IN THE HIGH COURT OF SINDH AT KARACHI

Before:
Ahmed Ali M. Shaikh, CJ
Yousuf Ali Sayeed, J

CP No.D-1817 of 2019

Marie Stopes Society V. Federation of Pakistan and others

Priority

1. For hearing of CMA No.13446/2021 (stay)
2. For hearing of CMA No.13445/2021 (Conte)
3. For hearing of CMA No.8165/2019 (stay)
4. For hearing of main case.

Petitioner M/s Marie Stopes Society through M/s Salahuddin Ahmed, Muhammad Rizwan and Salman J. Mirza, Advocates

Respondent No.1 the Federation of Pakistan through Mr. Khaleeq Ahmed, DAG
Respondent No.3 the State Bank of Pakistan through Mr. Atif-ud-Din, Advocate alongwith Mr. Yasir Arfat, Joint Director.

Date of hearing 28.10.2021

JUDGMENT

AHMED ALI M. SHAIKH, CJ.- Invoking the jurisdiction of this Court under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, the petitioner has sought following relief(s):-

> "A. Set aside the Policy for regulation of organizations receiving foreign contributions vide Notification No.I(5)INGO/05 dated 28.11.2013 and declare that the same is issued without lawful authority and is void ab initio and non est;
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> B. Restrain the Respondents from impeding, hindering or interfering with the Petitioner's functions and operation on the basis of the 2013 Policy or otherwise;
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> IN THE ALTERNATIVE, AND WIHTOUT PREJUDICE;
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> C. Set aside the Impugned Order dated 09.01.2019 passed by the Respondent No.1 and declare that the same is issued without lawful authority and jurisdiction and is even otherwise arbitrary, unreasonable and contrary to law and natural justice;

D. Restrain the Respondents or any other government agencies or instrumentalities from taking any adverse action against the Petitioner on the basis of the Impugned Order dated 09.01.2019;

E. Direct the Respondent No.1 to register the Petitioner under the 2013 Policy and duly execute MOU with the Petitioner thereunder;

F. Grant such other relief or mould the relief as may be just and appropriate."

2. Petitioner, M/s Marie Stopes Society, is a Pakistani organization registered under the Societies Registration Act, 1860, with the object of helping the people, precisely, less aware and illiterate, on the subject related to health and population welfare. The petitioner provides family planning service and ante and post natal care for mothers and new-borns via nearly 600 healthcare clinics and centres, the majority of which are registered with the respective Healthcare Commissions in the Provinces. The petitioner also provides family planning and reproductive health services in rural and far flung area across the country covering 63 Districts, inter-alia, through multiple service delivery channels like Behtar Zindagi Centres, Suraj Social Franchise and Pehli Kiran Reproductive Health Private Partners, Roshani Mobile Vans and Helpline & Website. The petitioner claims that it principally operates through funding from foreign charitable and aid organizations such as Susan Thompson Buffet Foundation, UK Department for International Development, USAID and Global Affairs Canada and all the foreign donations are remitted completely through banking channels as per law and relevant regulations.

3. In November, 2013, the Economic Coordination Committee (ECC) vide Notification No.I(5)INGO/05 introduced a "policy for regulation of organizations receiving foreign contributions (the "**Policy**")." In terms of the Policy any organization registered outside/inside Pakistan and desirous of utilizing foreign economic assistance will need prior registration with the Government and, subject to concurrence, will sign a MoU containing the information specified by the Government.

4. The petitioner firstly applied for registration in terms of the Policy on 06.3.2014 but its case was allegedly placed in cold storage. On 22.09.2017 the petitioner again applied for signing the MoU, however, the Respondent No.1 in a summary manner did not approve the same. On 28.01.2019, the petitioner submitted an Appeal under Clause 7 of the Policy but the same was also declined.

5. Learned counsel for the petitioner submitted that the Policy purports to determine the legal character and obligations of the organizations receiving foreign funding, issued through a Notification, is, prima facie, an attempt by the Executive Branch of the State to legislate, which amounts to a violation of the Constitution. He further submitted that the Policy itself recognizes the need for legislation and is nothing but a stop-gap arrangement, bereft of any force of law but is nonetheless being implemented so as to curtail the Petitioner's operations. He argued that the Article 4 of the Constitution stipulates that no person can be compelled to do something or be hindered from doing something other than in accordance with law. Per counsel, the Policy is bereft of legal force and is ultra vires the Constitution in terms of impinging on Fundamental Rights. He further contended that under the Constitution it is the prerogative of the legislature to lay down a law and under no circumstance such power can be exercised and or implemented by the executive. Counsel further argued that under the trichotomy of powers every organ of the State i.e. the Parliament, Judiciary and Executive has to remain well within their respective domains and even in case of dire need the executive cannot exercise such powers to enact law or policy having nexus with the affairs of the State. While emphasizing on Article 4 of the Constitution he urged with vehemence that every individual has a right to be dealt with in accordance with law and no person can be compelled to do or hindered from doing so unless it is under the sanction of law. In support of his contention the learned counsel has relied upon the cases reported in PLD 1965 Dacca 156, PLD 1967 Dacca 607, PLD 1978 Lahore 1298, PLD 1979 Karachi 300, 1983 SCMR 125, PLD 1993 SC 473, 1995 SCMR 529, 1998 SCMR 2268, PLD 1999 SC 1025, PLD 2007 SC 642, 2007 SCMR 330, 2010 SCMR 511 and 1778, PLD 2010 SC 61, 2011 SCMR 1, 2015 PLC (CS) 283, 2016 PLD SC 808, PLD 2019 SC 509 and 2021

SCMR 678. He prays that in the given circumstances the Policy may be declared ultra vires to the Constitution or alternatively the impugned letter/decision be set-aside directing the Respondent No.1 to enter into MoU with the petitioner allowing it to continue its lawful activities.

6. He also contended that the Policy was issued pursuant to the decision of the Economic Coordination Committee of the Cabinet while it is settled law that the governmental decisions are to be taken by the Cabinet as a whole and not by a part thereof. He has relied upon the Honourable Supreme Court Judgment reported in the case of Mustafa Impex v. Government of Pakistan 2016 PLD SC 808. He further submitted that even otherwise the impugned order/letter dated 09.01.2019 was devoid of reasoning, hence violated Section 24-A of the General Clauses Act, 1895.

7. Contrarily, the learned DAG opposed the petition on the premises that the Article 90(2) of the Constitution allows the Prime Minister to perform his functions either directly or through Federal Minister, the ECC committee of the Cabinet (constituted pursuant to Rule 17(2) of the rules of Business, 1973), therefore, the Notification/Policy issued in pursuance of the decision of the ECC Committee was lawful. He submitted that as the Judgment of the Superior Courts operates prospectively, the Policy issued in the year 2013, aimed to ensure accountability, transparency and securing the interests of the Country, is not covered by the Judgment of the Honourable Supreme Court pronounced in the case of Mustafa Impex supra. He, however, could not show any document that the impugned Notification/policy has any backing of the law or the Economic Affairs Division, Government of Pakistan was vested with such powers to issue/promulgate and implement the Notification/policy.

8. The learned DAG also submitted that the Honourable Apex Court vide order dated 10.10.2018 passed in Suo Moto Case No.13 of 2015 examined the Policy and satisfied with its purpose; however, after passage of five months the petitioner approached this Court, inter alia, declaring the Policy to be ultra vires to the Constitution. He pointed out that against the rejection of request, the petitioner preferred an Appeal in terms of Clause 7 of the Policy, which was also rejected on 10.12.2019

due to non-clearance of the security with direction to apply afresh for any new foreign funding project as terms of the Policy.

9. We have heard the learned counsel for the petitioner, DAG and perused the material available on record. It is an admitted position that the impugned Notification/Policy was framed/issued by the Economic Coordination Committee of the Cabinet sans Cabinet as a whole. As it was not a government decision taken by the Cabinet, it would be appropriate to examine the authority and powers of the executive to issue any policy/notification or whether any notification/order/directive issued by the Executive being devoid of constitutional backing has any sanctity in the eyes of law. It is settled principle of law that the executive has no inherent power except that has been vested in it by the law, a source of power and duty. While elaborating the powers of the executive the honourable Supreme Court in the case of Pakistan Muslim League (N) v. Federation of Pakistan (PLD 2007 SC 642) has observed that:-

> "It may not be out of place to mention here that "there is no inherent power in the executive, except what has been vested in it by law, and that law is the source of power and duty. The structure of the machinery of government, and the regulation of the powers and duties which belong to the different parts of this structure are defined by the law, which also prescribes, to some extent the mode in which these powers are to be exercised or those duties performed. From the all-prevading presence of law, as the sole source of governmental powers and duties, there follows the consequence that the existence or non-existence of a power or duty is a matter of law and not of fact, and so must be determined by reference to some enactment or reported case. Consequently, there are no powers or duties inseparably annexed to the executive Government. It cannot be argued that a vague, indefinite and wide power has been vested in the executive to invade upon the proprietary rights of citizens and that such invasion cannot be subjected to judicial scrutiny if it is claimed that it is a mere executive order. This is not the position in law. Any invasion upon the rights of citizens by anybody no matter whether by a private individual or by a public official or body, must be justified with reference to some law of the country. Therefore, executive action would necessarily have to be such that it could not possibly violate a Fundamental Right. The only power of the executive to take action would have to be derived from law and the law itself would not be able to confer upon the executive any power to deal with a citizen or other persons in Pakistan in contravention of a Fundamental Right. Functionaries of State, are

> to function strictly within the sphere allotted to them and in accordance with law. No Court or Authority is entitled to exercise power not vested in it and all citizens have an inalienable right to be treated in accordance with law. Therefore, an action of an Authority admitted to be derogatory to law and Constitution, is liable to be struck down." (PLD 1976 Karachi 1257 (DB), PLD 1967 Dacca 607 (DB), 19 DLR 689, 1990 CLC 1772, 1990 MLD 1468."

10. Additionally, the Honorable Apex Court in the same case has observed that:-

> "It is bounden duty of the Executive to respect an ordinary legal right of a subject in the same way as a Fundamental Right. For it is an established principle of British jurisprudence which may be treated as constituting a part of the Pakistan law also, that no member of the executive can interference with the liberty or a property of a subject except on the condition that he can support the legality of his action before a Court of Justice."

11. In the case of Muhammad Nawaz Sharif v. President of Pakistan PLD 1993 SC 473 the Full Bench of the Honourable Supreme Court has observed that "in a Constitution contained in a written document wherein the powers and duties of the various agencies established by it are formulated with precision, it is the wording of the Constitution itself that is enforced and applied and this wording can never be overridden or supplemented by extraneous principles or non-specified enabling powers not explicitly incorporated in the Constitution itself. In view of the express provisions of our written Constitution detailing with fullness, the powers and duties of the various agencies of the Government that it holds in balance there is no room of any residual or enabling powers inhering in any authority established by it besides those conferred upon it by specific words." Reference in this context can also be made to the cases of Ghulam Zamin v. A. B. Khondkar reported as PLD 1965 Dacca 156 and the Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v. President of Pakistan reported as PLD 2010 SC 61.

12. While elaborating and examining the discretionary authority of the government or its functionary in the nature of prerogative either under the Constitution or under any of the Act of the Parliament, the Honourable Supreme Court in the case of Controller of Patents and Designs v. Muhammad Quadir 1995 SCMR 529 observed that:-

> "There can be no cavil with the proposition that the Government of Pakistan or for that matter any of the holder of its offices or any Government functionary do not enjoy conventional prerogative as was or is available to Crown in England except those discretionary powers which are either specially conferred by the Constitution or under any law passed by the Parliament. We are also of the view that any discretionary power available to Government or its functionaries in the nature of prerogative either under the Constitution or under any of the Act of the Parliament is subject to the process of Judicial review by the Superior Courts, in accordance with their jurisdiction under the Constitution. However, any exercise of discretionary power in the nature of a prerogative claimed by the Government or holder of any of its offices, or its functionaries has to be justified either under some statute law or under the provision of the Constitution, before it is pressed into service before a Court."

13. In the case of Province of Punjab v. Gulzar Hassan PLD 1978 Lahore 1298, while relying on the observations of the Honourable Supreme Court in the case of Manzoor Elahi v. Federation of Pakistan (1975 SC 66), a Division Bench of the Lahore High Court has observed that:-

> "58. The view expressed by my Lord S. Anwarul Haq, J. (the present Chief Justice of Pakistan) in the above case at page 147 is also given below:-
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> > "While Article 4 embodies provisions of the utmost importance to the individual in the matter of his life, liberty, body, reputation and peoperty (sic), his right to freedom of action, and immunity from illegal restraint of any kind, yet it does not form part of Part II of the Constitution containing fundamental rights, and, for that reason, any violation of this Article would not bring the case within the four corners of the jurisdiction conferred on the Supreme Court by clause (3) of Article 184 of the Constitution. That jurisdiction has reference only to enforcement of any of the fundamental rights conferred by Chapter I of Part II of the Constitution. Nevertheless, it is clear at the same time that the High Court, acting under the various clauses of Article 199 of the Constitution, would be fully competent to deal with a case involving a violation of the provisions of Article 4 of the Constitution…"
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> 59. In view of the above observations of the Supreme Court, it is absolutely clear that no executive authority can take any executive action without the support of a valid law and any action taken in violation of the above rule can be struck down by the

> High Court under Article 199 of the Constitution as being without lawful authority."

14. In this regard there is no cavil that every citizen or every person for the time being in Pakistan guaranteed as his inalienable right to enjoy the protection of law and be treated as such.

15. With regard to the submissions of the learned DAG that the Petitioner had itself applied for registration and signing of MoU under the Policy and after rejection of their application it challenged the Policy as illegal and stop-gap or temporary arrangement not recognized by the law, is untenable. With profound respect it has been time and again observed by the superior Courts that though acquiescence is a specie of estoppel but there can be no estoppel against the law. (PLD 1963 SC 486, PLD 1995 SC 66, PLD 1998 SC 161, PLD 2006 SC 602, 2013 SCMR 642 and PLD 2019 SC 509). Furthermore, in the case of University of Malakand v. Alam Zeb 2021 SCMR 678 it has been observed by the Honourable Supreme Court of Pakistan that "if a person has been bestowed some legal right by law/statute and he omits to claim such legal right for a certain period of time, it does not mean that he has waived his legal right and subsequently he cannot claimed such right. Inherent power and doctrine of estoppel cannot be applied to defeat the provisions of statute." Accordingly, while applying for registration and signing of MoU under the Policy the petitioner is not estopped from challenging the same.

16. The learned DAG also argued that under the Article 90(2) of the Constitution the Prime Minister has to perform his functions either directly or through Federal Ministers, the Economic Coordination Committee of the Cabinet constituted by him in terms of Rule 17(2) of the Rules of Business, 1973, therefore, the Notification/policy, impugned herein, issued in pursuance of decision of the ECC is strictly in accordance with law. With profound respect, the submission made by the learned DAG as above is misconceived. For ready reference the Article 90 of the Constitution is reproduced hereunder:-

> "**90. The Federal Government**.- (1) Subject to the Constitution, the executive authority of the Federation shall be exercised in the name of the President by the Federal Government, consisting of the Prime Minister and the Federal Ministers, which shall act through the Prime Minister, who shall be the chief executive of the Federation.
>
> (2) In the performance of his functions under the Constitution, the Prime Minister may act either directly or through the Federal Ministers."

17. In the celebrated Judgment of Mustafa Impex v. Government of Pakistan PLD 2016 SC 808, the Honourable Supreme Court while examining different Articles of the Constitution, has observed that under Article 90 of the Constitution the executive authority of the Federation shall be exercised in the name of the President by the Federal Government. The Federal Government is then described as consisting of the Prime Minister and the Federal Minister. However, more fundamentally, in the opening paragraph of the Policy it has been incorporated that "*until legislation for a regulatory framework for foreign economic assistance flowing outside government channels is enacted, for improved accounting of such flow of funds and greater and effectiveness the following policy will operate*." The word "until" used in the aforesaid paragraph of the policy is defined in the Black's Law Dictionary Sixth Edition as under:-

> "**Until**. Up to time of. A word of limitation, used ordinarily to restrict that which precedes to what immediately follows it, and its office is to fix some point of time or some event upon the arrival or occurrence of which what precedes will cease to exist."

Interestingly enough the Notification was issued in the November 2013 and till date no legislation for a regulatory framework for foreign economic assistance flowing outside governmental channels is enacted nor there anything on the record or submitted by the learned DAG that the Policy was placed before the Cabinet for decision/approval, as the case may be.

18. Now, reverting to the submission of the learned counsel for the Petitioner that the impugned letter dated rejecting the petitioner's application is a non-speaking order against the spirit of Section 24-A of the General Clauses Act. Before proceeding further it would be appropriate to reproduce hereunder the said letter, copy available at page 191 of the file:-

> "It is submitted that your application alongwith supporting documents for signing of MoU with GoP/EAD was shared with the stakeholders as per "Policy for Regulation of Organizations Receiving Foreign Contributions, 2013" it is respectfully informed that your case for signing of MoU has not been approved.
>
> M/s Marie Stopes Society Pakistan may apply for signing of MoU afresh in case the organization secures foreign funding for some new project(s)."

19. The letter/order rejecting the Petitioner's application for signing MoU cannot be termed as a speaking order within the meaning of Section 24-A of the General Clauses Act, that envisages that every decision/order/judgment passed by the any forum, department or Court should be passed after application of mind with reasoning. Therefore, the impugned letter issued merely observing that the petitioner's application alongwith documents was shared with the stakeholders in terms of the Policy and same was rejected, is a cursory and slipshod approach always deprecated by the superior Courts and the impugned letter cannot sustain on this score as well. Reliance in this regard can be placed on the cases reported in 2010 SCMR 511 and 1998 SCMR 2268.

20. From the above discussion, it is crystal clear that the impugned letter dated 09.01.2019 rejecting the Petitioner's Application for signing MoU and the decision in the Appeal preferred against such order in terms of the Policy, lacked reasoning, with it only being mentioned in the comments that on account of dubious activities of the Petitioner, the MoU was not approved by the security apparatus and clearance of the project by the security agencies is mandatory requirement for signing the MoU with the Respondents.

21. Furthermore, it is the inalienable right of every citizen to be dealt with in accordance with law as envisaged in Article 4 of the Constitution and it is the duty of the public functionaries to act within the four corners of the mandate of the Constitution and Law. Action taken upon no ground at all or without proper application of the mind and without of the backing of law does not qualify as action in accordance with law and is liable to be struck down. In law, no person should be prevented from or be hindered in doing that which was not prohibited by law, and no person shall be compelled to do that which the law does not require him to do. Be that as it may, in light of the plethora of Judgments and principles laid down by the superior Courts, as referred to and discussed hereinabove, it is manifest that the Respondent Ministry of Finance, Revenue, Economic Affairs, Statistics and Privatization (Economic Affairs Division) was not vested with such powers nor in law was empowered/competent to regulate or curb the Petitioner's operations through the Policy, which has no constitutional strength or legislative mandate or legal sanctity or backing of enabling law, as such, does not carry any weight. We, therefore, arrived at an irresistible conclusion, that the impugned Notification/Policy dated 28.11.2013, which per Respondent was a stop-gap arrangement and in response of which the Federal Government did not take any step to provide a legislative cover, is of no legal effect. Consequently, any action/step taken against the Petitioner pursuant to the impugned Notification/Policy is declared to be without lawful authority and of no legal consequence. The Petition stands allowed in such terms.

Chief Justice

Judge