IN THE HIGH COURT OF SINDH AT KARACHI

Before: **Muhammad Ali Mazhar** and **Agha Faisal**, **JJ**.

C P D - 3552 of 2017
Master Motor Corporation (Pvt.) Limited
vs.
Federation of Pakistan & Others

C P D - 1264 of 2018
Master Motor Corporation (Pvt.) Limited
vs.
Federation of Pakistan & Others

For the Petitioner:	Barrister Abid Shahid Zuberi Barrister Ayan Mustafa Memon (in CP D-1264 of 2018) Barrister Ravi R. Pinjani (in CP D-3552 of 2017)
For the Respondent No. 1:	Sheikh Liaquat Hussain Assistant Attorney General (in both petitions)
For the Respondent No. 2:	Mr. Asim Ayaz Deputy General Manager Incharge (Policy) Engineering Development Board (in both petitions)
For the Respondent No. 3:	Mr. Mukesh Kumar G. Karara Advocate (in both petitions)
Dates of Hearing:	31.10.2018, 13.11.2018 & 23.11.2018.
Date of Announcement:	12.02.2019

JUDGMENT

Agha Faisal, **J**: The subject petitions filed by the common petitioner, being a company engaged in the assembling and manufacturing of motor vehicles, have assailed the conferment of *greenfield status* upon the respondent No.3 (“**FJW**”) herein, being a company incorporated with the objective of assembling / manufacturing motor vehicles, on the ground that the award of such status was not in consonance with the Automotive Development Policy 2016-21 (“**Auto Policy**”). Since similar questions of law and fact are agitated vide the subject connected petitions, hence, both the petitions shall be decided through this common judgment.

2. Barrister Abid Shahid Zuberi set forth the case of the petitioner (“**MMC**”), which arguments were also adopted by Barrister Ravi Pinjani, and argued that greenfield status could only be conferred upon assemblers who introduced a new brand into the market, hitherto alien to the public at large. It was sought to be demonstrated that the petitioner was earlier assembling and purveying motor vehicles, greenfield status in respect whereof had now been conferred upon FJW. It was thus contended that such a status is enjoined with significant fiscal benefits which places the beneficiary at an advantage to other competitors and the unmerited conferment thereupon upon FJW was thus required to be declared as unlawful. The arguments advanced on behalf of the petitioner in such regard are encapsulated and delineated herein below:

i. It was argued that MMC had been assembling *Forland* vehicles in Pakistan since the year 2002-2003. It was demonstrated from the record that the agreement empowering the petitioner to assemble such vehicles in Pakistan was valid up to the year 2015, however, MMC continued to sell the vehicles so manufactured up until the year 2017. It was argued that the petitioner had gone to significant lengths to introduce *Forland* vehicles in Pakistan and in such regard had invested heavily in the marketing and promotion thereof.

ii. Per learned counsel, MMC has also entered into agreement with the parent entity to assemble and purvey *Foton* vehicles in Pakistan. It was demonstrated from the record that the principals, with which the agreements to assemble *Forland* and *Foton* vehicles was entered into, were associated undertakings and further that *Forland* and *Foton* were different brand names for virtually synonymous vehicles. Learned counsel argued that while MMC's agreement in respect of *Forland* expired in 2015 it was still validly assembling and purveying *Foton* vehicles in Pakistan.

iii. Per learned counsel, the Auto Policy had designed the greenfield status to be confirmed upon new entrants into the market and such a concession was being misused and misapplied in the case of FJW. It was submitted that since *Forland* trucks were already prevalent in Pakistan and the public at large had been familiarized with the same through efforts of MMC then simply by termination of MMC's agreement to deal with the same and entering into such an agreement with a third party would not entitle the third party to the grant of greenfield status. It was also argued that conferment of greenfield status awarded significant fiscal advantages to the recipients which in turn had the effect of a diminishing the market price of their product while maximizing their profit. In such a scenario the competitive products would become unattractive on account of such fiscal advantage not being available to their assemblers. It was sought to be demonstrated that since the *Forland* and *Foton* vehicles were virtually similar therefore the availability of the *Forland* vehicles at a discount would prejudice the market share of *Foton* vehicles in Pakistan and the same would be to the manifest disadvantage of MMC.

iv. Learned counsel relied upon the cases reported as *Zainab Garments vs. Federation of Pakistan & Another* reported as *PLD 2010 Karachi 374*, *Jalal & Another vs. The Punjab Provincial Corporate Bank & Another* reported as 1999 YLR 2204, *Shaheen Cotton Mills, Lahore vs. Federation of Pakistan, Ministry of Commerce through Secretary* reported as *2011 PLD LHC 120*, *Tahir Humayun vs. High Court of Balochistan* reported as *PLD 2016 Quetta 56*, *Asif Fasihuddin Khan vs. Government of Pakistan* reported as *2014 SCMR 676*, *Messers MIA Corporation vs. Pakistan PWD & Ors.* Reported as *PLD 2017 Islamabad 29*, *Shamim Khan vs. Pakistan Defence Housing Authority* reported as *1999 YLR 410*, *Saad Muhammad Shaheen Al-Soofi & 8 Ors. vs. Principal and Chairman, Academic Council, Sindh Medical, Karachi and Another* reported as 1982 CLC 805, *Messrs Phoenix Mills & Ors. vs. City District Government, Karachi* reported as *PLD 2003 Karachi 83*, *Dildar Ali vs. D.C.O. Chiniot & Ors.* Reported as *2015 CLC 1141* and *Shaukat Ali & Ors. vs. Government of Pakistan, Ministry of Railway & Ors.* Reported as *PLD 1997 SC 342* in order, inter alia, to argue that any provision of policy is to be interpreted while keeping in view the spirit of said legislation; that review of policy matters of the Government by the High Courts was not barred in absolute; that any policy was required to have uniform application; that the petitioner could not be similarly nonsuited on the unsubstantiated allegations that disputed questions of fact was involved or that an alternative remedy was available; and that Article 18 of the Constitution conferred the inalienable right to trade or conduct business and such a right could not be abridged due to fanciful and arbitrary ideas and presumptions of state functionaries.

3. Mr. Asim Ayaz, Deputy General Manager and Incharge Auto Policy of the Engineering Development Board of Pakistan ("**EDB**"), respondent No.2 herein, entered an appearance on behalf of EDB and argued that the conferment of greenfield status upon the FGW was in accordance with the Auto Policy. It was argued that the Auto Policy was finalized after intensive consultation with all stakeholders; being the automotive industry including original equipment manufacturers, auto part manufacturers, consumers, part importers, new investors and the relevant government organizations. It was argued that greenfield status under the Auto Policy could be conferred in respect of a make not already being assembled / manufactured in Pakistan and since *Forland* was not being assembled / manufactured in Pakistan demonstrably since 2015, hence, the conferment of greenfield status in respect thereof upon was in due conformity with the Auto Policy. In order to illustrate the uniform applicability / interpretation of the Auto Policy, it was stated that Kia Lucky Motors Pakistan Limited and Hyundai Nishat Motors (Private) Limited were also granted greenfield status to assemble Kia and Hyundai in Pakistan notwithstanding the fact that the vehicles of the respective brands were earlier assembled / marketed in Pakistan by the Tawakkal Group and Dewan Group respectively. It was highlighted that Changan brand vehicles were earlier being assembled and marketed in Pakistan by a different entity and that the said vehicles were introduced and proliferated all over Pakistan. However, subsequent to the acquisition of the right to assemble and market the said vehicles by

MMC, greenfield status has also been accorded thereto in such regard. In conclusion it was submitted that the present petition was misconceived and hence merited dismissal.

4. Mr. Mukesh Kumar Karara, Advocate presented the case for FJW and submitted that the conferment of greenfield status thereupon was in due compliance with the Auto Policy. It was demonstrated that the petitioner's agreement to assemble *Forland* vehicles expired back in the year 2015 and that no such vehicles has been assembled by MMC thereafter. The learned counsel controverted the veracity of certain documentation put forth by the petitioners and submitted that the sole contractual right to assemble and purvey *Forland* vehicles in Pakistan is with FJW. The Court's attention was also drawn to letter issued by the Embassy of China Economic and Commercial Counsellors Office dated 05.07.2017, to augment the submission that FJW was the only entity authorized in Pakistan to assemble and purvey *Forland* vehicles. Learned counsel submitted that *Forland* and *Foton* were distinct brands and that no impediment could be presumed if the rights to assemble and market the respective brands was assigned to separate entities. Per learned counsel, the present petition was a mala fide attempt by MMC to stifle competition in the market and to unjustly enrich itself at the cost of FJW and the public at large. Learned counsel relied upon the ratio of *Interglobe Commerce Pakistan Pvt. Ltd. vs. Government of Pakistan and Others* reported as), *Anjuman Fruit Arhtian and Others vs. Deputy Commissioner, Faisalabad and Others* reported as *2011 SCMR 279*, *Hassan Bux vs. Board of Intermediate and Secondary Education, Hyderabad through chairman and Others* reported as 2017 PLC (C.S.) 350, *Ghulam Fatima and Another vs. Border Area Allotment Committee and Others* reported as *1982 CLC 2217*, *Zeeshan Bhatti vs. Maqbool*

Bhatti and Another reported as *PLD 2001 SC 415*, *Syed Ronaq Ali vs. Chief Settlement Commissioner* reported as *PLD 1973 SC 236*, *The Chief Settlement Commissioner vs. Raja Mohammad Fazil Khan & Others* reported as *PLD 1975 SC 331*, *Landale & Morgan Pakistan Ltd. vs. The Chairman Jute Board Dacca and Another* reported as *1970 SCMR 853*, *Mohammad Abdul Salaam vs. Chairman East Pakistan Election Authority and Others* reported as *PLD 1965 Dacca 231*, *Najeebullah and Others vs. Director NADRA and Others* reported as PLD 2016 Balochistan 1 and *Pakcom Ltd. vs. Federation of Pakistan and Others* reported as *PLD 2011 SC 44* to bulwark his argument that the present petitions are not maintainable as they pertain to factual controversies and prayed that the petitions merited dismissal forthwith.

5. We have given careful consideration to the arguments advanced on behalf of the respective parties and have also perused the documentation arrayed before us. At the very outset, it is imperative to observe that it is not the Auto Policy itself which has been challenged in the present proceedings but the grant of greenfield status to a specific entity in pursuance thereof. In our view, such a conferment could only be determined to be unlawful in the present facts and circumstances if such conferment was demonstrably arbitrary and / or discriminatory.

6. It may be pertinent to initiate this deliberation by referring to the relevant constituents of the Auto Policy wherein conferment of greenfield status has been envisaged:

> "A new manufacturer under Automotive Development Policy (2016-2021), establishing maiden assembly facility will invariably need separate treatment and greater incentives in the early years to enable it to introduce its brand, develop a market niche and share, create a distribution and after sales service networks, and develop a part-manufacturer base.

a. Investment Categories

ADP (2016-21) envisages two categories of New Investment with different incentives;

4.1.1 Category-A: *greenfield* Investment is defined as the installation of new and independent automotive assembly and manufacturing facilities by an investor for the production of vehicles of a make not already being assembled/manufactured in Pakistan.

[Note: “Make” is defined as any vehicle of whatever variant produced by the same manufacturer],

7. The incentives conferred upon the recipients of greenfield status are delineated as follows in Auto Policy:

> “Category-A Investor shall be entitled to the following incentives:
>
> a) Duty-free import of plant and machinery for setting up the assembly and/or manufacturing facility on a one time basis;
>
> b) Import of 100 vehicle of the same variant in CBU form at 50 percent of the prevailing duty for test marketing after ground breaking of the project;
>
> c) Concessional rate of custom duty @ 10 percent on non-localized parts and @ 25 percent on localized parts for a period of five years for the manufacturing of Cars and LCVs;
>
> d) Import of all parts (both localized and non-localized) at prevailing customs duty applicable to non-localized parts for manufacturing of trucks, buses and prime movers for a period of three year, and
>
> e) The existing policy for Motorcycle industry as approved by the government and notified by FBR vide SRO 939(I)/2013 and SRO 940(I)/2013 shall continue.”

8. The eligibility criteria is also stipulated in the Auto Policy in the following verbiage:

> “The Board of Investment shall be the single point of contact for the investor with the government. Any new investor shall be required to submit a detailed business plan and relevant documents for manufacturing of vehicles to the Board of Investment. The Board of Investment shall have the Business Plan assessed by the Engineering Development Board, which shall verify the investor’s in-house assembly/manufacturing facilities for the

> manufacture of road worthy vehicles. The Engineering Development Board shall determine eligibility of the applicant under he defined criteria to be declared as Category A or Category B Investor. The Ministry of Industries and Production, on recommendation of the Engineering Development Board, shall approve a new investor under the relevant category. The Auto Industry Development Committee (AIDC) and Engineering Development Board shall review results of the new investor policy once every two years and shall recommend modifications, if any."

9. It is noted that the Auto Policy envisages conferment of greenfield status upon installation of new and independent assembling and manufacturing facilities by investors for the production of vehicle of make not assembled / manufactured in Pakistan. While the learned counsel for the petitioner did not controvert the cessation of assembly in respect of *Forland* in 2015, it was argued that the said brand continued to be sold till 2017. There is a distinct difference between assembly / manufacture of a vehicle and sale of vehicles already assembled / manufactured previously and the two cannot be equated. In the present facts and circumstances, it is an admitted position that the *Forland* vehicles have not been assembled / manufactured in Pakistan since 2015, therefore, conferment of greenfield status upon a subsequent entity, installing new and independent automotive assembling / manufacturing facility, could not be deprecated on that ground.

10. We are also not convinced that sale of *Forland* vehicles in the market would adversely effect MMC, on the premise that *Forland* and *Foton* are synonymous brand names for the same vehicle. Even if the parent entities of *Forland* and *Foton* were associated undertakings the two brand names are mutually exclusive. Many automotive companies have different brand names under the same umbrella; General Motors manufactures and markets Cadillac, Buick, Chevrolet and GMC; Ford

makes and purveys vehicles branded as Lincoln, Mercury and Ford and in the past has owned Volvo, Land Rover and Jaguar; the Volkswagen Group currents enjoys the rights to Audi, Bentley, Bugatti, Lamborghini, Porsche, Seat, Skoda and Volkswagen. It cannot be said that grant of rights with respect to different brands to different entities would have any adverse effect *inter se*. Notwithstanding the foregoing, it is admitted that until 2015 MMC was assembling and marketing both *Forland* and *Foton* vehicles and if the two were synonymous brands for an identical vehicle then there would have been little benefit for MMC to assemble and purvey both.

11. It is within our contemplation that *Forland* vehicles were being marketed in the Pakistan in past and that the said brand itself is not novel to the market. However, it is also noted that the brand of Kia and Hyundai is also not new to the market as the same was being assembled in Pakistan previously. However, subsequent to the termination of such activity and with a view to reintroduce the said brand in the market greenfield status has been conferred upon the new entrants, who have sought to reintroduce the said brand to Pakistan. It is also within our knowledge that MMC itself has been conferred with greenfield status in order to assemble and purvey Changan vehicles, which were also previously being assembled and purveyed in Pakistan by another entity. This narrative, not controverted by the learned counsel for the petitioner, demonstrates that the conferment of greenfield status has been done in a uniform manner and the same cannot be termed to be arbitrary and/or discriminatory.

12. In view of the reasoning and rational contained herein we are of the considered opinion that the present petitions are misconceived,

hence, the same, along with pending applications, are hereby dismissed with no orders as to costs.

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