2012 C L D 396

[Sindh]

Before Munib Akhtar, J

PAKISTAN STEEL MILLS CORPORATION (PRIVATE) LIMITED---Plaintiff

Versus

KARACHI WATER AND SEWERAGE BOARD through Chief Executive and 2 others---Defendants

Suit No. 146 and C.M.A. No.9360 of 2007, decided on 2nd December, 2011.

(a) Specific Relief Act (I of 1877)---

----Ss. 42, 39 & 54---Civil Procedure Code (V of 1908), O.XXXIX, Rr.1 & 8---Plaintiff, a steel mill (public sector entity), in a suit for declaration, cancellation, injunction and damages, filed application seeking interim injunction against Water & Sewerage Board stating therein that for the purpose of its operations, the plaintiff needed huge quantity of water on a daily basis (running into millions of gallons per day), for which it was billed by the Water and Sewerage Board---Basic contention of the plaintiff was that the water being supplied to it came from, or belonged, to the Provincial Government and that the Water and Sewerage Board was not entitled to charge for the same and that in addition to the water charges claimed by the Board, it also charged for Sewerage and Conservancy and for fire fighting purposes, thus the bills raised and demands made from time to time by the Water and Sewerage Board had four distinct elements---Plaintiff's case was that (for the various reasons stated in detail) it was not liable to make payment to the Board in respect of any of said charges---Plaintiff also claimed that it was entitled to continued supply of water, thus the interim relief sought was that its water supply should not be disrupted for any alleged non-payment of the billed amounts---Validity---High Court disposed of the application in the terms that the Water and Sewerage Board, the City District Government and the Provincial Government were restrained from preventing, restricting or hindering the supply of water to the plaintiff in any manner interfering in or with the same subject to the terms that the plaintiff was liable to make payment of water charges as per the Agreement, and the Board was empowered to bill for and collect the same; that plaintiff and the Board shall be at liberty to compute the amount payable up to the date of present order on the stated basis, and if there had been (according to the plaintiff) any overpayment, or (according to the Board) any underpayment, then the concerned party shall be entitled to make an appropriate application for such orders as the court may deem appropriate; that Rs.200 million earlier deposited by the plaintiff and withdrawn by the Board shall be deemed adjustable against the water charges; that plaintiff shall continue to make timely payment of the water charges in terms of future billing---Water and Sewerage Board, City District Government Provincial Government were restrained from recovering demanding or collecting any amount by way of sewerage or conservancy charges, whether by way of arrears thereof as on the date of present order, or on account of any future billing---Future billing by the Board may continue to reflect

these elements, and the plaintiff shall be entitled, without prejudice to its case, to deposit the billed amount(s) with the Nazir of the High Court, which amounts shall be dealt with in terms of such orders or directions as may be given by the court---If at all any such amounts were deposited, then the Nazir shall immediately invest the same in some profit bearing scheme---Plaintiff shall be obligated to make payment of the arrears of the "fire" element of the billing up to the date of present order, which payment shall be made in six equal monthly instalments (and payable each month thereafter accordingly), and which shall be deposited with the Nazir of the court---City District Government (or any successor entity) shall be entitled to withdraw the same by making an appropriate application to the court---Future billing by the Board shall not contain any such element, and the Board was restrained from in any manner collecting, demanding or recovering any such amount from the plaintiff---City District Government (or any successor entity) may recover, demand and collect the "fire tax" in future in accordance with any applicable law for the time being in force.
Karachi Municipal Corporation v. Karimi and Co. PLD 1967 Kar 371; Karimi and Co. v. Karachi Municipal Corporation 1974 SCMR 440; S.Z. Mehdi v. Government of Sindh and others 1990 CLC 352; ABN Amro Bank v. Karachi Water and Sewerage Board 2009 YLR 775; ABN Amro Bank v. Chairman, Karachi Water and Sewerage Board 2006 CLC 597 and Nazir Ali v. Karachi Water and Sewerage Board 2004 CLC 578 ref.

(b) Contract Act (IX of 1872)---

----S. 2(d)---Consideration---Act or omission which serves as the consideration for the promise, need not come from the promisee; it may move from "any other person".

(c) Precedent---

----Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law but governed and qualified by the particular facts of the case in which such expressions are to be found---Case is only an authority for what it actually decides and cannot be quoted for a proposition that may seem to follow logically from it.
Quinn v. Leatham [1901] AC 495 and Trustees of the Port of Karachi v. Muhammad Saleem 1994 SCMR 2213 ref.
Abdul Rehman for Plaintiff
Emad-ul-Hasan for Defendant No.1
Ali Azam for Defendant No.2
Khizar Zaidi, A.A.-G
Dates of hearing: 22nd September and 13th October, 2011.

ORDER

MUNIB AKHTAR, J.---By means of this application, the plaintiff seeks interim injunctive relief in the following circumstances. The plaintiff is a public sector entity, which owns and operates what is by far the largest steel mill in the country. For purposes of its operations, the plaintiff needs huge quantities of water on a daily basis (running into millions of gallons per day), for which it is billed by the defendant No.1, the Karachi Water and Sewerage Board. The plaintiff's basic contention is that the water being

supplied to it comes from, or belongs to, the defendant No.3, the Province of Sindh, and that therefore the defendant No.1 is not entitled to charge for the same. In addition to the water charges claimed by it, the defendant No.1 also charges for sewerage and conservancy, and for fire fighting purposes. Thus, the bills raised and demands made from time to time by the defendant No. 1 have four distinct elements. The plaintiffs case is that (for the various reasons stated in more detail herein below) it is not liable to make payment to the defendant No.1 in respect of any of these charges. At the same time, the plaintiff claims that it is entitled to the continued supply of water. Thus, the interim relief sought by it is that its water supply should not be disrupted for any alleged non-payment of the billed amounts.

2. Learned counsel for the plaintiff submitted that the defendant No.1 (or for that matter, any of the other defendants) were not providing the plaintiff with any fire fighting or sewerage/conservancy services or facilities. He submitted that the plaintiff had an extensive fire fighting system on its own premises, including a proper fire brigade, which was of course necessitated by the very nature of the industrial plant and complex owned and operated by it. He submitted that the plaintiff also had its own sewerage arrangements, and did not make use of any such services from the defendants. He therefore contended that the plaintiff was not liable to be charged for sewerage, conservancy and fire fighting, and that these components in the defendant No.1's billing were entirely improper and unlawful. Insofar as the water charges were concerned, learned counsel submitted that water was being provided to the plaintiff from the Keenjhar-Gujjo canal, for which funding had been provided by the plaintiff itself. The defendant No. 1 had made no contribution towards this scheme. Thus, learned counsel contended, the plaintiff was not liable to be charged for the water being supplied to it, or at any rate, the defendant No.1 was not entitled to make any such demand. In any case, the water belonged to the defendant No.3 (i.e., the Province). An agreement had been entered into between the plaintiff and the defendant No.1 on or about 11-12-1994, in terms whereof the parties had agreed upon the rates at which the plaintiff was to be charged for water. Learned counsel submitted that this agreement was liable to be cancelled, as it was void by reason of a failure of consideration. Learned counsel submitted that the plaintiff had repeatedly raised these issues with the Province and also the defendant No.1, but to no avail. In this regard, he referred to the correspondence annexed to the plaint. It appears that the final bill issued by the defendant No.1 (i.e., up to the filing of the suit) amounted to billions of Rupees (inclusive of alleged arrears). Learned counsel submitted that the plaintiff was not liable for these amounts, but also emphasized that notwithstanding its position regarding the water charges, the plaintiff had in fact been making regular payments with regard to this component of the bills. Despite this, the defendant No.1 unlawfully stopped, or attempted to block, the supply of water to the plaintiff on the pretext of the unpaid amounts. Learned counsel submitted that had this attempt succeeded, it would very rapidly have led to an exceedingly dangerous situation developing at the plaintiff's complex with catastrophic consequences. It was this attempt that was the immediate cause for the filing of the suit and the seeking of interim relief. He pointed out that in terms of the interim arrangement made by the Court, the plaintiff was being supplied water for which it was making payment, and in addition, the plaintiff had deposited a sum of Rs. 200 million in Court, which had been withdrawn by the defendant No.1. Learned counsel also relied on certain case law, which I will consider later.

3. Learned counsel for the defendant No. 1 opposed the grant of interim relief. His case was that the said defendant was entitled to charge the plaintiff for each of the four elements that constituted the billing, and that the latter was a defaulter whose arrears ran into billions of rupees. Learned counsel submitted that the plaintiff was a commercial organization, which could charge such prices as it liked for its products, whereas the defendant No.1 was a public utility engaged in providing public services in relation to water and sanitation. By refusing to pay its bills, the plaintiff had contributed significantly to the huge losses being sustained by the defendant No.1. Learned counsel submitted that it was entirely irrelevant whether any sewerage or fire fighting services were, or were not, being provided to the plaintiff (although his case was that in fact, such services were being provided or made available) because the nature of the demands being made in this connection was that of a tax and not a fee. The importance of the distinction was of course, that in the case of a tax it was not relevant that a specific service was not being provided to the particular ratepayer from whom the tax was being demanded. He submitted that sewerage and conservancy, as also fire fighting, services were provided generally to the ratepayers of any given area, and were available for and in the area of the plaintiff's operations. It was therefore no answer to the demand raised by the defendant No.1 that the plaintiff did not avail these services. Learned counsel relied on various provisions of the Karachi Water and Sewerage Board Act, 1996 ("1996 Act") in support of his case, including in particular section 9 thereof, and I will refer to these subsequently. He also relied on the 1994 agreement referred to above and submitted that in terms thereof, the plaintiff was being charged for water at a reduced rate precisely for the reason that it had contributed financially to the scheme whereby the water was being supplied. He therefore contended that the principal point raised by the plaintiff was expressly factored into the agreement, which was lawful and binding. He submitted also that the defendant No. 1, in the exercise of the powers conferred upon it by the 1996 Act, was entitled to vary the water rates from time to time, and the plaintiff was obliged to make payment in terms thereof. He also referred to certain cases, which I will presently consider.

4. Exercising his right of reply, learned counsel for the plaintiff referred to various notifications issued from time to time, and also referred to certain provisions of the Sindh Local Government Ordinance, 2001 to contend that the defendant No.1 did not, and indeed could not, in particular charge for fire fighting services. These matters will also be considered in detail below.

5. I have heard learned counsel, examined the record with their assistance and considered the case-law relied upon. As noted above, the impugned demand comprises of four distinct elements. The bills served on the plaintiff by the defendant No. 1 are each titled "Bulk Consumer Bill", and the four elements are listed therein as "water", "sewerage", "conservancy" and "fire". Since the plaintiff denies liability to make any payment in respect of each of these elements, it will be necessary to consider the legal nature of each component. The aforementioned agreement of 11-12-1994 ("the 1994 Agreement") will also have to be examined closely, in particular in light of the plaintiff's objection that it is void by reason of a failure of consideration. A number of statutory provisions will also need to be considered.

6. For reasons that will presently become clear, the analysis must begin with the Sindh Local Government Ordinance, 1979 ("the 1979 Ordinance"). That Ordinance set up

different types of local government bodies known as "councils", which included "metropolitan corporations", of which the most important and the one relevant for present purposes was the Karachi Metropolitan Corporation ("KMC"). Section 60(1) enabled councils to levy taxes, rates, tolls and fees, as mentioned in Schedule V. Section 64(1) provided that "unless otherwise provided, all taxes, rates, tolls and fees levied under this Ordinance shall be collected in the prescribed manner by the persons authorized for such collection...." As originally enacted, Schedule V provided as follows (insofar as is presently relevant):--

"PART I- TAXES, RATES, TOLLS AND FEES TO BE LEVIED
BY KARACHI METROPOLITAN CORPORATION

.....

(2) Drainage Tax.

(3) Development tax for specified public benefit or public utility projects.

(4) Rates for the bulk supply of water.

PART II- TAXES, RATES, TOLLS AND FEES WHICH MAY BE LEVIED BY A CORPORATION INCLUDING THE METROPOLITAN CORPORATION, MUNICIPAL COMMITTEES AND TOWN COMMITTEES

.....

(12) Lighting rate and fire rate.

(13) Conservancy rate.

.....

(15) Rate for the provision of water works or the supply of water.

.....

(18) Fees for benefits derived from any works of public utility maintained by the council.

.....

(22) Fees for specific services rendered by the council." (emphasis supplied)"

7. In 1983, the 1979 Ordinance was amended by the addition of a new Chapter XVI, consisting of sections 121 through 148, and two Appendixes (herein after referred to as the "Chapter XVI provisions"). Section 121(1) provided as follows:--

"There shall be established a Board in the Karachi Metropolitan Corporation called the Karachi Water and Sewerage Board"

This newly created Board (hereinafter referred to as the "old Board") was not a legal entity in its own right, distinct and separate from KMC, but rather something set up "in" the latter. However, section 148 did provide that the provisions of the newly added Chapter XVI would have effect notwithstanding anything to the contrary contained in the 1979 Ordinance. The old Board comprised of a Chairman and various members, and section 123(1) provided that the Chairman would have, in relation to the old Board, the same powers as were exercisable in relation to KMC by its Mayor. It may be noted that Rule 2 of the Sindh Councils (Contract) Rules, 1980 provided, inter alia, that all contracts to be entered into by KMC could be made on its behalf by the Mayor. Thus, the Chairman of the old Board was empowered to enter into contracts on its behalf. Section 124 specified the powers of the old Board, and needs to be set forth in full:--

"124. The Board shall--

(i) sanction in the manner and on payment of fees as may be prescribed by regulations:

(a) water connections,

(b) water supply by tankers; and

(c) sewerage connections;

(ii) collect or recover rates, charges or fees for water supply and sewerage service, including arrears thereof;

(iii) have the power to reduce, suspend or disconnect the water supply in the event of contravention of the provisions of this Ordinance or regulations;

(iv) have the power to impose surcharge, not exceeding double the amount due, if rates, charges or fees for water supply or sewerage service or the arrears thereof are not paid within the time fixed by the Board;

(v) have full financial powers within the budget grant;

(vi) make regulations with the approval of the Karachi Metropolitan Corporation;

(vii) undertake construction improvement, maintenance and operation of:

(a) water works including wells and recharge facilities for collecting, purifying, pumping, storing and distributing water to all types of consumers;

(b) sewerage works for collecting, pumping, treating and disposing of sewerage and industrial waste;

(viii) assess the position of water supply from time to time and regulate water supply;

(ix) review the existing schemes or prepare new schemes relating to water works and sewerage work and undertake execution thereof with the approval of the Karachi Metropolitan Corporation;

(x) regulate, control or inspect water connection, sewer lines and service lines including internal fittings;

(xi) maintain accounts and records of the Board;

(xii) prepare and submit to the Karachi Metropolitan Corporation schedule of water and sewerage tariff, rates, charges or fees to be levied by it;

(xiii) prepare or revise schedule of posts for the Board and submit it to the Karachi Metropolitan Corporation for approval;

(xiv) produce and supply potable water;

(xv) place, maintain aqueducts, conduits, sewers etc."

Thus, the position that emerged after the inclusion of Chapter XVI was that the powers of KMC, insofar as they related to charges, rates or fees in respect of water and sewerage were to be exercised by the old Board. It is however important to keep in mind that the old Board did not have any independent powers, exercisable in its own right, in this regard; it was simply that KMC would now exercise those powers through the old Board. However, the powers were still those of KMC itself. It is also important to note that the old Board had no power in relation to any "taxes" that could be imposed by KMC. Finally, it must also be noted that what Schedule V referred to as "conservancy" was, in Chapter XVI, known as "sewerage". These points emerge clearly from a sample notification placed before me by learned counsel, being a notification issued on 18-9-1995 (though published in the provincial Gazette on 13-3-1996). The notification was issued with reference to section 62(2) of the 1979 Ordinance. This provision (which contained a non obstante clause overriding the other provisions of the Ordinance) enabled the Provincial Government to direct any council to levy any tax, rate, toll or fee which that council was competent to levy. The notification itself was issued by the Municipal Commissioner of KMC, and related to water charges and "consequential conservancy (sewerage) rates", and provided that the revenue obtained would in its entirety go to the old Board as regards the water charges, but be shared equally between KMC and the old Board as regards the sewerage charges.

8. In 1987-88, Part I of Schedule V was substituted such that (as presently relevant) KMC could now also levy a "fire tax". No corresponding change was however, made in Chapter XVI.

9. The foregoing was thus the statutory framework when the 1994 Agreement came to be executed, and it is now necessary to consider it, in some detail. The first point to note is that the agreement was entered into between the old Board through its Chairman on the one hand, and the plaintiff through its Chairman on the other. The presence of the Additional Chief Secretary (Dev.) of the Provincial Government as a "mediator" was expressly noted, and he in fact also signed the agreement. The agreement expressly noted that the old Board and the plaintiff had remained in dispute with regard to the issue of rates, for the resolution of which there had been a number of meetings mediated by the Additional Chief Secretary. The 1994 Agreement was the culmination of those efforts. It is to be noted that the agreement was confined exclusively to the issue of water rates. Clause (i) expressly noted that although the plaintiff was liable to pay for the supply of

water "on industrial rates", it would be charged at a concessional rate on account of the fact that it was being "supplied raw water from a system laid down by Pakistan Steel itself'. Clause (i) set forth the agreed upon rate, and then the all-important clause (ii) provided as follows:--

"In case of change in water rates, Pakistan Steel would be charged the revised METERED DOMESTIC Water Rate for BULK CONSUMERS less a rebate of 23.50%... from the date the revised water rates are made effective by KW&SB, the last such revision having been made effective 1st November, 1994."

Clause (iii) provided that the agreed upon water charges would be notified by the KMC Municipal Commissioner, and it appears that this was done, and the rates were duly notified as per the 1994 Agreement.

10. It will be recalled that Part I of Schedule V of the 1979 Ordinance empowered KMC to establish bulk rates for the supply of water, and the Chapter XVI provisions provided that the water charges would be collected by the old Board. As noted above, the Chairman of the old Board was duly empowered to execute contracts on its behalf. (Whether the 1994 Agreement was to be regarded as a contract entered into by the old Board for itself or for KMC, given that the former did not as such have any separate legal existence, is, as will presently become clear, now a moot point.) In my view, prima facie, the 1994 Agreement was a lawful agreement, duly entered into by the parties thereto and it lawfully set the rates at which charges for the bulk supply of water were to be paid by the plaintiff, those rates being duly notified by KMC pursuant to the 1979 Ordinance. As provided in clause (ii), the charges were as a specified percentage of the water rates being charged from time to time from bulk consumers at the metered domestic water rate. The stage is therefore set for consideration of the plaintiff's main grievance with regard to the 1994 Agreement, namely that it is void on account of a failure of consideration.

11. Learned counsel for the plaintiff took two points in this regard. Firstly, he contended that the scheme or system by which water was being provided (the Keenjhar-Gujjo canal) had been financed by the plaintiff itself. This point is without merit. The plaintiff's position in this regard was expressly noted and acknowledged in the agreement itself, and it was for that very reason that the plaintiff was to be charged for water at a concessional rate. Furthermore and in any case, even if the plaintiff had financed the system whereby water was to be supplied to it that did not in and of itself mean that the plaintiff did not have to pay for the water. Such a result could only come about by reason of some statutory provision or legally binding agreement, representation or commitment, and none was relied upon or shown in this regard. Secondly, learned counsel contended that the water being supplied did not come from a source owned or controlled by the old Board (or the defendant No.1); the water belonged to the Province. It was this supply that the defendant No.1 had attempted to block and which had led to the filing of the suit. For either of these reasons, there was a failure of consideration. In my view, even if the defendant No.1 did attempt to block the water supply, that would not amount to a failure of consideration. It would, at best, amount to a breach of the terms of the 1994 Agreement. Equally, the fact (if indeed, such be the case) that the water being supplied belonged to the Province, and not to the old Board or the defendant No.1, that would not amount to a failure of consideration. The water was, after all, being supplied. Rather, it could at best be regarded as being contrary to another aspect of the doctrine of consideration, namely, that the consideration must move from the promisee. While the 1994 Agreement imposed an obligation on the plaintiff to pay the old Board for the water

being supplied, it did not as such state that the water supplied came, or was to come, from the latter. The plaintiff of course contends that the reason for this was that the water belonged to the Province. So, although the plaintiff was receiving water, it was not coming from the person to whom the plaintiff was obliged to make payment, i.e., the old Board. In other words, the consideration had not moved from the promisee. Now, the foregoing objection would have considerable merit in English law. However, the position under the Contract Act, 1872 is different (even though our law of contract is based on English law). The definition of consideration given in section 2(d) differs in certain important respects from English law, as is clear from the words emphasized:--

"When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise".

Thus, the act (or omission) which serves as the consideration for the promise need not come from the promisee; it may move from "any other person". It is quite clear from the record, including the 1994 Agreement itself that the Province (the putative owner of the water) is quite content to supply, and continue supplying, water to the plaintiff. As noted above, the Additional Chief Secretary not merely mediated the dispute between the parties, but was also a signatory to the 1994 Agreement. Nothing was stated at the bar at the time of the hearing of this application by learned A.A.-G. as would negate, refute or qualify this position. In my view therefore, prima facie, the 1994 Agreement is fully supported by lawful consideration and cannot therefore be faulted on this basis, nor can the plaintiff be permitted, at least at this stage, to raise the plea that the agreement has failed or is void on account of a failure of consideration. It follows therefore, that the 1994 Agreement was binding on the parties, and continues to remain so. It is this agreement which regulates matters insofar as the water charges are concerned.

12. I now move forward to 1996, in which year the 1996 Act came to be enacted. This Act received the Governor's assent on 23-4-1996. On the same date, the Governor also assented to the Sindh Local Government (Amendment) Act, 1996, which brought about important changes in the 1979 Ordinance, which are also relevant for present purposes. Taking up the latter statute first, it substituted Part I of Schedule V, which now read as follows (as presently relevant):--

"PART I- TAXES, RATES, TOLLS AND FEES TO BE LEVIED BY THE METROPOLITAN CORPORATION

.....

(2) Fire Tax.

(3) Conservancy Tax.

(4) Drainage Tax.

....."

In addition, the heading of Part II was substituted so that it now read as under (emphasis supplied):

"PART II- TAXES, RATES, TOLLS AND FEES WHICH MAY BE LEVIED BY MUNICIPAL COMMITTEES AND TOWN COMMITTEES AND A CORPORATION EXCLUDING THE METROPOLITAN CORPORATION"

It is to be noted that Part I now conferred a power to impose "taxes" in relation to the subjects enumerated therein. It will also be seen that the powers of KMC (being a metropolitan corporation) were restricted to those taxes which were provided for in Part I since a metropolitan corporation now stood "excluded" from imposing any of the taxes, rates, etc. specified in Part II. In particular, the earlier power to impose rates for the bulk supply of water (which had been included in Part I), and to impose "rates" for conservancy and fire, and generally for the supply of water (all included in Part II) were now outside KMC's purview. These changes came about, at least in part, as a result of the enactment of the 1996 Act, and it is this law which must now be examined.

13. The first point to note is that the defendant No.1 ("KW&SB") now came into existence as a separate and distinct legal entity in its own right: section 3(2) of the 1996 Act. Section 20(1) repealed sections 121 to 147 of Chapter XVI of 1979 Ordinance, which of course, had related to the old Board. When the Chapter XVI provisions are compared with those of the 1996 Act, it will be seen that the latter are in most respects the same as the former. In some cases, two or more sections of the Chanter XVI provisions have been amalgamated into one section in the 1996 Act without virtually any change in language. There are however, important differences. For example, all references to KMC have been substituted with the Provincial Government. Of particular relevance is section 7 of the 1996 Act, which relates to the powers and functions of KW&SB. When this section is compared with section 124 of the 1979 Ordinance (reproduced above), the two are found to be almost the same, but with certain important differences. The one most relevant for present purposes is that KW&SB (by virtue of clause (ii)) now has the power to "levy" rates, charges and fees for water supply and sewerage services, and not merely to "collect" or "recover" them, as was the position for the old Board under clause (ii) of section 124. This is of course completely understandable. KW&SB was now a separate legal entity created by and acting under its own statute, whereas the old Board was simply an entity created "in" KMC. KW&SB therefore necessarily had to be granted the power to levy rates, charges and fees, and not merely collect and recover them. In the earlier situation, as explained above, it was simply KMC exercising powers that legally continued to vest in it, but those powers were to be exercised through the old Board. Finally, it may be noted that section 20(2)(iv) of the 1996 Act provides that "all contracts entered into or rights acquired by the old Board shall be deemed to have been entered into, acquired by the new Board". It is for this reason that I had noted earlier that it was a moot question whether the 1994 Agreement had been entered into by the old Board on its own behalf or for KMC; whatever may have been the previous position, the agreement has now statutorily devolved on KW&SB.

14. The position that emerged in 1996, as presently relevant, was therefore as follows. KMC now did not have any power at all to levy rates for the supply of water, whether in bulk or otherwise. It also could not levy any rates in respect of fire fighting or conservancy. It could however, levy taxes with regard to the latter two subjects. The power to levy rates for the supply of water and sewerage services now vested in KW&SB. The latter entity had stepped into the position of the old Board/KMC in respect of the 1994 Agreement and all rights and obligations in respect thereof had devolved on it. At this stage, it will be convenient to deal with a submission made by learned counsel

for KW&SB, namely that it could charge revised rates from the plaintiff by reason of section 9 of the 1996 Act because the plaintiff is a "constituent body" as referred to therein. This section is in fact an amalgamation of sections 131 and 132 of the Chapter XVI provisions. In my view, the submission is misconceived. This is so because these provisions, i.e., both under the 1979 Ordinance and the 1996 Act, deal with the supply of potable water. KW&SB, like the old Board before it, is responsible for the "bulk production" of potable water, and is responsible for its retail distribution, except in respect of areas receiving water supply from "constituent bodies". No doubt the plaintiff is expressly included in this expression, and KW&SB is empowered to make "bulk water supply" to the constituent bodies at rates and on terms as it may determine from time to time. The position of the old Board was exactly the same. However, there is no doubt in my mind that section 9, like sections 131 and 132 before it, is concerned only with potable water. Now it is expressly recognized in the 1994 Agreement that in terms thereof, the plaintiff is being supplied "raw water", which obviously cannot be water fit for human consumption, i.e., potable water. Section 9 cannot therefore be pressed in service by KW&SB because it (like sections 131 and 132 before it) has no application to the facts and circumstances of the dispute in the present suit.

15. It would also be appropriate at this stage to consider the case-law relied upon by learned counsel for the parties. The relevant decisions include four Division Bench decisions of this Court, and a Supreme Court decision. The first decision is Karachi Municipal Corporation v. Karimi & Co. PLD 1967 Karachi 371 (DB) ("Karimi I"). The Supreme Court judgment is the appeal that was preferred against this decision, which is reported as Karimi & Co. v. Karachi Municipal Corporation 1974 SCMR 440 ("Karimi II"). The next decision is S. Z. Mehdi v. Government of Sindh and others 1990 CLC 352 (DB) ("Mehdi"). All of these cases were relied upon in the principal decision cited by learned counsel for KW&SB, which is reported as ABN Amro Bank v. Karachi Water and Sewerage Board 2009 YLR 775 (DB) ("ABN Amro II"). The last mentioned decision was on appeal from the judgment of a learned single Judge, reported as ABN Amro Bank v. Chairman, Karachi Water and Sewerage Board 2006 CLC 597 ("ABN Amro I"), and in fact, learned counsel for the plaintiff referred to the latter decision. However, the principal case that he relied on was Nazir Ali v. Karachi Water and Sewerage Board 2004 CLC 578 (DB) ("Nazir Ali").

16. I start with Karimi I. The statute under consideration was the City of Karachi Municipal Act, 1933 ("1933 Act"). Section 34 of this Act listed the purposes for which the municipality had been empowered to serve the denizens of Karachi. Chapter VIII dealt with the municipal taxes that could be imposed by the municipality for purposes of the 1933 Act. Briefly stated, the municipality could impose a property tax (section 98), a conservancy tax (section 99), a water tax (section 100) and, generally, any tax which the Provincial Government could impose (section 96(2)(d)). It is important to note that although the levies were all "taxes", sections 99 and 100 expressly provided that the conservancy and water taxes could only be imposed on two types of lands and buildings: (a) those which were actually connected to the municipal drains or water-works (as the case may be); or (b) were situated in that portion of the municipality for which public notice had been given that the municipality had made arrangements for (i) the removal of sewage, rubbish, etc., or (ii) the supply of water (as the case may be). Thus, the conservancy and water taxes were really speaking more akin to what, in modern parlance and the jurisprudence now prevailing, would be called fees for services.

17. The actual municipal tax in issue in the Karimi litigation fell in the "general" category (i.e., under section 92(2)(d)), and was a "show tax", i.e., an entertainment tax on cinemas. Karimi & Co. operated a cinema in Nazimabad, and one of the objections taken to the tax was that it could not levied as none of the purposes listed in section 34 were being achieved in that area by the municipality. This contention was soundly repelled by the learned Division Bench in Karimi I. The peculiar features of sections 99 and 100, and the conditions imposed for the levy of the conservancy tax and water tax were noted, and it was observed as follows:--

"These are the only two sections of the Act which provides that certain taxes can be levied only after something is undertaken or done by the Corporation. With regard to no other tax any condition, such as contained in section 99 or 100, is laid down by the Act. It would, therefore, appear that as far as the levy of show tax is concerned no particular duty is required to be fulfilled by the Corporation before such a tax is levied so long the plaintiffs cinema was within the limits of the city of Karachi and he was holding the show therein.... What was, however, urged was that the Corporation did not have the power to levy such a tax in so far as it was not in a position to perform its functions in that area in the way of providing amenities as laid down in section 34. This contention, however, righteous cannot be accepted as a legal proposition. The object of the Act is to make law relating to the municipal government of the city of Karachi. For that purpose the city of Karachi is an in divisible whole. If a certain tax is levied and collected from a certain area but is not expended on it, we are unable to hold that such a tax is not levied for the purposes of the Act which is the municipal government of the pity of Karachi. It is, of course, right and just that no responsible body is expected to levy tax without performing it, duties. It is also right to expect that the distribution of benefits must be equitable in all the areas as far as possible. But if this is not done, can it be subjected to an injunction of the Court. It seems to us that that question is a political one and the remedy where such a situation arises would be by representation and agitation and by such other means as may be found necessary. The people of a particular area may feel aggrieved that they are not receiving their due share or for that matter any share of the benefits of municipal government and on that ground they should not be made to pay any particular tax. But when such a situation arises and it has arisen in, the past the remedy has not been by action in a law Court." (pp. 545-56)

The municipality's appeal was therefore allowed.

18. Being aggrieved by this decision, Karimi & Co. appealed to the Supreme Court, but that appeal was also dismissed in Karimi II. In his concurring judgment, Anwarul Haq, J. observed as followed:--

"As a general rule, the validity of the imposition of a municipal tax can be challenged either on the ground that the requisite power has not been conferred on the municipality concerned by the statute or the charter which governs its functions and powers; or that the imposition is not for the purposes of the municipality. The challenge cannot, however, be based on the ground that the municipality has failed to carry out its duties and obligations in a certain locality or for the benefit of certain individuals, as, municipal taxation is intended for carrying on the administration of the municipality as a whole. The failure, neglect, or inability of the municipality to perform its functions in a certain locality, comprised within the municipal area, does not relieve the citizen of his liability to pay municipal taxes, whose imposition has been authorised by law, as the liability to pay arises on account of the presence of the citizen, or the property taxed, in the area of the

municipality concerned, and not as a quid pro quo for concrete services rendered. The well-established concept underlying the functioning of local government institutions is that such general taxes are for the collective good of the municipal community as a whole, and are not to be regarded as being in the nature of payment for particular utilities or services provided by the municipal administration. There are, however, exceptions to this rule such as are to be found in sections 99 and 100 of the City of Karachi Municipal Act, 1933 (hereafter referred to as the Act) which contemplate that conservancy and water taxes are to be levied only if certain services and supplies are provided to the buildings and localities concerned. It appears, therefore, that the Legislature has itself taken care to specify those charges and taxes, the payment of which would depend on the performance of certain duties and services. This condition cannot be extended to other taxes not so specified."

19. The foregoing cases formed the basis for the decision in Mehdi, which, as will shortly become clear, is the crucial decision for present purposes. By that judgment, the learned Division Bench disposed off a number of petitions, in each of which the issue was in relation to the water charges being demanded. In the case of at least one of the petitioners, the grievance was that although he did not have a water connection, he was being charged nonetheless. The learned Division Bench repelled this contention. The learned Bench expressly cited the Karimi litigation (and cited the passages reproduced above), and observed as follows:--
"There is no dispute that the water is being supplied in that locality or in that area. Therefore, applying the principles laid down in the aforesaid judgments failure or inability of Karachi Water and Sewerage Board and K.M.C. not to C supply water to the petitioners does not mean that the water rate cannot be charged from them particularly as water is being supplied in the locality or in that area."

20. As noted above, the foregoing three decisions were cited by the learned Division Bench in ABN Amro II, the principal decision relied on by learned counsel for KW&SB. In this case also, the grievance of the appellant was that it has not been provided a water connection at the relevant time and for the relevant period, but this contention was repelled. Learned counsel for the plaintiff on the other hand principally relied on Nazir Ali. In the latter decision, the issue was also that water charges were being demanded without there being a water connection, and it was observed as follows by the learned Division Bench:--
"...if water charges were collectable by the respondents irrespective of the question whether any services were rendered, such a levy could only be treated as a tax for general revenue purposes. We have not been able to find any provision in Karachi Water and Sewerage Board Act, 1996 enabling the respondents to levy any tax. In fact both sections 7 and 8 indicate that it is only competent to collect a charge for supply of water. No doubt the rates prescribed in such cases may not invariably conform to the quantum of services rendered but it has to be shown that some service was being rendered. We may also add that at one time the respondent was a part of the Karachi Metropolitan Corporation, which had the authority to levy local taxes but we are extremely doubtful whether the Legislature ever intended to confer the power to levy taxes upon autonomous corporations like the one the respondent has become pursuant to the 1996 Act. In the circumstances, we are of the view that the water rate relating to commercial premises not connected with water line is only intended to serve a national purpose for determining the quantum of water charges payable but does not authorize the respondent to collect

charges from a person who is not provided with any services contemplated in the 1996, Act. The petition is accordingly allowed and the respondents are restrained from collecting water charges till such time as supply to the petitioner's premises is made."
Learned counsel for the plaintiff submitted that the learned Division Bench in ABN Amro II was not referred to Nazir Ali, and since the latter was the earlier decision, I had to regard myself as bound by it. He submitted that to the extent that there was any conflict between Nazir Ali and ABN Amro II, the latter decision had to give way to the former. However, I note that the learned Division Bench in Nazir Ali was not referred to the earlier Division Bench decision in Mehdi, the relevant passage from which has been reproduced above. Therefore, the real question is whether Nazir Ali can stand with Mehdi, since if the answer to this question is in the negative, then I must regard myself as bound by Mehdi on the basis of the very principle relied on by learned counsel for the plaintiff.

21. Mehdi is therefore the crucial decision. It is important to keep in mind the statutory framework in which this judgment was delivered. At that time, the relevant statute was the Karachi Water Management Board Ordinance, 1981 ("1981 Ordinance"), which was promulgated on 21-5-1981. It will be seen that this Ordinance pre-dated the insertion (in 1983) of Chapter XVI in the 1979 Ordinance (by which the old Board was created "in" KMC), and indeed, was repealed when that Chapter was inserted. But, at the time that Mehdi was decided, it was the 1981 Ordinance that was in force. By section 3(2), a statutory body, the Karachi Water Management Board ("KWMB") was created. Section 9 provided for the powers and functions of KWMB, and clause (v) empowered it to "levy, enhance, reduce or revise water charges, in the prescribed manner...." When the 1981 Ordinance is examined as a whole, in my view it is (as presently relevant) essentially the same as the equivalent provisions in the 1996 Act or the Chapter XVI provisions. Thus, the statutory framework in which Mehdi was decided was the same as that in which Nazir Ali subsequently came to be decided. It follows that I must therefore regard myself as bound by Mehdi, and to the extent that Nazir Ali is in conflict with it, the latter must give way to the former.

22. This does not however, quite end the matter. The first point to note is that the 1981 Ordinance was confined to water matters alone (as is indeed obvious from the very name of the statutory body thereby created). I remind myself of the principle laid down in Quinn v. Leatham [1901] AC 495, and cited with approval by the Supreme Court in Trustees of the Port of Karachi v. Muhammad Saleem 1994 SCMR 2213 (at paras 17-18):--
"...every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it." (per Lord Halsbury, LC)
The second point is that even as regards the water charges, the case-law analyzed above really has no bearing in the present matter, since in my view, the question of the supply of water to, and the charges payable in respect thereof by, the plaintiff is to be decided with reference to the terms of the 1994 Agreement, and not any specific provisions of the 1996 Act. This question has already been examined in detail and answered in the paras herein above.

23. The question therefore is whether and if so to what extent, the rule laid-down in Mehdi can apply in relation to the sewerage and conservancy charges being claimed by KW&SB in the present case. In my respectful view, it cannot be applied to those charges. The statutory framework, i.e., the 1981 Ordinance, in which Mehdi was decided was confined exclusively to water matters; sewerage was entirely beyond the scope of that enactment. It is clear from Mehdi that the learned Division Bench regarded the water charges as a "general" levy in the same sense as the "shop tax" that was the subject of the Karimi litigation, and therefore concluded that if water was being supplied generally to the area concerned, that was sufficient to sustain a demand for water charges even if the particular petitioner before the court was not, in fact, being supplied water. It is also significant that the 1981 Ordinance did not confer any power on KWMB to charge "fees" in connection to the supply of water. However, insofar as the 1996 Act is concerned, it specifically refers to "sewerage services" being provided by KW&SB. The use of the term "service" has a well established and understood meaning. Furthermore, the 1996 Act expressly empowers KW&SB to levy "fees". The same was the position of the old Board under the Chapter XVI provisions.

24. In my view therefore, the rule laid down in Mehdi does not extend to sewerage services being provided by KW&SB and the fees payable in respect thereof. I am respectfully of the view that the rule laid down in Nazir Ali is more apt and applicable. Thus, although I am, for the reasons stated above, bound by Mehdi insofar as water charges are concerned and cannot apply the rule laid down in Nazir Ali in respect of such charges, I regard myself free to adopt that rule in respect of sewerage services. The relevant question therefore is not whether sewerage or conservancy services were generally being made available in the area where the plaintiff's complex and industrial operation is located (if indeed such was the case). Rather, the question is whether such services, are in fact being availed by it. The plaintiff categorically contends that it does not avail such services and has an elaborate sewerage disposal system of its own. KW&SB has equally categorically taken the position in its written statement that such services are being availed by the plaintiff. However, in para 2 of its written statement, KW&SB has stated as follows:--

"The answering defendant supplies water to the plaintiff as a Bulk consumer and take their waste from process of thermal power and steel manufacturing into CDGK's Nalas before disposal into creek, which is of utmost importance to avoid pollution and unhygienic conditions inside and around the premises of the plaintiff as well as in the neighbouring areas and also as required for clean environment of creek and sea at their border."

Thus, the facilities (i.e., drains) being used by the plaintiff for sewerage purposes, even as per KW&SB, belong not to it, but to the defendant No. 2, CDGK. In my view, it is clear that the issue of whether sewerage and conservancy services are being provided to the plaintiff, and if so by whom, and whether the services are being availed by it is a matter that can only be decided at the trial. In other words, a triable issue has been raised in this regard. Prima facie therefore, it would appear that the plaintiff would be entitled to interim relief in respect of the sewerage and conservancy charges.

25. One more point must also be kept in mind in the foregoing context. It will be recalled (see para 12 herein above) that the changes brought about in 1996 in and to Part I of Schedule V to the 1979 Ordinance empowered KMC to impose a "conservancy tax", and

conservancy and sewerage are terms that are used more or less synonymously. If a conservancy "tax" were imposed, then of course, the question of whether or not any services were being made available and/or actually availed would become a moot point, since a "tax" is not limited in the same manner as a "fee" for services provided. Nothing was however shown to me that would indicate that KMC had imposed such a tax.

26. The position however, is different with respect to the last element of the impugned billing, namely the charge in respect of fire fighting. It will be recalled that a "fire tax" could be levied by KMC in terms of Part I of Schedule V to the 1979 Ordinance. A notification, published in the provincial Gazette on 23-5-2001, was placed before me, which clearly showed that KMC had indeed imposed (or rather, enhanced) the "fire tax". It is therefore not relevant that the plaintiff has its own fire fighting establishment, and does not avail the fire fighting services provided by local government bodies. Since a "tax" could be and was imposed, the plaintiff was obliged to pay the same. However, the important question of who could collect this tax does need to be addressed. There is certainly nothing in the 1996 Act which empowers KW&SB to levy such a tax, nor does not there appear to be anything which empowers it to even collect it. It will be recalled (see para 6 herein above) that a levy under the 1979 Ordinance was to be "collected in the prescribed manner by the persons authorized for such collection" (per section 64). Nothing was shown to me as would establish that KW&SB had been, or indeed could even lawfully be, authorized to collect the "fire tax". This is an important point to which I will revert subsequently.

27. The analysis so far can be summarized as follows. Insofar as the water charges are concerned, the matter is regulated by the 1994 Agreement, which is lawful and binding and has been entered into for valid consideration. This agreement has devolved on KW&SB. The plaintiff is therefore bound to pay the water charges in terms of clause (ii) of the 1994 Agreement (reproduced in para 9 herein above). As regards the sewerage and conservancy charges, those were services for which the plaintiff can only be charged if it is actually availing the same. This is categorically denied by the plaintiff. The contrary stand taken by KW&SB is not entirely satisfactory since even if its position is correct, it would seem that the services are in fact being provided by CDGK and not KW&SB. Therefore, prima facie, the plaintiff may be entitled to interim relief in this regard. Finally, insofar as the "fire tax" is concerned, it is prima facie payable since it is a tax and not a fee for services rendered. Therefore, the fact that the plaintiff is not availing fire fighting services from the local government bodies is not relevant. However, there is a question as to whether KW&SB can at all be, or was, legally empowered to collect this tax, since it could only be imposed by KMC and not by KW&SB itself.

28. I now come to the final stage of the analysis, which is whether and if so to what extent, the foregoing position was affected or modified by the Sindh Local Government Ordinance, 2001 ("2001 Ordinance"), which repealed and replaced the 1979 Ordinance. I appreciate that a recent Act of the Sindh Assembly has in fact repealed the 2001 Ordinance and revived the 1979 Ordinance. However, this aspect of the matter was not argued before me and I therefore confine myself to an examination of the relevant provisions of the 2001 Ordinance.

29. The 2001 Ordinance established different types of local areas, one of which was a city district. Karachi, being the provincial capital, was automatically a city district. The local

government for a city district was the District Government and thus the local government for Karachi was the City District Government, Karachi, otherwise known as "CDGK", which is the defendant No. 2 in the present suit. There were many differences between the systems of local government respectively set up by the 1979 and 2001 Ordinances. One of the most important was the concept of devolution or decentralization, i.e., transfer of administrative functions, responsibilities and powers from the Provincial Government to the District Governments. The First Schedule to the 2001 Ordinance specified the offices or departments of the Provincial Government that devolved to the District Governments in Parts A and B, and those offices were grouped together into different groups as specified in Part C. Section 13 provided that the District Government was to comprise of the Zila Nazim (an elected official) and the District Administration. Section 26 delineated the structure of the District Administration. It was to comprise of the offices devolved on the District Government and other offices to be set up by the latter, as grouped in terms of the First Schedule. Each such group of offices was to be headed by an officer called the Executive District Officer ("EDO"), while the entire system was to be coordinated and controlled administratively by the group known as the District Coordination Group, to be headed by the District Coordination Officer ("DCO"). Section 28 specified the powers and functions of the DCO, while section 29 dealt with the EDO.

30. It appears that sometime in December, 2002, KW&SB was "decentralized", i.e., devolved to CDGK. Two notifications were issued in this regard. One, issued under sections 3 and 4(2) of the 1996 Act, reconstituted the KW&SB Board. Statutorily, this was a matter internal to KW&SB. The second, issued under various provisions of the 2001 Ordinance, purported to "devolve" KW&SB to CDGK as the 15th group of offices of the latter. In material part, the second notification provided as follows:--

"(i) The role and functions assigned to the KW&SB under the Karachi Water and Sewerage Board Act 1996 are devolved to the City District Government Karachi and Towns.

(iv) KW&SB Act shall remain in force till further orders. The Provincial Government may take necessary steps to repeal or amend the KW&SB Act 1996 to ensure smooth implementation of the Sindh Local Government Ordinance 2001."

One of the provisions under which the foregoing notification was issued was section 182(3). This provided, inter alia, that control of water and sanitation agencies would vest in the City District Government.

31. Now the devolution or decentralization of provincial departments or offices under the 2001 Ordinance did not, in the main, present any difficulties. There was simply a shift of executive and administrative authority and responsibility from one tier of government to another. KW&SB however, was a special case, inasmuch as it was a statutory body created by and under a provincial law, i.e., the 1996 Act. The second notification indicated the uneasy fit that resulted from KW&SB's "devolution". The declaration that the 1996 Act continued to remain in force was of course both superfluous and meaningless. The 1996 Act was a statute, which could only be undone (i.e., repealed, etc.) by the legislature, and not by an executive act, even if such powers were purported to have been given under the 2001 Ordinance (which they were not). Until and unless the position was altered by a suitable Act of the Provincial Assembly (which never came

about), KW&SB necessarily and by law continued to exist as a distinct and separate legal entity. How then, and in what manner, did it stand "devolved" or "decentralized" to the CDGK? The notification spoke of the "role and functions assigned to KW&SB" being devolved to CDGK. Read literally, this statement was patently unlawful. The role of, and functions assigned to, KW&SB were statutory in nature, having been created by, under and for the purposes of the 1996 Act. No administrative act under another law, i.e., the 2001 Ordinance, could affect or alter this statutory arrangement and position. Now, it will be recalled that certain powers and functions in relation to the old Board had been conferred upon KMC under Chapter XVI of the 1979 Ordinance. When the 1996 Act came to be enacted, those powers and functions were to be exercised in relation to KW&SB by the Provincial Government. In my view, the devolution or decentralization that could permissibly take place under and in terms of the 2001 Ordinance was only to the extent that the powers that vested in the Provincial Government under the 1996 Act were now to be exercised by CDGK. This was the combined effect of the statutory provisions of the 1996 Act read with the mandate of section 182(3) of the 2001 Ordinance.

32. The result of the December 2002 notifications was therefore that KW&SB was simultaneously both a statutory corporation and an administrative "group" of offices under CDGK. As is obvious, this was a somewhat anomalous position, and certain consequences flowed from it. Thus, KW&SB could not be treated by CDGK in the same manner as any other devolved office or department. For example, it could not be broken up into two or more constituent units or offices, nor could it be administratively amalgamated with another office or department. It was controlled by CDGK only to the extent that the latter could now exercise the powers vested in the Provincial Government under the 1996 Act, or to the extent that CDGK officials were nominated to or represented on the KW&SB Board (and as to the latter, the Board was itself always subject to the 1996 Act). However, being a statutory corporation, KW&SB could not overstep the boundaries of the 1996 Act, nor could CDGK administratively confer any powers on KW&SB outside the four corners of that Act. In other words, KW&SB could, as before, only do what the 1996 Act made permissible. This is of course simply an application of the general principle applicable to statutory corporations: such entities, being the creation of particular enactments, can only do that which the parent statute makes permissible or that which is reasonably incidental thereto. Anything else lies in the prohibited field. This position can be contrasted with that of a natural person, who may lawfully do anything that is not prohibited by law. One necessary consequence of the foregoing principle was that KW&SB could continue doing that which it could do under the 1996 Act, notwithstanding that under the provisions of the 2001 Ordinance, the relevant agency or office of the City District Government (i.e., the office dealing with water and sanitation matters) could not have done that thing. In other words, if KW&SB had been merely an administrative unit, office or department of or in the Provincial Government (or for that matter, of or in KMC, as was the position of the old Board) then the scope and extent of its powers or functions would, on decentralization, be defined, shaped and delimited by the 2001 Ordinance. However, since it was a statutory body in its own right, it continued to enjoy the powers and functions available to it under the 1996 Act even if such powers and functions would not otherwise have been within its remit under the 2001 Ordinance. However, the reverse was equally true. If the provisions of the 2001 Ordinance empowered the relevant office of the City District Government (i.e., the office dealing with water and sanitation) in respect of any matter, but such matter was

expressly or impliedly outside the scope of the 1996 Act, then KW&SB could not be empowered with regard thereto even after decentralization.

The position, anomalous though it was, of KW&SB as a "devolved" office of CDGK having been examined, I now turn to consider the four elements of the impugned billing, i.e., in relation to "water", "sewerage", "conservancy" and "fire" in light of the 2001 Ordinance. Insofar as the water charges were concerned, the position remained unaffected. In my view, the relationship of the plaintiff and KW&SB continued, as before, to be regulated by the 1994 Agreement as explained above. In relation to the remaining three elements, two provisions of the 2001 Ordinance need to be considered. The first is section 185, which as presently relevant, provided as follows:--

"185. Financial transition.---(1) All taxes, cess, fees, rates, rents, tolls and charges which were being charged, levied and collected by any office of the Government,' development authority, water and sanitation agency, board or solid waste management body or any Local Council, shall continue to be charged, levied and collected under this Ordinance by the successor local governments and every person liable to pay such taxes, cess, fees, rates, rents, tolls, charges and accumulated arrears and receivables shall continue to make payment thereof until revised, withdrawn or varied under this Ordinance."
This provision provided for continuity in the transition from the local government system prevailing under the 1979 Ordinance to the 2001 Ordinance. However, it must, for present purposes, be read in context. The reference to the rates, fees, etc. being charged previously by a "water and sanitation agency" now being chargeable by "the successor local government" must be qualified in the special case of KW&SB. As explained above, KW&SB exercised statutory powers in this regard under the 1996 Act. That position could not therefore be affected by section 185, and it could not be that it was now the "successor local government", i.e., CDGK that was entitled to levy such charges, whether before or after KW&SB had been administratively devolved to it. As long as the 1996 Act remained in the field, it continued to apply in its own terms, as explained above.

34. The second provision is section 116, which provided in material part as follows:--
"116. Taxes to be levied.---(1) A Council may levy taxes, cesses, fees, rates, rents, tolls, charge, surcharge and levies specified in the Second Schedule."
Insofar as CDGK was concerned, it was Part II of the Second Schedule that was applicable, and this provided in material part as follows:--
"....
7. Fees for specific services rendered by City District Government.
.....
14. Charges for execution and maintenance of works of public utility like lighting of Public places, drainage, conservancy and water supply operated and maintained by City District Government."
It will be seen that paragraph 14 of Part II refers to "charges" for the execution and maintenance of works of public utility such as conservancy and water supply. What is the legal nature of such "charges"? In my view, it would seem that they would be more akin to fees than taxes, i.e., would be chargeable by CDGK only and to the extent that such works of public utility were actually provided.

35. When sections 185 and 116 are read together in the specific statutory context presently relevant, i.e., the 1996 Act, the following position emerges. Insofar as the

"conservancy" and "sewerage" elements of the impugned billing were concerned, they continued as before to be regulated in terms of the 1996 Act, and the position under that law has already been examined herein above. Thus, as regards the plaintiff, the charges could, as before, only be levied if the relevant services were actually being availed or used by it. As noted above, the plaintiff and KW&SB have taken opposing stands on this issue, and the matter can therefore only be resolved at the trial.

36. Insofar as the "fire" element of the impugned billing is concerned, it will be recalled that KMC had the power to impose a "fire tax", and that such a tax was in fact levied. This levy was preserved and continued by reason of section 185 of the 2001 Ordinance. However, I may note that as regards CDGK itself is concerned, it could only levy a "charge" with regard to fire fighting facilities, and then only if such facilities could be regarded as "works of public utility" within the meaning of paragraph 14 of Part II of the Second Schedule or fees for services specifically rendered in terms of paragraph 7 thereof. Learned counsel for the plaintiff submitted that fire fighting fell exclusively within the domains of the Taluka Municipal Administration and Town Municipal Administration, which were different levels of local government. However, I note that fire fighting was included in the definition of "municipal services" contained in section 2(xxii). Section 36 expressly provided that where a City District had been created, "the organizations and authorities providing municipal services and facilities and the offices decentralised or set up in a Taluka or Talukas or districts notified to be City District shall come under the administrative and financial control of the City District Government". Similarly, section 40 empowered the Zila Council in a City District to, inter alia, "review development of integrated system of water reservoirs, water sources, treatment plants, drainage, liquid and solid waste disposal, sanitation and other municipal services". Thus, it cannot be said that fire fighting was outside the scope of the powers of CDGK. However, in my view, section 185 is conclusive on the point. It will be recalled (see para 26 herein above) that a notification regarding the "fire tax" levied by KMC, and published in the provincial Gazette on 23-5-2001, was placed before me. Obviously, section 185 continued this levy when the 2001 Ordinance was promulgated a few months later, in August 2001. Nothing was shown to me as would indicate that CDGK varied, withdrew or revised this notification. Therefore, it would seem that the "fire tax" continued to remain in the field. As already indicated, I am of the view that the plaintiff was liable to pay this levy since it was a tax, and since the tax was continued, the same position prevailed under the 2001 Ordinance.

37. However, the question that still remains is as to who was empowered to recover or collect the "fire tax". As I have indicated above, I am of the view that there is nothing in the 1996 Act that empowers KW&SB to recover any such amount. What was the position under the 2001 Ordinance? Section 118(1) provided that all taxes levied under the said Ordinance were to be collected as prescribed. Section 2(xxxi) defined a "tax" as "including any cess, fee, rate, toll or other impost leviable" under the 2001 Ordinance. Thus, the word "tax" was used, depending on the context, in the generic sense of any levy that could be imposed, or more specifically, as a tax per se. Section 31 empowered the Provincial Government to frame the District Government Rules of Business, and these were framed on or about 23-8-2001 as the Sindh District Governments (Conduct of Business) Rules, 2001 ("the Rules"). Rule 3(2) allocated the business of the District Government amongst the various groups of offices constituting the District Administration in terms of Schedule II to the Rules. Paragraph 11 of Schedule II

delineated the business that fell to the Revenue group. Sub-paragraph (ii) related to "Excise and Taxation", and provided that the Revenue group was responsible for the "assessment and collection of taxes/duties and fees devolved to District Government" and other taxes (including federal and provincial levies) that were to be collected at the level of the District Government. It is obvious that the word "taxes" was used in its generic sense, and thus the jurisdiction to recover all manner of levies and imposts under the 2001 Ordnance was that of the Revenue group.

38. The position that therefore emerges is that KW&SB is not legally empowered to collect the "fire tax" under the 1996 Act, nor under the 2001 Ordinance, where the matter would appear to fall to the Revenue group. I would also add that in my view, for the reasons stated in paras 31 and 32 herein above, no administrative order could have been made under the 2001 Ordinance assigning the duty to collect the "fire tax" to KW&SB, nor could the Rules have been amended to so provide. Therefore, on any view of the matter, the collection of the "fire tax" as an element in and of the impugned billing would prima facie appear to be unlawful.

39. In view of the foregoing discussion, I would dispose off the present application in the following terms. The defendants are restrained from preventing, restricting or hindering the supply of water to the plaintiff from the Keenjhar-Gujjo canal scheme or system or in any manner interfering in or with the same, subject to the following terms:--

(i) The plaintiff is liable to make payment of water charges as per clause (ii) of the 1994 Agreement, and the defendant No.1 is empowered to bill for and collect the same. The plaintiff and the defendant No.1 shall be at liberty to compute the amount payable up to the date of this order on the foregoing basis, and if there has been (according to the plaintiff) any overpayment, or (according to the defendant No. 1) any underpayment, then the concerned party shall be entitled to make an appropriate application for such orders as the Court may deem appropriate. The Rs.200 million earlier deposited by the plaintiff and withdrawn by the (defendant No. 1 shall be deemed adjustable against the water charges. The plaintiff shall continue to make timely payment of the water charges in terms of future billing.

(ii) The defendants are hereby restrained from recovering, demanding or collecting any amount by way of sewerage or conservancy charges, whether by way of arrears thereof as on the date of this order, or on account of any future billing. However, the future billing by defendant No.1 may continue to reflect these elements, and the plaintiff shall be entitled, without prejudice to its case, to deposit the billed amount(s) with the Nazir of the Court, which amounts shall be dealt with in terms of such orders or directions as may be given by the Court, If at all any such amounts are deposited, then the Nazir shall immediately invest the same in some profit bearing scheme.

(iii) The plaintiff shall be obligated to make payment of the arrears of the "fire" element of the billing up to the date of his order, which payment shall be made in six equal monthly installments starting from 20-12-2011 and payable each month thereafter accordingly), and which shall be deposited with the Nazir of the Court. The defendant No.2 (or any successor entity) shall be entitled to withdraw the same by making an appropriate application to the Court. However, the future billing by defendant No.1 shall not contain any such element, and the said defendant is hereby restrained from in any

manner collecting, demanding or recovering any such amount from the plaintiff. It is clarified that the defendant No. 2 or any successor entity) may recover, demand and collect the "fire tax" in future in accordance with any applicable law for the time being in force.

40. In the end, I would only note that the observations made in the paras hereinabove are tentative in nature and are for purposes of disposing of the present application. Nothing herein stated shall affect the hearing and disposal of the suit on the basis of the evidence that is recorded at the trial.

M.A.K./P-29/K Order accordingly.

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