. We emphasize that this consolidated in the parent statute the

position that had already emerged in Sindh since 1976, i.e., of the rate being fixed. The only difference was that previously this was the combined result of the 1965 Ordinance and the 1966 Rules. The fixed rate was seven percent from 1976 to 2008, and thereafter was six percent. Under the previous regime the situation could have been altered by suitable amendments to the 1966 Rules, though of course the "cap" imposed by the parent statute of six percent could not be changed in this way. However, it appears that even the 1966 Rules were not changed. The entire position was consolidated and incorporated in the parent statute in 2016.

21. As regards the matter of minimum wage under the 1961 Ordinance was concerned, the same was made applicable by Rule 4(3) to which reference has already been made. This provided as follows:

> "Where the provisions of the [1961 Ordinance] are applicable to any establishment and it is found that any wages paid are less than those specified in that Ordinance, contribution payable shall be calculated on the wages so specified in that Ordinance."

This ensured that the minimum wage set from time to time under the 1961 Ordinance determined the basis on which the contribution was to be calculated. The replacement of the 1961 Ordinance by the 2015 Act did not alter this position since the reference to the former in Rule 4(3) became, in terms of well settled principles, a reference to the latter. Thus, when the 2016 Act came into force and up to the changes made by the 2018 Act (i.e., stage III, with which we are concerned), a combined reading of s. 20(1) of the parent statute and Rule 4(3) ensured that, as before, the rate of contribution was six percent, to be computed on the basis of the

minimum wage. The amendments of the 2018 Act consolidated this position in the parent statute by the introduction of the second proviso to s. 20(1). This, in effect, now expressly incorporated in statute what had earlier been set out in the Rules.

22. It follows from the foregoing that the submissions made by learned counsel for the appellants regarding the constitution of the Governing Body under s. 5, or the (non) exercise of powers by it under s. 75 were, with respect, beside the point. The points taken were of no relevance for the issues raised and/or the challenge to the demands made of the appellants under the 2016 Act on the basis of the minimum wage set from time to time under the 2015 Act. The entire case presented by the appellants proceeded, with respect, on a fundamentally flawed premise. It had no nexus with the demands made against the appellants.

23. For the foregoing reasons (which are perhaps rather different from those that found favour with the learned High Court), at the conclusion of the hearing it was announced that the appeals stood dismissed.

JUDGE

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Karachi,the
11th March, 2021
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Approved For Reporting

**ANNEX**

| 1965 Ordinance<br>(As originally promulgated) | 1965 Ordinance (As up to the eve of replacement by the 2016 Act) | 2016 Act<br>(As originally enacted | 2016 Act<br>(As amended by the 2018 Act) |
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| **2(8)** "employee" means any person employed ... but does not include ...<br><br>(f) any person employed on wages exceeding five hundred rupees per mensem;<br><br>**20. Amount and payment of contributions**.—(1) Subject to the other provisions of this Chapter, the employer shall, in respect of every employee, whether employed by him directly or through any other person pay to the Institution a contribution at such times, at such rate and subject to such conditions as may be prescribed.<br><br>(2) Such contribution shall comprise the share payable by the employer (hereinafter referred to as the employer's contribution) and | **2(8)** "employee" means any person employed ... but does not include ...<br><br>(f) any person employed on wages exceeding fifteen thousand rupees per mensem:<br><br>Provided that an employee shall not cease to be an employee for the reason that his monthly wages exceed fifteen thousand rupees per mensem;<br><br>**20. Amount and payment of contributions.–** (1) Subject to the other provisions of this Chapter, the employer shall, in respect of every employee, whether employed by him directly or through any other person pay to the Institution a contribution at such times, at | **2(9)** "employee" means any person employed ... but does not include ...<br><br>(e) any person employed on wages as determined under section 75:<br><br>Provided that an employee shall not cease to be an employee for the reason that his monthly wages exceed the wages determined under section 75;<br><br>**20. Amount and payment of contributions**.– (1) Subject to the other provisions of this Chapter, the employer shall, in respect of every employee, whether employed by him directly or through any other person pay to the Institution a contribution at such times, at the rate of six per cent and subject to such conditions as may be | **2(9)** "employee" means any person employed ... but does not include ...<br><br>(e) any person employed on wages exceeding the upper wage limit determined under section 75:<br><br>Provided that an employee shall not cease to be an employee for the reason that his monthly wages exceed the upper wage limit determined under section 75;<br><br>**20. Amount and payment of contributions**.– (1) Subject to the other provisions of this Chapter, the employer shall, in respect of every employee, whether employed by him directly or through any other person pay to the Institution a contribution at such times, at the rate of six per cent and subject |

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| the share payable by the employee (hereinafter referred to as the employee's contribution) and the rates of such shares shall be determined by rules: ...<br><br>(3) The employer shall, subject to the provisions of clause (b) of subjection (4), deduct the amount of the employee's contribution from his wages: ...<br><br>(4) Subject to the provisions of subsection (2) of section 71—<br>(a) no contribution shall be payable on wages which are in excess of rupees twenty per day; and<br>(b) no deduction on account of the employee's contribution shall be made from wages which are less than rupees two per day.<br><br>**71. Review and modification of wage limits, contributions and benefits**.—(1) In January of each year, the Governing Body shall review the wage limits specified in | such rate not more than six percent and subject to such conditions as may be prescribed:<br><br>Provided that no contribution shall be payable on so much of an employee's wages as is in excess of four hundred rupees per day or ten thousand rupees per mensem.<br><br>(2) [Omitted by Ordinance IX of 1972]<br><br>(3) The employer shall not be entitled, to deduct his own share of contribution from the employee's wages or otherwise to recover from him any portion of the contribution, notwithstanding any agreement to the contrary.<br><br>(4) [Omitted by Act XI of 1994]<br><br>**71. Review and modification of wage limits, contribution and benefits.–** (1) In January of each year, the Governing Body shall | prescribed:<br><br>Provided that no contribution shall be payable on so much of an employee's wages as determined by Government under section 75 per month.<br><br>(2) The employer shall not be entitled, to deduct his own share of contribution from the employee's wages or otherwise to recover from him any portion of the contribution, notwithstanding any agreement to the contrary.<br><br>**75. Review and modification of wage limits, contribution and benefits**.–(1) In January of each year, the Governing Body shall review the wage limits specified in clause (e) of sub-section (9) of section 2 and the rates of contribution and benefits provided under this Act in the light of any changes in wage levels or living costs and shall submit a report thereon together with its recommendations to Government. | to such conditions as may be prescribed:<br><br>Provided that no contribution shall be payable on so much of an employee's wages as is in excess of the upper wage limit determined under section 75:<br><br>Provided further that the rate of contribution shall be the minimum wage rate prevailing at the time of paying the contribution under the Sindh Minimum Wage Act, 2015.<br><br>(2) The employer shall not be entitled, to deduct his own share of contribution from the employee's wages or otherwise to recover from him any portion of the contribution, notwithstanding any agreement to the contrary.<br><br>**75. Determination of wage limits**. (1) For the purpose of determining the wage limit so specified for payment of social security compensation and rates of benefits payable under this Act, a lower wage limit and an upper |

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| subsection (4) of section 20 and the rates of contribution and benefits provided under this Ordinance in the light of any changes in wage levels or living costs and shall submit a report thereon together with its recommendations to Government.<br><br>(2) Government may, after considering the said report and recommendations, by notification, enhance or reduce the wage limits specified in sub-section (4) of section 20 or the rates of benefits payable under this Ordinance. | review the wage limits specified in clause (f) of sub-section (8) of section 2 and the rates of contribution and benefits provided under this Ordinance in the light of any changes in wage levels or living costs and shall submit a report thereon together with its recommendations to Government.<br><br>(2) Government may, after considering the said report and recommendations, by notification, enhance or reduce the wage limits specified in clause (f) of sub-section (8) of section 2 or the rates of benefits payable under this Ordinance. | (2) Government may, after considering the said report and recommendations, by notification in the official gazette, enhance or reduce the wage limits specified in clause (f) of sub-section (8) of section 2 or the rates of benefits payable under this Act. | wage limit shall be defined as sub-section (2) and (3).<br><br>(2) The lower wage limit shall be equivalent to the minimum wages determined by Government under the Sindh Minimum Wages Act, 2015 (Sindh Act No. VIII of 2016) prevailing at the time of paying contributions payable under this Act....<br><br>(3) The upper wage limit shall be five thousand rupees plus the minimum wages determined by Government under Sindh Minimum Wages Act, 2015 (Sindh Act No. VIII of 2016) at the time of paying contributions payable under this Act.... |