IN THE HIGH COURT OF SINDH AT KARACHI

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

CP D 7097 of 2018	:	Sindh Petroleum & CNG Dealer Association & Others vs. Federation of Pakistan & Others
CP D 7480 of 2018	:	Dr. Parshotam & Others vs. Federation of Pakistan & Others
CP D 7950 of 2018	:	PharmEvo Private Limited & Others vs. Federation of Pakistan & Others
CP D 8093 of 2018	:	Hilton Pharma (Private) Limited vs. Federation of Pakistan & Others
CP D 8127 of 2018	:	ATM Industries & Others vs. Federation of Pakistan & Others
CP D 8132 of 2018	:	Pakistan Services Limited & Others vs. Federation of Pakistan & Others
CP D 8137 of 2018	:	Stallion Textile Limited & Others vs. Federation of Pakistan & Others
CP D 8138 of 2018	:	Ali Danyal Industries (Private) Limited & Others vs. Federation of Pakistan & Others
CP D 8229 of 2018	:	Indus Motor Co. Limited vs. Federation of Pakistan & Others
CP D 8740 of 2018	:	Hotel Galaxy (Private) Limited & Another vs. Federation of Pakistan & Others
CP D 1455 of 2019	:	Kamil Packaging (Private) Limited & Another vs. Federation of Pakistan & Others
CP D 1557 of 2019	:	International Steel Limited & Others vs. Federation of Pakistan & Others
HCA 382 of 2018	:	Sui Southern Gas Company Limited vs. Federation of Pakistan & Others
HCA 398 of 2018	:	Sui Southern Gas Company Limited vs. Federation of Pakistan & Others

For the Petitioners	:	Mr. Makhdoom Ali Khan, Advocate Mr. Hussain Ali Almani, Advocate (in CP D 8093 and 8229 of 2018) Mr. Mohsin Shahwani, Advocate (in CP D 7097 of 2018) Mr. Ameen Bandukda, Advocate (in CP D 7950 of 2018 and 1557 of 2019) Ms. Naveen Merchant, Advocate (in CP D 8740 of 2018) Mr. Abdul Rahman, Advocate Mr. Ahmed Madni, Advocate (in CP D 7480 of 2018) Mr. Naeem Suleman, Advocate Mr. Arshad Hussain, Advocate (in CP D 8127 of 2018 and 1455 of 2019) Mr. Nahl Chamdia, Advocate (in CP D 8093 and 8229 of 2018) Mr.Junaid Mukhtar Siddiqui, Advocate (in CP D 8132 of 2018) Syed Mohsin Ali, Advocate (in CP D 8137 and 8138 of 2018)
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JUDGMENT

Agha Faisal, **J**: The crux of the determination herein is the challenge to the Notification dated 4th October, 2018 ("Impugned Notification") issued by the Oil and Gas Regulatory Authority ("OGRA"), whereby *inter alia* the sale price for supply of natural gas sold to various categories of retail consumers by the Sui Southern Gas Company Limited ("SSGC") was determined. The matters to be determined herein comprise of Constitutional petitions challenging the validity of the Impugned Notification and High Court Appeals, whereby SSGC has challenged interim orders rendered by a learned Single Judge of this Court in suits challenging the Impugned Notification. The thread common to all these matters is the price of natural gas notified vide the Impugned Notification, hence, these matters were heard conjunctively and shall be decided by this common judgment.

2. It is appropriate to record at this juncture that the Impugned Notification was earlier challenged before the honorable Peshawar High Court and the honorable Lahore High Court respectively, albeit in reference to the tariff notified in respect of Sui Northern Gas Pipelines Limited ("SNGPL"), upon grounds similar to those invoked before us.

The honorable Peshawar High Court dismissed the challenge, in *Lucky Cement Limited vs. Federation of Pakistan & Others* (*Writ Petition 5571-P of 2018*) and connected petitions, and held that the governing law, being the Oil and Gas Regulatory Authority Ordinance, 2002 ("OGRA Ordinance") and the Natural Gas Tariff Rules ("Tariff Rules"), contained provisions for adequate and efficacious remedies sufficient for the redressal of the grievance of the petitioners, therefore, the said petitions were deemed as not being maintainable.

The honorable Lahore High Court, in *Khalid Mehmood vs. Federation of Pakistan & Others* (*Writ Petition 9466 of 2019*), determined that OGRA had sufficient authority to determine the price of natural gas and that the pricing structure was intended to benefit the consumers at large, hence, the petition was deemed to be devoid of merit and was dismissed in limine.

It is also relevant to record that shortly after conclusion of the hearings herein OGRA revised the natural gas tariff structure on two successive occasions, vide subsequent notifications, and as a consequence thereof the Impugned Notification no longer holds the field.

3. Learned counsel assailed the Impugned Notification on behalf of the respective petitioners and such efforts were supplemented by the arguments of the respondents in the High Court Appeals, subject matter herein. It is considered expedient to distill the essence of the arguments articulated before us and delineate the same herein below:

i. OGRA was not properly constituted when the Impugned Notification was issued.

ii. It was established by an earlier Division Bench of this Court, in the case of *Sui Southern Gas Company Limited vs. Federation of Pakistan & Others* reported as *PLD 2017 Sindh 733* ("*SSGC vs. Pakistan*"), that non adherence to the timelines provided in the OGRA Ordinance / Tariff Rules would render the tariff determination exercise a nullity and that the said judgment is binding upon this Court.

iii. OGRA notified the same price for consumers of SSGC as that for SNGPL, despite the factoring determinants having been much lower in the case of SSGC, hence, providing a windfall for SSGC.

iv. The categorization of retail consumers, and the tariffs determined to be applicable thereto, was discriminatory.

4. The Additional Attorney General and the respective learned counsel for SSGC and OGRA sought to demonstrate from the record that apprehensions of the petitioners were unfounded; OGRA was in fact properly constituted at all material times; *SSGC vs. Pakistan* was distinguishable in the present controversy; the pricing formula left SSGC in a deficit so there was no question of a profit let alone a windfall; and that the categorization of consumers was undertaken in the public interest as a policy consideration.

5. We have heard the respective learned counsel and have also examined the documentation to which our scrutiny was solicited. While the findings of the honorable Peshawar High Court, determining that in the presence of a remedial forum, prescribed in the OGRA Ordinance and the Tariff Rules, the challenge to the Impugned Notification in the writ jurisdiction was unmerited, are borne in mind, and it was also noted that the respective petitioners made no attempt to controvert or distinguish the said pronouncement, however, we consider it beneficial to address the issues raised before us, in seriatim, in order to determine this controversy.

6. With regard to the first objection taken on behalf of the petitioners, it was submitted by their legal counsel that OGRA consists of a chairman and three additional members and that at the relevant point in time there was a vacancy, being the member gas. While conceding that the quorum for meetings of OGRA is the chairman and two other members, it was submitted that the said prescription was meant to protect the day to day decisions of OGRA and that determination of gas price was not a day to day decision.

Learned counsel for SSGC had admitted that the determination of gas price was not a day to day decision, however, had controverted the argument that the quorum requirement prescribed in the OGRA Ordinance was merely for such matters. Our attention was drawn to Section 4(4) of the OGRA Ordinance which protects the actions of OGRA despite there being a vacancy therein.

7. It is considered prudent to reproduce the relevant provisions of the OGRA Ordinance prior to entering into a deliberation thereupon:

> “3. Establishment of Authority : - (1) The Federal Government hereby establishes a regulatory authority, which shall be known as the Oil and Gas Regulatory Authority...
>
> (3) The Authority shall consist of a Chairman and three additional Members out of whom one shall be designated as Member Gas, one Member as Member Oil and one Member as Member Finance…
>
> 4. Meetings of the Authority : - (1) The Chairman and two other Members shall constitute a quorum for a meeting of the Authority requiring a decision by the Authority…
>
> (4) No act, proceeding or decision of the Authority shall be invalid by reason only of the existence of a vacancy in, or defect in the constitution of the Authority…”

8. It is prima facie apparent from a plain reading of the relevant statutory provisions that the quorum requirements are unqualified. The provisions under scrutiny appear to be grammatically capable of the said meaning only and it is a natural consequence to find that the legal meaning of the provisions corresponds to their grammatical meaning. The learned counsel for the petitioners have been unable to point out any constituent of the aforementioned provisions, or that of the main enactment itself, to suggest that anything points away from the plain meaning ascribed thereto. Therefore, it is our considered view that the existence of a vacancy in OGRA did not vitiate the process of determination of gas prices, as denoted vide the Impugned Notification.

9. Prior to addressing the second issue placed before us it is imperative to underscore that the petitioners have themselves taken a position that determination of gas price was not a day to day issue. In addition to the arguments led before us, this stance was also scribed in the written arguments filed on behalf of the petitioners in CP D 8093 and 8229 of 2018. While this argument did not augment the case of the petitioners in the issue dilated upon supra, it will have a significant impact on the question to be determined next.

10. It had been argued on behalf of the petitioners that an earlier Division Bench of this Court, while seized of a High Court Appeal in *SSGC vs. Pakistan*, had upheld the judgment of a learned Single Judge setting aside the notification fixing gas prices for the year 2014 – 2015, *inter alia*, on the ground that the timelines prescribed for notification of the gas prices were not adhered to and since such timelines constitute mandatory provisions of the law, and not directory, hence, any determination in transgression of the said timelines is void. Upon reading the aforesaid judgment it is observed that the decision therein was predicated upon the 2014 – 2015 notification having failed at the benchmark set out by the august Supreme Court, in the case of *Mustafa Impex Karachi vs. Government of Pakistan & Others* reported as *PLD 2016 Supreme Court 808* ("*Mustafa Impex*"), as it was found that the advice of the Federal Cabinet was absent from proceedings culminating in the aforesaid determination. In the present facts and circumstances the decision of the Federal Cabinet, prior in time to the Impugned Notification, had been placed before us and the veracity thereof was not controverted by any of

the counsel. It is thus our view that the judgment in *SSGC vs. Pakistan* is distinguishable in the present facts and circumstances.

11. It is also to be considered that *SSGC vs. Pakistan* had maintained a decision of a learned Single Judge of this Court, in *Suit 1978 of 2015* being *Pakistan Beverage (Private) Limited vs. Federation of Pakistan & Others* and connected matters ("*Pak Beverage*"), albeit upon the premise that the gas price notification then under scrutiny did not qualify upon the yardstick of *Mustafa Impex*. It is pertinent to observe that that the judgment in *Pak Beverage* is also distinguishable based upon the import of Section 230 of the Elections Act 2017, promulgated subsequent in time, since the purported delay in issuance of the Impugned Notification or the alleged non-adherence to the timelines is said to have occurred during the period that a caretaker government was in place, i.e. after the expiration of the tenure of an elected government and prior to the assumption of office of the subsequent elected government.

The learned counsel for the petitioners had argued that the process leading to the determination of gas prices is governed by a schedule and that the issuance of the Impugned Notification did not adhere to the said timelines. It was argued that the timeline in respect of the process of filings was not followed, however, upon production of relevant waivers / extensions, by the learned counsel for SSGC, permissible under the law the angle of challenge was narrowed to the assertion that the forty day period, given to the Federal Government to advise OGRA regarding the minimum charges / sale price of each category of retail consumer, was exceeded. We will endeavor to address the issue of whether the prescription of time is mandatory or otherwise further down, however, it is imperative to first consider the implication of Section 230 of the Elections Act 2017.

12. Section 230 of the Elections Act 2017 reads as follows:

> "230. Functions of caretaker Government. (1) A caretaker Government shall-
> (a) perform its functions to attend to day-to-day matters which are necessary to run the affairs of the Government;
> (b) assist the Commission to hold elections in accordance with law;
> (c) restrict itself to activities that are of routine, non-controversial and urgent, in the public interest and reversible by the future Government elected after the elections; and

(d) be impartial to every person and political party.

(2) The caretaker Government shall not –
(a) take major policy decisions except on urgent matters;
(b) take any decision or make a policy that may have effect or pre-empt the exercise of authority by the future elected Government; …"

(Underline added for emphasis.)

A precursor to the restraints placed upon a caretaker government vide the Elections Act 2017 was the judgment of the honorable Supreme Court in the case of *Khawaja Muhammad Asif vs. Federation of Pakistan & Others* reported as *2013 SCMR 1205* ("*Khawaja Asif Case*") wherein it was held that the caretaker cabinet / prime minister, appointed under Article 224(1)(2) or 224A as the case may be, is empowered to carry out only day to day affairs of the State and that policy decisions should be left to be made by the incoming government in view of the provisions of Constitution that the affairs of the State are to be run by the chosen representatives of the people.

13. As emphasized supra, the learned counsel for the petitioners had themselves argued that determination of the prices of natural gas was not a day to day issue. Without entering into an independent assessment of whether determination of gas prices falls within the domain of day to day business or otherwise, going by the position taken by the petitioners in such regard any delay occasioned by the Federal Government in rendering its advice with regards to gas pricing would be exceptionable as a caretaker government would be precluded from taking such actions.

Since the issue of an intervening caretaker government was not before the learned Single Judge while deciding *Pak Beverage*, therefore, the import of the *Khawaja Asif Case* coupled with Section 230 of the Election Act 2017 would be sufficient cause to consider *Pak Beverage* distinguishable in the present facts and circumstances.

14. While we have found that the authority relied upon by the petitioners is distinguishable in the present facts and circumstances, however, we consider it appropriate to independently determine whether the non-conformity with the timeline prescribed vide the OGRA Ordinance / Tariff Rules for determination of gas prices would be fatal to such a determination. We remain cognizant that resolution of questions of fact

are discouraged in the writ jurisdiction, therefore, we shall circumscribe the determination herein upon admitted facts.

15. There are two aspects to the timeline prescribed culminating in the notification of gas prices. The first aspect is the process of application by the licensee itself (being SSGC in the present case). It was contended that the schedule for such an application process, prescribed inter alia vide Rule 4 of the Tariff Rules, was not adhered to by the SSGC. It remains an admitted position that the filing supposed to have been done by SSGC by 1st December 2017 was not undertaken until 28th February 2018. Learned counsel for the petitioners contended that such a delay was fatal to the determination under scrutiny. Learned counsel for the OGRA drew the Court's attention to Rule 22 of the Tariff Rules which prescribes that the authority (OGRA) may extend any time limit prescribed by the said rules or specified by the authority itself. Our surveillance was also drawn to SSGC's letter dated 30th January 2018 seeking extension of time up until 28th February 2018 and OGRA's letter dated 15th February 2018 acceding to the said request and granting the desired extension of time and it was thus demonstrated that the filings of the licensee / petitioner (SSGC) were within the relaxation of time granted thereto and duly permissible under the Tariff Rules.

Learned counsel for the petitioners did not press this aspect of the delay further and preferred to concentrate their challenge to the second aspect of the delay, being that since the relevant advice of the Federal Government was not received within the forty day period scribed in such regard, vide Section 8(3) of the OGRA Ordinance read with Rules 18(2) of the Tariff Rules, and the gas price was not notified within three days hence, as prescribed by Rule 18(3) of the Tariff Rules, therefore, any subsequent determination in such regard, being the Impugned Notification, was void.

16. Prior to deliberating upon this issue it may be prudent to detail the relevant facts; namely that the pertinent OGRA determination was dated 21st June 2018; the advice of the Federal Government was required to be rendered within forty days; the caretaker federal cabinet did not render the advice sought and instead thereof, vide its letter dated 27th July 2018, the Ministry of Petroleum advised OGRA that since the revision / increase in gas prices was a major policy decision, therefore, the same shall be

taken by the elected government upon its assumption of office; the new prime minister was notified on 18th August 2018 and the new cabinet rendered the pertinent advice on 27th September 2018, where after, the Impugned Notification was issued.

It is also pertinent to record at this juncture that, pursuant to Section 8(4) of the OGRA Ordinance, in the event that the Federal Government fails to render the relevant advice within the stipulated time period, OGRA itself is empowered to notify the price determined by itself in respect of natural gas, provided that the rates determined are higher than the most recently notified sale prices.

It is borne from the record that the prescribed timeline was not adhered to by the Federal Government and further that no notification was issued by OGRA on its own accord. It is thus to be determined whether such timelines are mandatory in nature and whether non-compliance of the same would be fatal to a determination of gas prices.

17. It may be prudent to highlight the precepts of gas price determination in order to address this controversy. Section 6(2)(s) of the OGRA Ordinance empowers OGRA to prescribe, review, approve and regulate tariffs for regulated activities pertaining to natural gas and operations of the licensees for natural gas. Sections 7 and 21 of the OGRA Ordinance, read with Rule 21 of the Tariff Rules, provide the criteria for determination, approval, modification and revision of tariffs.

A licensee applies for the tariff based upon the estimated revenue requirements after incorporating the actual changes in well head prices. The aggregate of the cost of gas sold, cost of services and the development surcharge, if any, constitutes the consumer tariff. A few months down the road a new petition is filed, termed the review of estimated requirements, based *inter alia* upon actualization of well head prices. At the end of the year a final petition for total revenue requirement is preferred. The authority determines the total revenue requirement so as to ensure that the licensee achieves the rate of return provided in its license. Any shortfall in revenue is aggregated to reflect in a subsequent application. Per learned counsel for SSGC, a licensee is only entitled to the quantum of return provided in its license and excess, if any, is

repatriable to the Federal Government in the form of development surcharge, pursuant to the Natural Gas (Development Surcharge) Ordinance 1967 (“Surcharge Ordinance”).

It is thus demonstrated that while the return of a licensee remains fixed, the revision in prices is a corollary of the variation in the cost of gas and services ancillary thereto. If a valid determination is held up on any account then the necessary consequence is a snow-balled increase in the next round, which would also take into account the cost of there not having been a timely increase. Prior to the determination under scrutiny, being for the year 2018-19, the previous determination took place in 2016 and was set aside, therefore, for all intents and purposes the revision envisaged vide the Impugned Notification took into account the rising costs since 2013. It was not the case of the petitioners that the rise in tariff was incongruent with the rise of the underlying costs, however, the basic argument was that since the timelines had not been adhered to, therefore, the determination was void.

18. The issue of the timeline has to be considered in its present perspective. The delay occasioned in presentation of the petition / application by SSGC stood condoned by the relevant authority, therefore, the issue remains that the Federal Government did not render its advice in time and that OGRA did not unilaterally notify the prices despite being empowered to do so. It would thus be fair to observe that any delay attributable to SSGC stood condoned, however, delay upon which SSGC had no control was required to be treated as fatal to the determination of gas prices.

19. Learned counsel for SSGC had submitted that where a provision of a statute related to the performance of a public duty and where there was inconvenience or injustice to persons, who have no control over those entrusted with the duty, without promoting the essential aims and objects of the maker thereof, such prescriptions were generally considered to be directory (reliance placed upon *Reference 01 of 1988 PLD 1989 SC 75*). Contrarily, learned counsel for the petitioners had sought to distinguish the said proposition / authority on the premise that the same was applicable only in the context of elections and that the said principle did not have a general application.

20. In the present facts and circumstances it is apparent that SSGC had no control over the actions of the Federal Government, caretaker or otherwise. It is also apparent that it was never the case of failure of the Federal Government to advise; as the first advice of the Federal Government (caretaker) was to hold prices pending a decision by the incoming elected government and the same was followed by the advice (elected Government) to notify prices.

There is no cavil to the fact that fixation of gas prices is a public duty and it is also apparent that any failure or delay in the performance of this duty causes inconvenience / injustice to persons (licensee / consumers) who have no control over those (Govt. / OGRA) entrusted with the duty. Even if a price determination is delayed the licensee is at liberty to account for the shortfall and any costs associated herewith in the next assessment. The detriment to the consumer will be that instead of an increase being staggered, over the period that it was occasioned, the entire impact is borne at one go when the compounded cost is taken into account. Therefore, in the case of increasing prices any delay or denial of an increase in a year shall compound the quantum in the following year, which is prima facie undesirable from a consumer point of view.

21. It may be illustrative to consider the analysis delineated supra in the present perspective. The learned counsel for the petitioners argued that SSGC had initially applied for a much lower increase in price then provisionally determined in respect thereof eventually by OGRA. On the other hand learned counsel for SSGC / OGRA demonstrated from the record that the period under scrutiny saw the sharpest devaluation of currency in history and *inter alia* it was for this reason that the provisional determination was made. Per learned counsel, OGRA was required to consider the increase in underlying prices per Rule 17 of the Tariff Rules, even if the same had not been pleaded there before. The rationale is that a determination is required to reflect the prevailing ground reality as much as possible.

However, the increase may also be considered empirically. Per OGRA determination the aggregated return to SSGC was reported to have been computed at Rs. 589.09 / MMBTU. Per the Impugned

Notification, the amount allowed to SSGC was Rs. 554.63 / MMBTU, thus, it is apparent that despite the incremental tariff there remained a shortfall of Rs. 34.46 / MMBTU, translating in to a loss of over 12.33 billion. These figures, provided by the learned counsel for SSGC and not controverted by the learned counsel for the petitioners, are also reinforced by the decision taken by OGRA, dated 27th February 2019, in the matter of SSGC's review petition for estimated revenue requirements for the said year wherein the average prescribed price sought, after taking into account the accumulated shortfall, was Rs. 623.86 / MMBTU. It is thus borne from the uncontroverted record that the tariff allowed to SSGC vide the Impugned Notification was below the required threshold.

22. It is in this context that we must perceive the implication of non-adherence to the timeline prescribed by the Tariff Rules. Compliance with the prescribed timeline would have meant that the incremental rates would have come into effect from 01st July 2018. The delay in issuance of the notification also delayed the implementation of the new prices, therefore, the consumers benefitted from the lower tariffs from almost three months than had the notification been issued as per timeline. It would thus appear that the end user / consumer has only benefitted from the delay in issuance of a price revision notification.

The licensee on the other hand has suffered an additional carrying cost, in addition to the shortfall, which it must bridge from its own resources until the next price determination. The delay occasioned by the Govt. or OGRA cannot be attributed to the licensee and the issuance of the Impugned Notification, albeit late, has the effect of mitigating the delay and consequently also decreasing the burden to be passed on to the consumers.

23. In order to determine the effect of the timelines prescribed it is imperative to consider Rule 21 of the Tariff Rules, which stipulates that no proceedings shall be invalid by reason of any defect or irregularity unless the authority, on an application taken by any party, declares that substantial injustice has been caused by such defect or irregularity. It would thus appear that any infringement of the timelines is protected by the said rules themselves.

The Tariff Rules expressly require a party to challenge any irregularity or defect perceived in any proceedings, before the authority, and it is then to be determined whether such an infraction constitutes substantial injustice. To the best of our knowledge the parties herein have not challenged the non-adherence to the timelines before the authority and even otherwise have failed to substantiate how the said non-compliance could be construed as substantial injustice.

24. It had been argued before us that since the OGRA Ordinance provided for a consequence in the event of failure of the Federal Government to send timely advice, therefore, the said provision was mandatory instead of directory. Prior to addressing this argument it is considered appropriate to deliberate whether there was in fact a failure of the Federal Government to advise.

25. The term failure was defined by the learned counsel for SSGC as denoting an inexcusable neglect or omission, reliance was placed upon *RCD Ball Bearing Limited vs. SESSI* reported as *PLD 1991 Supreme Court 308* in such regard. It was argued that there was no neglect or omission on the part of the Federal Government and on the contrary OGRA was advised to maintain prices until the decision was taken by the incoming elected government and the learned counsel for the petitioners have been unable to controvert this argument. However, even if we are to consider the delay to be exceptionable, in view of *Khawaja Asif* and the Elections Act 2017, the question that remains to be addressed is whether the prescribed timeline is mandatory or otherwise.

26. It has already been observed that the Tariff Rules specifically contain a provision for saving any proceedings notwithstanding any defect or irregularity therein. It is also noted that the ratio of expounded by the august Supreme Court in *PLD 1989 SC 75* stipulates that where a provision of a statute relates to the performance of a public duty, and where the inconvenience or injustice is caused to persons, who have no control over those entrusted with the duty, without promoting the essential aims and objects of the maker thereof, such prescriptions were generally considered to be directory. So now the only argument of the petitioners, in regard hereof, that remains to be considered is whether the prescription

is mandatory on account of the word "*shall*" having been employed to denote the consequence for failure of the Federal Government to advise.

The necessary consequence of this interpretation would be that if the Federal Government failed to advise within time and the authority failed to exercise its authority to notify its own determination then no rate revision would be possible, pending the subsequent evaluation cycle, regardless of any escalation in the cost components.

27. It is gleaned from *Statutory Interpretation by Eskeridge, Frickey & Garrett American Casebook Series published by West* that when a statute use the mandatory language ("shall" rather than "may"), courts often interpret the statute to exclude the discretion to take account of equitable or policy factors, however, ordinary usage does often considers the two terms interchangeable, depending upon the circumstances.

Bennion on Statutory Interpretation Sixth Edition refers to a majority House of Lords decision, *R v Soneji [2005] UKHL 49 [2005] All ER 321*, and commentates that the distinction, and its many artificial requirements, had outlived its usefulness and instead the emphasis ought to be on the consequences of non-compliance and posing the question whether parliament can fairly be taken to have intended total invalidity. A recent pronouncement of the august Supreme Court, in *The State vs. Imam Buksh* reported as *2018 SCMR 2039*, echoed a similar approach and *Mansoor Ali Shah, J* observed as follows:

> "To distinguish where the directions of the legislature are imperative and where they are directory, the real question is whether a thing has been ordered by the legislature to be done and what is the consequence, if it is not done. Some rules are vital and go to the root of the matter, they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance. The duty of the court is to try to unravel the real intention of the legislature. This exercise entails carefully attending to the scheme of the Act and then highlighting the provisions that actually embody the real purpose and object of the Act. A provision in a statute is mandatory if the omission to follow it renders the proceedings to which it relates illegal and void, while a provision is directory if its observance is not necessary to the validity of the proceedings. Thus, some parts of a statute may be mandatory whilst others may be directory. It can even be the case that a certain portion of a provision, obligating something to be done, is mandatory in nature whilst another part of the same provision, is directory, owing to the guiding legislative intent behind it. Even parts of a single provision or rule may be mandatory or directory. "In each case one must look to the subject matter and consider the importance of the provision disregarded and the relation of that provision to the general object intended to be secured." Crawford opined that "as a general rule, [those provisions that] relate to the essence of the thing to be performed or to matters of substance, are mandatory, and those which do not relate to the essence and whose compliance is merely of convenience rather than of substance, are directory." In another context, whether a statute or rule be termed mandatory or directory would depend upon larger public interest, nicely balanced with the precious right of the common man. According to Maxwell, "Where the

> prescription of statute relates to the performance of a public duty and where the invalidation of acts done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty without promoting the essential aims of the legislature, such prescriptions seem to be generally understood as mere instructions for the guidance and government of those on whom the duty is imposed or in other words as directory only. The neglect of them may be penal indeed, but it does not affect the validity of the act done in disregard of them." Our Court has held while determining the status of a mandatory or directory provision that "perhaps the cleverest indicator is the object and purpose of the statute and the provision in question." And to see the "legislative intent as revealed by the examination of the whole Act.".”

The judgment referred to supra was rendered in a criminal case but the ratio gleaned therefrom is applicable to the exercise of interpretation being undertaken by us. A similar approach was also enunciated by the apex Court in a fiscal matter, being *Collector of Sales Tax Gujranwala & Others vs. Super Asia Mohammad Din and Sons & Others* reported as *2017 SCMR 1427*, where *Mian Saqib Nisar, CJP* (as he was then) maintained that the ultimate test to determine whether a provision is mandatory or directory is that of ascertaining the legislative intent. While the use of the word 'shall' is not the sole factor which determines the mandatory or directory nature of a provision, it is certainly one of the indicators of legislative intent. Other factors include the presence of penal consequences in case of non-compliance, but perhaps the clearest indicator is the object and purpose of the statute and the provision in question. It is the duty of the Court to garner the real intent of the legislature as expressed in the law itself.

It falls to us to subject the present facts and circumstances to the touchstone prescribed by the august Supreme Court and then determine whether the prescribed timeline was mandatory or directory.

28. At the very onset it is pertinent to record that neither the OGRA Ordinance nor the Tariff Rules contain any *penal* consequence for non-adherence to the timeline. There is a consequence provided, however, the same is conditional and qualified. Per Section 8 of the OGRA Ordinance and Rule 18 of the Tariff Rules, OGRA is empowered to notify its determined price, in case of failure of the Federal Government to advise within time, provided that the OGRA determined price is higher than the most recently notified price. It would thus follow that the power so conferred would not be exercisable in the event that the OGRA determined price is lower than the most recently notified price.

The objective of this distinction appears to favour the licensee as notification of a higher tariff is contemplated even in the absence of the Federal Government's advice but the same does not hold true in the opposite circumstances. However, upon careful contemplation it would appear that the true safeguard is for the interests of the consumer as expeditious transition of higher costs into a commensurate tariff would preclude the consumer from being burdened with the carrying cost of any delay in determination of the tariff structure appropriately reflective of the actual cost components.

29. We have already observed that there are no penal consequences provided in the governing law in so far as non-adherence to the timelines are concerned. It is also gleaned that the object of the provisions, under scrutiny herein, that the intent is to protect the ultimate user / consumer from any further costs supplemental to the contemplated costs of natural gas and it is also gathered from the three stage process, initial determination, review and final determination, that the legislative intent is to keep the tariff structure responsive to any fluctuations in its determinants. The legislative intent may also be gleaned from consideration of Rule 21 of the Tariff Rules, which saves proceedings even in the event of defects or irregularities provided that such an infraction is not declared by the authority as having caused substantial injustice. It is thus maintained that mere employment of the term *shall*, in the provision/s under consideration, does not render it mandatory.

30. We would also consider appropriate to put this analysis in perspective and observe that had OGRA considered the advice of the Federal Government (caretaker), to maintain prices pending a decision by the elected government, as failure to advise and notified the gas price by itself then the rate notified would have been Rs. 589.09 / MMBTU. This amount is considerably dearer than the rate actually notified post the Federal Government advice, being Rs. 554.63 / MMBTU. Even otherwise the revised tariff was brought into effect belatedly, hence, the consumers availed an additional three months at the old tariff.

31. Therefore, upon subjecting the facts and circumstances under scrutiny to the touchstone determined by the august Supreme Court, it is

our considered view that the timeline prescribed for determination of natural gas prices, under consideration herein, is directory in nature.

32. There is also an ancillary issue to consider before parting with this issue, i.e. retrospective effect of the Impugned Notification. While the Impugned Notification was issued on 04th October 2018, it sought to be enforced with effect from 27th September 2018 and it is this issue of retrospectivity that needs to be addressed. Learned counsel for the petitioners had cited the judgment of the august Supreme Court in *Anoud Power Generation Limited & Others vs. Federation of Pakistan & Others* reported as *PLD 2001 Supreme Court 340* in order to argue that the Impugned Notification could not have been given retrospective effect. In the aforesaid pronouncement it had been maintained that a notification cannot operate retrospectively and that benefits accruing in favour of a party, per an earlier notification, shall subsist unless the same is rescinded or modified.

The learned counsel representing the Federation, OGRA and SSGC did not advance any arguments to substantiate the basis upon which the Impugned Notification could be given retrospective effect. Learned counsel for the said respondents have also failed to refer to any provisions of the OGRA Ordinance and / or the Tariff Rules to justify the retrospective effect contemplated in the Impugned Notification.

33. The principle of *nova constitutio futuris formam imponere debet, non praeteritis* denotes that a new law ought to regulate what is to follow and not the past. *Mian Saqib Nisar, J* (as he then was) deliberated upon the effect of this principle, in *Zila Council Jhelum vs. Pakistan Tobacco Company Limited & Another* reported as *PLD 2016 SC 398*, and observed, in the context of statutes, that a statute cannot be applied retrospectively in the absence of an express enactment or necessary intendment, especially where it may effect vested rights, past and closed transactions or facts or events that have already occurred.

In the present facts and circumstances it is not a statute itself but a notification that seeks to take effect retrospectively. No provision of the governing statute, or rules made pursuant thereto, has been highlighted before us to demonstrate the existence of any provision empowering the notification of prices with retrospective effect. Therefore, it is our

considered view that the Impugned Notification would take effect from the date that it was notified.

34. We now proceed to address the third argument advanced on behalf of the petitioners that since the rate determinations for SSGC and SNGPL were different, that of SSGC being lower, therefore, notifying the same rate for SSGC as that for SNGPL amounts to unjustly enriching SSGC to the detriment of the consumers. The question of unjust enrichment / windfall profits has been discussed supra and the findings do not support the claim of the petitioners. However, we shall endeavor address this issue in its own context.

35. It has been demonstrated before us that a price determination is the aggregation of the cost of gas sold, cost of services and the development surcharge. It is also uncontroverted before us that a licensee is only entitled to the rate of return provided in its license and any excess is repatriable to the Federal Government pursuant to the Surcharge Ordinance. Therefore, the governing framework does not provision for a licensee receiving any amount in accretion to its predetermined quantum of return. It is in this backdrop that we consider the issue agitated before us.

36. A summary for the economic coordination committee of the cabinet, dated 07th September 2018, was placed before us to demonstrate that the determined price per MMBTU for SNGPL was significantly higher than that tabulated for SSGC, however, the notification of gas prices did not take that into account and prescribed the same rates for SSGC as for SNGPL.

The summary referred to supra prescribed a price of Rs. 629 / MMBTU for SNGPL and Rs. 589.09 / MMBTU for SSGC, however, the price determined vide the Impugned Notification for both licensees was Rs. 554.63 / MMBTU. It is thus prima facie demonstrated from the record, relied upon by both sides, that in the tariff awarded to SSGC, vide the Impugned Notification, there remained a shortfall of Rs. 34.46 / MMBTU, translating in to a loss to SSGC of approximately 12.33 billion.

37. At this juncture we consider it appropriate to dwell upon the issue of uniform pricing, SSGC and SNGPL, in vogue in Pakistan. Learned

counsel for OGRA had placed before us a copy of the summary for the ECC of the Cabinet issued by the Ministry of Energy Petroleum Division, No. DGO(AC)-5(26)/18-19 and dated 07-09-2018, paragraph 7 whereof explicated that the government follows a policy of uniform gas sale prices across the country. Learned counsel had submitted that the objective of this policy was to prevent any geographical discrimination within Pakistan.

We have already determined supra that that the variation in the proposed / determined tariffs for SSGC and SNGPL have had no adverse consequence for the public at large. It has also been discussed that the pricing mechanism fixes the return for a licensee and no additional gains are permissible within the framework as returns above the pre-determined quantum, if any, are repatriated to the Government. In this backdrop it is maintained that the learned counsel have been unable to persuade us as to how a uniform pricing policy is either arbitrary, discriminatory or in violation of fundamental rights, hence, we find any interference therewith unmerited in the present facts and circumstances.

38. The final issue before us is the categorization of retail consumers of natural gas and the apparent disparity in the prices prescribed in respect thereof. Learned counsel for the petitioners had argued that the categorization was arbitrary and the respective pricing was discriminatory. Learned counsel for respondents, in the Constitutional petitions, had submitted that the categorization and pricing were done with a view to afford protection to the weaker segments of society and in addition thereto the pricing with respect to the commercial sector reflected the economic and fiscal priorities of the government. It was contended that in any event such an exercise was entirely a policy matter which did not merit any interference in the present facts and circumstances.

39. The Impugned Notification contains several categories; domestic, commercial, industrial etc., with sub categories also contained in several cases. Different tariffs are prescribed for each category and petitioners falling into categories with a relatively higher tariff had argued that such categorization / pricing was arbitrary and / or discriminatory. At the very onset it merits consideration whether such categorization / pricing falls within the ambit of the executive and whether the same is justiciable. The answer lies in a recent (yet unreported) judgment of the honorable

Supreme Court, *dated 11.05.2019*, in the case *of Sui Northern Gas Pipelines Limited vs. Federation of Pakistan (Civil Appeal 159-L of 2018)* and connected matters wherein *Mansoor Ali Shah, J* has maintained that categorization of natural gas consumers is a policy issue and the same becomes justiciable only if it is demonstrated that application of the policy infringes upon the fundamental rights of consumers.

40. The Impugned Notification contains several slabs in the domestic category, with the ostensible objective of subsidizing the disadvantaged segment of society and the tariff rises progressively predicated upon the quantum of usage. A consumer using 50 M^3 per month is charged a lower rate than a consumer using 500 M^3 per month but the same does not constitute discrimination. The pricing policy appears to subsidize low usage domestic consumers, while not extending the same benefit to the high usage (presumably more affluent) segment, and also seeks to discourage heavy consumption upon domestic connections.

The commercial consumers are segmented into several categories with varying rates for each category. *Roti Tandoors* have a lower, yet progressive, tariff as compared to cement factories and fertilizer plants have a lower, yet progressive, tariff as compared to ice factories. There is no manifest discrimination apparent and the structure appears to be reasonably classified based upon the social, fiscal and economic priorities of the Government.

41. Having established that the gas pricing structure is a policy driven decision, which merits interference only if demonstrably contrary to the fundamental rights, it is opined that while the petitioners have claimed to be financially challenged by the rise in natural gas prices, they have been unable to demonstrate that the price structure, as envisaged vide the Impugned Notification, is arbitrary, discriminatory or contrary to any fundamental rights. The learned counsel for the petitioners (and the learned counsel for the contesting respondents in the High Court Appeals) have been unable to justify their challenge to the Impugned Notification in view of the discussion contained herein and buffeted by the fact that they have opted to eschew the fora provided for redressal of their grievance/s vide the governing law. As a consequence hereof the Impugned

Notification is hereby maintained and the Constitutional petitions under consideration are determined to be devoid of merit.

42. In the High Court Appeals under scrutiny the appellant, being SSGC, had challenged the ad-interim orders whereby restraints were placed upon the collection of natural gas tariffs notified vide the Impugned Notification. The result of the analysis above is squarely applicable *mutatis* mutandis to the determination of such appeals and as a consequence thereof the said appeals are allowed.

43. In view of the discussion and reasoning delineated supra, the matters under consideration are determined in seriatim as follows:

a. The Constitutional Petitions, being CP D 7097 of 2018, CP D 7480 of 2018, CP D 7950 of 2018, CP D 8093 of 2018, CP D 8127 of 2018, CP D 8132 of 2018, CP D 8137 of 2018, CP D 8138 of 2018, CP D 8229 of 2018, CP D 8740 of 2018, CP D 1455 of 2019 and CP D 1557 of 2019 are hereby dismissed with no order as to costs.

b. The High Court Appeals, being HCA 382 of 2018 and HCA 398 of 2018, are hereby allowed; resultantly the respective orders impugned therein are hereby set aside; and the interim applications, wherein the respective impugned orders were rendered, are hereby dismissed.

J U D G E

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