

IN THE HIGH COURT OF SINDH AT KARACHI

Present: **Mohammad Ali Mazhar** and **Agha Faisal, JJ.**

CP D 8591 of 2018 : Mirpurkhas Sugar Mills Limited
& Others vs.
Province of Sindh & Others

CP D 8592 of 2018 : Al Noor Sugar Mills Limited
& Others vs.
Province of Sindh & Others

CP D 8624 of 2018 : Ghulam Nabi Othi vs.
Province of Sindh & Others

For the Petitioners : Mr. Ijaz Ahmed Zahid
Advocate
(In CP D 8592 of 2018.)

Mr. Abdul Sattar Pirzada
Barrister at Law
(In CP D 8591 & 8592 of 2018)

Mr. Mamoon N. Chaudhry
Advocate
(In CP D 8591 & 8592 of 2018)

Mr. Syed Mureed Ali Shah
Advocate
(In CP D 8624 of 2018)

For the Respondents : Mr. Kafeel Ahmed Abbasi
Deputy Attorney General

Mr. Jawad Dero
Additional Advocate General

Mr. Rafiq Ahmed Kalwar
Advocate
For the Sindh Abadgar Board

Mr. Abdul Samad Shaikh
Focal Person (Legal)
Agriculture Department

Nawab Zubair Talpur
President
Sindh Growers Alliance

Muhammad Masroor Soomro
Member Executive Committee
Sindh Abadgar Board

Muhammad Anwar
General Secretary
Sindh Growers Alliance

Dates of Hearing : 14.02.2019, 20.02.2019,
28.02.2019 & 05.03.2019

Date of Announcement : 05.03.2019

JUDGMENT

Agha Faisal, J: These three petitions pertain to the notification issued by the Government of Sindh Agriculture Supply and Prices Department dated 07.12.2019 (“**Impugned Notification**”) whereby, *inter alia*, the minimum price of sugarcane for the crushing season 2018-19 was fixed at Rs.182 per 40 Kg. The petitioners in CP D 8591 of 2018 and CP D 8592 of 2018 have assailed the Impugned Notification and seek to have it struck down, whereas the petitioner in CP D 8624 of 2018 has sought the enforcement of the Impugned Notification. Since the controversy is common *inter se*, therefore, the said matters shall be determined through this common judgment.

2. The representative facts pertinent hereto are that the Government of Sindh is required to issue a notification each crushing season, pursuant to Section 16 of the Sugar Factories Control Act, 1950 (“**Act**”), fixing the minimum price of sugarcane payable to the growers in the province. In pursuance of the forgoing the Impugned Notification was issued, *inter alia*, fixing the minimum price for sugarcane for the crushing season 2018-19. The petitioners in CP D 8591 of 2018 and CP D 8592 of 2018 assailed the Impugned Notification on the initial premise that the determinants for fixation of the price had not been taken into account and argued subsequently that the Impugned Notification was

even otherwise in abject violation of the judgment of the Honorable Supreme Court in the case of *Mustafa Impex and Others Vs. the Government of Pakistan and Others* reported as *PLD 2016 SC 808* (“*Mustafa Impex*”). On the contrary the petitioner in CP D 8624 of 2018 placed reliance upon the Impugned Notification and sought the implementation thereof, inclusive without limitation by recourse to coercive measures.

3. Barrister Pirzada, arguing for the petitioners in CP D 8591 of 2018 and CP D 8592 of 2018, submitted that notwithstanding the contention that the Impugned Notification was issued in *prima facie* disregard of the determinants of price fixation prescribed vide the Act, it was apparent that the Impugned Notification itself was issued in violation of the precepts of *Mustafa Impex*. Learned counsel demonstrated from the record that there was no cabinet approval obtained for the fixation of price and the subsequent issuance of the Impugned Notification and further that a post facto ratification was attempted in respect thereof, as represented by the Circular issued by the Government of Sindh Agriculture Supply and Price Department dated 17.01.2019 (“**Impugned Circular**”), whereby the content of the Impugned Notification was sought to be validated. Per learned counsel post facto ratification was impermissible and the same was maintained by a learned Divisional Bench of this Court in the case of *Karamat Ali & Others vs. Government of Sindh* reported as *PLD 2018 Sindh 8* (“*A D Khawaja*”). It was thus submitted that the Impugned Notification and the Impugned Circular were dissonant with the law, hence, liable to be struck down forthwith.

4. Mr. Ijaz Ahmed Zahid, Advocate supplemented the arguments advanced on behalf of the cited petitioners and contended that while the essential ingredients for a price fixing notification were manifestly disregarded for the determination of minimum price, it was apparent that the Impugned Notification itself was issued in derogation of the law and that the Impugned Circular also suffered the same predicament. Learned counsel also explicated upon the issue of the imbalance created by fixation of sugarcane price on the one side while leaving the determination of sugar price to market forces and illustrated that in the recent past the price of sugar had appreciated by twenty percent (20%) whereas the price of sugarcane had appreciated four hundred percent (400%). It was thus concluded that the Impugned Notification and the Impugned Circular were otherwise than in accordance with the law and prayed that the same be set aside.

5. Mr. Rafiq Kalwar, Advocate represented the Sindh Abadgar Board, the respondent No.7, and submitted that the same sugarcane price was continuously fixed each crushing season for the preceding four seasons and that the issue pertaining to whether it was lawful to fix the price of sugarcane while leaving the price of sugarcane to market forces is pending before the honorable Supreme Court. Learned counsel argued that while it is the case of the growers that the minimum price of sugarcane should be higher than that prescribed vide the Impugned Notification, the said respondents support the Impugned Notification in this present form as any interference in the same would have an adverse impact on the growers at large. Learned counsel submitted that *Mustafa Impex* was not attracted in the present facts and circumstances as the applicability of the ratio therein was wholly with respect to fiscal or

budgetary matters. Learned counsel also sought to distinguish *A D Khawaja* on the grounds that the said judgment was targeted to provide justice whereas the applicability of the same principle to set aside the Impugned Notification would only hamper the cause of justice. Learned counsel further argued that the provisions of section 16 of the Act are procedural in nature and not substantive, hence, a procedural lapse cannot be made the basis of a challenge to the Impugned Notification. It was categorically admitted by the learned counsel that since January, 2019 the price at which sugarcane is being purchased from the growers is upwards of Rs.200 per 40 Kg. and has also reached Rs.220 per 40 KGs. at certain times. It was thus contended that the impact of the sustaining the Impugned Notification is only respect to one month, prior to 2019, wherein growers were constrained to purvey their sugarcane at prices lower than the minimum price set by the Impugned Notification.

6. Mr. Mureed Ali Shah, Advocate argued on behalf of the petitioner in CP D 8624 of 2018 and sought to enforce the Impugned Notification, inter alia, by employing coercive measures against the sugar mills. Learned counsel referred to an earlier petition filed by him, being CP D 6445 of 2018 which was disposed of on 30.10.2018 calling upon the Government of Sindh to comply with the provisions of the Act within the timeframe prescribed in such regard. It was submitted that even if the Impugned Notification is construed to be otherwise then in accordance with the mandate of *Mustafa Impex* the same may be treated as covered by virtue of the Order of this Court referred to supra.

7. Mr. Jawad Hussain Dero, Additional Advocate General Sindh, articulated at the very onset that cabinet approval was entirely a

procedural matter and that no substantive weightage could be apportioned thereto. It was submitted that all the requisite consents and approvals were obtained by the Government of Sindh and the Impugned Notification was validly issued and even otherwise the Impugned Circular had the effect of curing any defect that they may have been perceived with respect to the Impugned Notification, therefore, there was no cause to challenge the same. Learned counsel sought to distinguish *Mustafa Impex* and submitted that the ratio therein only applies to sales tax matters and fiscal notifications. Learned counsel further sought to distinguish A D Khawaja on the ground that the facts therein were inconsistent with those in the present controversy. It was submitted that the enforcement of a notification could not be considered while the very validity thereof was under challenge, hence, CP D 8624 of 2018 was premature at best and even otherwise not maintainable. In conclusion it was submitted that the Impugned Notification was validly issued and pursuant to the issuance of the Impugned Circular any reservation in regard thereof was put to rest. It was thus argued that all three petitions were not maintainable and even otherwise devoid of merit, hence, liable to be dismissed forthwith.

8. We have heard the respective learned counsel and have also appreciated the authority and documentation arrayed before us. We deem it appropriate to confine the ambit of this determination to the validity of the Impugned Notification, and Impugned Circular, on the anvil of the judgments of the Superior Courts.

9. It may be pertinent to initiate this deliberation by referring to the Order dated 13.10.2018 of learned Divisional Bench of this Court in CP

D 6445 of 2018. The said petition had been filed seeking the establishment of the Sugarcane Control Board ("**Board**") and the fulfillment of the duties ancillary and incidental thereto. The matter was disposed of with directions to the Government of Sindh to constitute the Board and thereafter complete the necessary requisites culminating *inter alia* in the timely fixation of the minimum price for sugarcane for the crushing season 2018-19. The cited Order drew attention of the official respondents to their statutory obligations contained, *inter alia*, in the Act. Pursuant thereto the Board was constituted vide a notification dated 30.10.2018 and thereafter a meeting of the Board was held on 20.11.2018. The minutes of the aforesaid meeting of the Board recorded that the stakeholders had not reached an understanding with regard to the price of sugarcane. A summary for the worthy Chief Minister Sindh ("**Summary**") was purportedly drafted dated 27.11.2018, although the copy available on file denotes that it was delivered to the Chief Minister Secretariat on 10.12.2018, and at the bottom thereof is a note annotated by the Minister for Agriculture Supply and Price dated 06.12.2018 stipulating that the worthy Chief Minister may approve the same sugarcane price for the crushing season 2018-19 as that of the previous year. Prior to the adverting to the remaining annotations upon the said Summary it may be pertinent to record that on the very next day, being 07.12.2018, the Impugned Notification was issued and content thereof is reproduced herein below:

"No.8(142)/S.O.(ext.)2018-19. In exercise of the powers conferred by sub-section (i) of section 16 of Sugar Factories Control (Sindh amendment) act, 2009, the government of Sindh, agriculture, Supply & Prices Department, with the approval of Competent Authority, is pleased to fix the minimum price of sugarcane @ Rs.182/- (Rupees One Hundred Eighty Two) per 40 Kg. (Mds.) for crushing season 2018-19.

No.8(142)S.O.(Ext)2018-19. In exercise of the powers conferred under Section 16(3) of the Sugar Factories control Act, 1950 (Sindh Amendment) 2009, the Government of Sindh, Agriculture, Supply and Prices Department, is pleased to direct the Sugar Factories in the Province to pay quality premium to the cane growers at the end of the crushing season 2018-19 at the rate of fifty paisa per 40 Kg. (Mds.), can for each 0.1 percent (including fraction thereof to be calculated prorata) of excess sucrose recovery above 8.7 percent determined on overall sucrose recovery basis of each mill.”

10. It is manifest from the annotations appended to the Summary that the Chief Secretary Sindh signed of the same on 09.12.2018, being two days post issuance of the Impugned Notification. The final annotation on the said Summary is that of the worthy Chief Minister Sindh dated 10.12.2018, three days post issuance of the Impugned Notification, wherein it is stated that the price determination has to be ratified by the cabinet and hence the issue must be placed in the next cabinet meeting. The meeting of the cabinet was held on 07.01.2019 and with respect to the issue of sugarcane price the cabinet decided to ratify the minimum purchase price of sugarcane in the manner delineated in the Impugned Notification. Subsequent thereto the Impugned Circular was issued on 17.01.2019, content whereof is reproduced herein below:

“Circular

No.8(142)/S.O.(ext)2018-19. The Provincial Cabinet of Sindh in its meeting held on 07.01.2019 decided to ratify the minimum purchase price of sugarcane @ Rs.182 per 40 Kg. (Md) and 30th November, 2018 as commencement date of sugarcane crushing for 2018-19 season which has already been notified vide this Department’s Notification of even number dated 07.12.2018.”

11. We are cognizant of section 16 of the Act which stipulates that the Government may on the recommendation of the Board or otherwise by notification determine the minimum price of sugarcane for the

respective crushing season. It is considered prudent to reproduce the relevant constituent herein below:

“16. Fixation of Minimum price. (1) Government may, on the recommendation of the Board or otherwise by notification determine minimum price of the cane having regard to:

(a) the cost of production of sugarcane; and

(b) the return to the grower from alternative crops and the general trend of prices of agricultural commodities.

(2) The Price determined under sub-section (1) may from time to time be reviewed.

(3) The occupier of a Factory shall pay quality premium at the end of crushing season at such rates as may be determined by Government in proportion of sucrose recovery of such Factory in excess of base level sucrose contents viz. 8.7 per 100 Kilograms.

(4) The price of the cane shall be paid to the cane grower by issuing payee's account cheques.

(5) If the payment under sub-section (4) is not made within fifteen days of supply of the cane, mark-up at the rate as may be fixed by Government by notification shall also be paid to the cane grower in addition to the principal amount.

(6) No occupier of a Factory shall make any deduction except the deduction as may be prescribed from the amount payable to the cane grower under sub-section (4).

(7) No occupier of a Factory shall, except with the approval of the Cane Commissioner, deduct any weight from the total weight of the cane on account of its unsuitable variety or immaturity or for any other reasons.”

12. It is thus apparent that notwithstanding the fact that the fixation of the minimum price has to be done by the Government the same can be done either of the recommendation of the Board or otherwise as prescribed supra. The minutes of the meeting of the Board dated 20.11.2018 clearly demonstrate that since the stakeholders had not reached an understanding with regard to the price of sugarcane, therefore, no recommendation was put forth by the Board in such regard. It was thus apparent that the Government remained empowered

to determine the minimum price by notification. Article 129 of the Constitution prescribes that the executive authority of the Province shall be exercised in the name of the Governor by the Provincial Government consisting of the Chief Minister and Provincial Ministers. Article 130 of the Constitution defines cabinet as a cabinet of ministers with the Chief Minister at its head. It is gleaned from the record that no decision was taken either by the worthy Chief Minister or the cabinet with regard to the price fixation prior to the issuance of the Impugned Notification. On the contrary the record reflects that the Summary was received at the Chief Minister House three days post issuance of the Impugned Notification. Even at that stage, per record, the worthy Chief Minister took no unilateral decision and referred the matter to the cabinet, which demonstrably did not meet until one month post issuance of the Impugned Notification. The cabinet sought to accord post facto ratification to the constituents of the Impugned Notification, notwithstanding the fact that no competent decision had ever been taken in the first place. The Impugned Circular reiterates the cabinet decision and in doing so confers no validity upon the Impugned Notification. It is thus apparent that even prior to adverting to the ratio of *Mustafa Impex* and *A D Khawaja* the Impugned Notification and the Impugned Circular appear to have been issued in *prima facie* dissonance of the law.

13. The honorable Supreme Court maintained in *Mustafa Impex* that decisions required to be taken by the Federal Government are in fact required to be taken by the cabinet and any unilateral decision making would amount to a usurpation of power. The said judgment also disapproved of post facto approval by the cabinet accorded to actions

taken otherwise than in consonance with the law. It may be pertinent to reproduce the relevant observations of the honorable Supreme Court herein below:

“80. It only remains, in this context, to examine what precisely is the meaning to be assigned to the term Chief Executive and it is to this that we now turn. Article 90, as stated above, describes the Prime Minister as Chief Executive and contemplates the Cabinet acting through him. Clause (2) of Article 90 adds that he may act either directly or through Federal Ministers. This is his discretionary choice. From the above the logical inference follows that the function of the Chief Executive is to execute and implement the policy decisions taken by Cabinet i.e. the Federal Government. He executes policy decisions, he does not take them by himself. The executive function, even on a literal basis, is to execute or implement decisions. On this interpretation the whole structure now falls into place. The Prime Minister cannot take decisions by himself, or by supplanting or ignoring the Cabinet because the power to take decisions is vested with the Federal Government i.e. the Cabinet, and unilateral decisions taken by him would be a usurpation of power. As our parliamentary system of government is based on the British system it would be more useful to relate the term 'Chief Executive' to the British concept of the Prime Minister as "primus inter pares" or a first among equals. The Rules of Business, if they carry, or imply, a different impression, must yield to the superior mandate of the Constitution. The decisions of the Federal Government are the decisions of the Cabinet and not of the Prime Minister. Any decisions taken by the Prime Minister on his own initiative lack the authority of the law or the Constitution.

81. The above views are buttressed by the provisions of Article 91(6) which provide that the Cabinet shall be "collectively responsible to the Senate and the National Assembly". It should be noted that it is not the Prime Minister by himself who is responsible to Parliament. It is the body known as the Cabinet, which is collectively responsible. It follows that to allow him to act on his own would enable him to escape from responsibility to Parliament for the consequences of his actions, which cannot conceivably be the intention of the constitution. The underlying substratum of any representative form of government is to link acceptance of responsibility with the exercise of power. This principle applies across the board. It applies with special force in relation to fiscal or budgetary matters. He cannot make fiscal changes on his own and nor can he engage in discretionary spending by himself. Furthermore, the Prime Minister is not constitutionally mandated to authorize expenditure on his own. In all cases the prior decision of the Cabinet is required since it is unambiguously that body alone which is the Federal Government. All discretionary spending without the prior approval of the Cabinet is contrary to law. We clarify that an ex post facto

approval by the Cabinet will not suffice since money once spent cannot be unspent.”

14. *A D Khawaja* was a decision by a learned Divisional Bench of this Court wherein the controversy included post facto approval accorded to a decision not taken by the provincial cabinet in application of the ratio of *Mustafa Impex*. It is considered relevant to record that *A D Khawaja* did not pertain to fiscal or budgetary matters and on the contrary pertained to an appointment in the executive. Munib Akhtar, J. held that the ratio of *Mustafa Impex* remained duly applicable in the circumstances and expounded that the provincial government can only mean the provincial cabinet and it is not permissible for a decision to be taken in the executive branch and then be endorsed or approved by the cabinet. The relevant observation in such regard is reproduced herein below:

“72. What we can however do is determine whether he exercise hitherto carried was contrary to law or not. In our view, it was contrary to law and cannot be sustained. This is so for more than one reason. Firstly, the decision at the Provincial end had to be taken by the Provincial Cabinet since the statutory power can be exercised by it alone, and must be so exercised by it, in light of the *Mustafa Impex case*. It does not suffice, and indeed is contrary to law, for the decision to be taken elsewhere in the executive branch and then to be simply endorsed or approved by the Cabinet. The power vests only in the Cabinet and must be exercised there and nowhere else.”

15. *A D Khawaja* resolutely maintained that, by reason of law enunciated by the honorable Supreme Court in *Mustafa Impex*, Provincial Government can only mean the Provincial Cabinet and that statutory powers cannot be exercised elsewhere in the executive branch, by any authority or body (including any minister of whatever rank), therefore it is only the cabinet itself that can act, and that too at a

duly convened meeting for which the agenda is properly circulated in advance.

16. Applying the ratio of the aforesaid pronouncements of the superior Courts to the present controversy it is manifest that the power to fix the minimum support price for sugarcane was vested in the Provincial Government, and by definition the same was required to mean the Provincial Cabinet. It is apparent that no decision in such regard was taken by the cabinet, or even the worthy Chief Minister, on or before 07.12.2018 when the Impugned Notification was issued. It is also apparent that even subsequent thereto the chronological sequence of events, highlighted herein, denote that the process culminated in a cabinet meeting on 07.01.2019 wherein post facto ratification was sought to be accorded to the constituents of the Impugned Notification, without any identification of the decision or the decision maker in regard thereof.

17. It was thus the considered opinion of this Court that the Impugned Notification and the Impugned Circular were issued otherwise than in accordance with law, hence, the same were set aside vide our short order dated 05.03.2019, content whereof is reproduced herein below:

“For the reasons to be recorded later the Notifications dated 07.12.2018 and 17.01.2019 are set aside keeping in view the dictum laid down by the hon’ble Supreme Court in the case of *Mustafa Impex, Karachi vs. Government of Pakistan & others* (PLD 2016 S.C. 808). The Government of Sindh is directed to issue fresh sugarcane price Notification for the crushing season 2018-19 within fifteen days’ time.

At this juncture, the counsel for the petitioners stated that from 17.01.2019 they are already paying not less than minimum price of Rs.182/- per 40 kg. to the growers which statement has been confirmed by the representatives of Sindh Abadgar Board and Sindh Growers Alliance. Till the issuance of fresh Notification by

the Government of Sindh for the crushing season 2018-19, the sugarcane growers shall continue to be paid minimum price of Rs.182 per 40 kg. keeping in view the joint statement of counsel for the petitioners. The petitions are disposed of accordingly.

Copy of this order may be transmitted to the learned Advocate General Sindh, Chief Minister Secretariat, Sindh and the Chief Secretary, Government of Sindh for compliance.

Office is directed to place copy of this order in petitions listed above.”

18. These petitions were disposed of vide the aforementioned short order and these are the reasons for the said short order.

J U D G E

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Karachi.

Dated 08.03.2019.

*Farooq PS/**