

IN THE HIGH COURT OF SINDH AT KARACHI

Present:
Muhammad Junaid Ghaffar, J.
Agha Faisal, J.

CP D 4662 of 2017

Quality Steel Re-Rolling
vs.
Federation of Pakistan & Others

(And connected petitions, particularized in the Schedule¹ hereto.)

For the Petitioners : Barrister Kamal Azfar
Ms. Naveen Merchant, Advocate
Mr. Jam Zeeshan, Advocate
Mr. Imran Iqbal Khan, Advocate
Mr. Muhammad Adeel Awan, Advocate
Mr. Yacoob Nasir, Advocate
Mr. Salman Yousuf, Advocate
Mr. Ghulam Nabi Shar, Advocate
Mr. Yasir Ali, Advocate
Mr. Syed Irshad-ur-Rehman, Advocate
Mr. Muhammad Waleed, Advocate
Barrister Zain Mustafa Soomro

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

Mr. Khalid Rajpar, Advocate
Mr. Shahid Ali Qureshi, Advocate
Mr. Muhammad Khalil Dogar, Advocate
Dr. Shah Nawaz Memon, Advocate
Mr. Ameer Bakksh Metlo, Advocate
Mrs. Masooda Siraj, Advocate
Mr. Javed Hussain, Advocate
Mr. Muhammad Aqeel Qureshi, Advocate
Mr. Zulfiqar Ali Khan, Advocate
Mr. Imran Ali Mithani, Advocate
Mr. Irfan Mir Halepota, Advocate
Mr. Zubair Hashmi, Advocate
Mr. Qaim Ali Memon, Advocate
Mr. Syed Mohsin Imam, Advocate
Mr. Sarfaraz Khan Marwat, Advocate
Mr. Mirza Nadeem Taqi, Advocate
Mr. Noor Nabi, Advocate
Mr. Mohabbat Hussain Awan, Advocate
Mr. Okash Mustafa, Advocate
Mr. Muhammad Taseer Khan, Advocate
Mr. Zulfiqar Ali Mirjat, Advocate

Mr. Tariq Aziz, Principal Appraiser, PMBQ.

Dates of hearing : 20.01.2021; 10.03.2021; 01.04.2021;
02.04.2021 & 16.04.2021

Date of judgment : 16.04.2021

¹ The Schedule hereto shall be read as an integral constituent hereof.

JUDGMENT

Agha Faisal, J. The petitioners have assailed SRO 583(I)/2017 dated 01.07.2017 (“Impugned SRO”) and seek for the instrument to be declared as *ultra vires* / nullity in law, upon the premise that same has been issued in violation of the Constitution, per the law illumined by the august Supreme Court in *Mustafa Impex*². The respective petitions were heard conjunctively and determined vide our common short order dated 16.04.2021, announced in Court upon conclusion of the proceedings, which read as follows:

“For reasons to be recorded later on, all these petitions are allowed to the extent of SRO 583(I)/2017, dated 01.07.2017, which is hereby declared to be *ultra vires*, being in violation of the law declared by the Honourable Supreme Court in the case reported as *PLD 2016 SC 808 (Mustafa Impex and Others vs. The Government of Pakistan and Others)*. The securities / sureties, furnished if any, before the Nazir of this Court stand discharged. Nazir to act accordingly.”

2. Briefly stated, the petitioners were aggrieved by certain amendments to the sales tax regime, applicable thereto, brought about vide the Impugned SRO. It was articulated that while the Constitution envisaged such variation in the incidence of taxation to be brought about by the *Federal Government*, however, the impugned variation was brought by the *Board with the approval of the Federal Minister-in-charge*. It was in this context that the Impugned SRO was contended to be devoid of Constitutional fiat. It is considered illustrative to reproduce the preamble of the instrument under challenge herein below:

“S.R.O.583(I)/2017.- In exercise of the powers conferred by section 71 of the Sales Tax Act, 1990, read with clauses (9) and (46) of section 2, sections 3 and 4, sub-section (2) of section 6, section 7A, clause (b) of sub-section (1) of section 8, sub-sections (2A) and (3) of section 22, sections 23 and 60 thereof, the Board with the approval of the Federal Minister-in-charge is pleased to make the following further amendments in the Sales Tax Special Procedure Rules, 2007...”

(Underline added for emphasis.)

Respective arguments

3. The crux of the petitioners’ case was that the Impugned SRO cannot survive constitutional scrutiny, when subjected to the anvil of *Mustafa Impex*. The learned Deputy Attorney General, and the counsel for the respondents, articulated no cavil with respect to *applicable* ratio of *Mustafa Impex*; however, supported the instrument impugned by resting their case upon the subsequent

² *Mustafa Impex vs. Government of Pakistan* reported as *PLD 2016 Supreme Court 808* (“*Mustafa Impex*”).

insertion of section 74A³ in the Sales Tax Act 1990 (“Act”), being a validation clause.

Scope of determination

4. We have appreciated the arguments of the respective learned counsel and considered the pertinent law.

5. In *Mustafa Impex*, the august Supreme Court *inter alia* enunciated that where a power is conferred by statute on the Federal Government then such power can only be exercised exclusively by the Federal Cabinet. It was further held that fiscal notifications enhancing the levy of any tax by a Secretary or Minister are *ultra vires*. The *PMDC case*⁴ clarified that ratio of *Mustafa Impex* would apply prospectively and admittedly *Mustafa Impex* preceded the Impugned SRO. It is considered imperative to reiterate that the respective learned counsel remained in accord in so far as the import of *Mustafa Impex* was concerned; therefore, the only issue to be determined by us is whether the Impugned SRO was saved by the subsequent insertion of the relevant validation clause in the Act.

Finance Act 2017

6. Section 3 of the Act *inter alia* confers the authority to declare that in respect of any taxable goods, the tax shall be charged, collected and paid in such manner and at such higher or lower rate or rates as may be specified vide a notification. Such authority was vested in the Federal Government; however, post *Mustafa Impex*, vide Finance Act 2017 (“FA 2017”), the Act was amended to confer such authority upon the *Board with the approval of the Federal Minister-in-charge*.

7. The FA 2017 also inserted section 74A in the Act which stipulated that all notifications and orders issued and notified in exercise of the powers conferred upon the *Federal Government*, prior to commencement of FA 2017, shall be deemed to have been validly issued and notified in exercise of such powers.

³ 74A. Validation. (1) All notifications and orders issued and notified in exercise of the powers conferred upon the Federal Government, before the commencement of Finance Act, 2018 shall be deemed to have been validly issued and notified in exercise of those powers. (2) Notwithstanding any omission, irregularity or deficiency in the establishment of or conferment of powers and functions on the Directorate General (Intelligence and Investigation), Inland Revenue and authorities specified in section 30A, all orders passed, notices issued and actions taken, before commencement of the Finance Act, 2018, in exercise or purported exercise of the powers and functions of the officers of Inland Revenue under this Act by the Director General (Intelligence and Investigation), Inland Revenue or the authorities specified in section 30A shall be deemed to have been validly passed, issued and taken under this Act.

⁴ *PMDC vs. Federation of Pakistan* reported as 2018 SCMR 1956.

8. It is pertinent to highlight at this juncture that the substitution of *Federal Government* with *Board with the approval of the Federal Minister-in-charge* and insertion of section 74A in the Act took place simultaneously vide the FA 2017; and the Impugned SRO was issued subsequently, post conferment of such authority upon the *Board with the approval of the Federal Minister-in-charge*.

Finance Act 2018

9. The Finance Act 2018 ("FA 2018") reversed the conferment of authority, upon the *Board with the approval of the Federal Minister-in-charge*, and reinstated the relevant competence upon the *Federal Government*.

10. In so far as section 74A was concerned, FA 2018 substituted the figure of 2017 therein with 2018. As a consequence thereof section 74A now read to state that all notifications and orders issued and notified in exercise of the powers conferred upon the *Federal Government*, prior to commencement of FA 2018, shall be deemed to have been validly issued and notified in exercise of such powers.

Section 74A – import of Finance Act 2017 & Finance Act 2018

11. It is observed that the Impugned SRO was issued by the *Board with the approval of the Federal Minister-in-charge*, post conferment of authority thereon vide amendments undertaken vide FA 2017. In so far as the original text of section 74A was concerned, it provided no benefit to the Impugned SRO since the effect was to be in respect of notifications and orders issued and notified prior to commencement of FA 2017.

12. The FA 2018 extended the ambit of section 74A of the Act but only in so far as the period was concerned; i.e. in respect of notifications and orders issued and notified prior to commencement of FA 2018. However, the crucial point to consider is that section 74A of the Act sought to validate notifications and orders issued and notified *in exercise of powers conferred upon the Federal Government*. At the time that the Impugned SRO was issued the relevant power was not conferred upon the *Federal Government*; therefore, the instrument was admittedly never issued in exercise of any power conferred upon the *Federal Government*.

13. Section 74A of the Act was amended vide the FA 2018, however, it is *prima facie* evident from the verbiage thereof that it affords no protection to any notification or order issued and notified in exercise of powers conferred upon the *Board with the approval of the Federal Minister-in-charge*. The august Court has held⁵ that a statute was the edict of the legislature and the language employed in the statute was determinative of the legislative intent. In view of the glaring omission of the legislature to save any notification issued and notified in exercise of powers conferred upon the *Board with the approval of the Federal Minister-in-charge*, it is observed that nothing has been placed before us to suggest that ambit of section 74A of the Act affords any protection to the Impugned SRO.

Pari materia judicial edicts

14. In *Premier Systems*⁶, a Division Bench of this Court was seized of a similar matter, albeit in the analogous context of the Customs Act 1969, wherein the competence of the *Board with the approval of the Federal Minister-in-charge* was under challenge. *Munib Akhtar J* authored the edict and struck down the statutory provision, empowering the *Board with the approval of the Federal Minister-in-charge* to act in place of the *Federal Government*, as well as the notification issued in terms of and in purported exercise of the powers conferred by the said provision.

The appeal⁷ filed assailing *Premier Systems* was disposed of by the Supreme Court leaving the issue of the validation clause⁸ to be raised before the Courts of competent jurisdiction and to be decided on its own merit. It is imperative to note that while the validation provision inserted in the Customs Act 1969 contained a *non obstante* clause seeking to give effect notwithstanding any order or judgment of any court, including the High Courts and the Supreme Court, no such verbiage was employed by the legislature in section 74A of the Act.

15. The matter came before this Court in *Dewan Motors*⁹ and a Division Bench of this Court held that the validation clause was *ultra vires* to the Constitution as through the impugned amendment the legislature had attempted to validate a Constitutional defect vide legislation subordinate thereto, without making any amendment in the Constitution itself.

⁵ Per *Saqib Nisar J* (as he then was) in *Pakistan Television v. Commissioner Inland Revenue*, reported as 2017 SCMR 1145.

⁶ Per *Munib Akhtar J* in *Premier Systems vs. Federation of Pakistan* reported as 2018 PTD 861.

⁷ Civil Appeal 321 of 2018.

⁸ Inserted in the Customs Act 1969 vide Finance Act 2018; post rendering of *Premier Systems*.

⁹ *Dewan Motors vs. Federation of Pakistan* (CP D 4658 of 2018); judgment dated 06.08.2020.

16. The corresponding analogous provision/s of the Act, and a notification issued thereunder, came under challenge before this Court in *Al Razzaq Fibres*¹⁰, wherein a Division Bench of this Court struck down the statutory provision in the Act, empowering the *Board with the approval of the Federal Minister-in-charge* to act in place of the *Federal Government*, as well as the notification issued in terms of and in purported exercise of the powers conferred by the said provision.

17. The judgment in *Al Razzaq Fibres* delved into the validation provision as well and held that section 74A of the Act had no relevance to the controversy since it was in respect of validation of acts of the *Federal Government* and afforded no protection to powers exercised by the *Board with the approval of the Federal Minister-in-charge*. An identical view was taken by the honorable Lahore High Court in *T U Plastic Industry*¹¹.

18. It may be appropriate to record that the pronouncements of earlier Division Benches on this Court, in *Premier Systems*, *Dewan Motors* and *Al Razzaq Fibres* are binding¹² upon us.

Conclusion

19. It had already been conceded by the respondents' learned counsel that the Impugned SRO was hit by the ratio of *Mustafa Impex*; hence, the only issue before us was the import of the validation clause. The verbiage of Section 74A of the Act demonstrates that it was never inserted to afford any protection to exercise of powers exercised by the *Board with the approval of the Federal Minister-in-charge*¹³; therefore, no case is made out before us to save the Impugned SRO in reliance upon section 74A of the Act.

20. In view of the reasoning and rationale herein deliberated we are of the considered view that SRO 583(I)/2017 dated 01.07.2017 is *ultra vires* and of no legal effect, being in violation of the law illumined by the august Supreme Court in *Mustafa Impex*; hence, we had determined these petitions vide our short order dated 16.04.2021. These are the reasons for our aforementioned short order.

JUDGE
JUDGE

¹⁰ *Al Razzaq Fibres vs. Federation of Pakistan (CP D 1704 of 2018)*; judgment dated 18.01.2021.

¹¹ Per Shahid Karim J in *T U Plastic Industry Co (Private) Limited vs. Federation of Pakistan* reported as 2019 PTD 1542.

¹² *Multiline Associates vs. Ardeshir Cowasjee & Others* reported as 1995 SCMR 362.

¹³ As recognized earlier in *Al Razzaq Fibres*.

Schedule

CP D 4663 of 2017 : Superior Steel Corp. vs. Federation of Pakistan & Others	CP D 4664 of 2017 : Rehman Steel vs. Federation of Pakistan & Others
CP D 4665 of 2017 : Masood Farooq Ind. vs. Federation of Pakistan & Others	CP D 4666 of 2017 : Standard Steel Mills vs. Federation of Pakistan & Others
CP D 4667 of 2017 : Sadiq Re-Rolling Mill vs. Federation of Pakistan & Others	CP D 4668 of 2017 : Nauman Steel vs. Federation of Pakistan & Others
CP D 4669 of 2017 : H.F. Steel vs. Federation of Pakistan & Others	CP D 4670 of 2017 : Sikander Ind. vs. Federation of Pakistan & Others
CP D 4671 of 2017 : Al-Mobeen Steel vs. Federation of Pakistan & Others	CP D 4813 of 2017 : Ghulam Ali Bhatia & Others vs. Federation of Pakistan & Others
CP D 5191 of 2017 : Muhammad Hanif & Another vs. Federation of Pakistan & Others	CP D 5314 of 2017 : A.F. Steel Re-Rolling Mills vs. Federation of Pakistan & Others
CP D 5483 of 2017 : R.S. Industries & Others vs. Federation of Pakistan & Others	CP D 5526 of 2017 : Ghulam Ali Bhatia & Others vs. Federation of Pakistan & Others
CP D 5631 of 2017 : Diamonds Metals (AOP) vs. Federation of Pakistan & Others	CP D 5640 of 2017 : Al-Hamza Steel Mills (Pvt.) Ltd. vs. Federation of Pakistan & Others
CP D 5889 of 2017 : Ghulam Ali Bhatia & Another vs. Federation of Pakistan & Others	CP D 6111 of 2017 : Asif Kazani & Others vs. Federation of Pakistan & Others
CP D 6379 of 2017 : Mehboob Re-Rolling Mills vs. Federation of Pakistan & Others	CP D 6533 of 2017 : SAI Steel Re-Rolling Mills & Another vs. Federation of Pakistan & Others
CP D 6565 of 2017 : Ghulam Ali Bhatia vs. Federation of Pakistan & Others	CP D 6759 of 2017 : A.F. Steel Re-Rolling Mills vs. Federation of Pakistan & Others
CP D 6857 of 2017 : Majeed & Sons Steel (Pvt.) Ltd & Others vs. Federation of Pakistan & Others	CP D 6970 of 2017 : Kashif Ayub vs. Federation of Pakistan & Others
CP D 7230 of 2017 : Shahbeena vs. Federation of Pakistan & Others	CP D 7323 of 2017 : Kashif Ayub vs. Federation of Pakistan & Others
CP D 7475 of 2017 : Shabeena vs. Federation of Pakistan & Others	CP D 7855 of 2017 : Muhammad Iqbal vs. Federation of Pakistan & Others
CP D 8166 of 2017 : A.F. Steel Re-Rolling Mills vs. Federation of Pakistan & Others	CP D 8406 of 2017 : Amaan Steel (AOP) vs. Federation of Pakistan & Others
CP D 8776 of 2017 : Mehboob Re-Rolling Mills & Others vs. Federation of Pakistan & Others	CP D 8804 of 2017 : Faiza Steel & Others vs. Federation of Pakistan & Others
CP D 8930 of 2017 : Muhammad Iqbal & Others vs. Federation of Pakistan & Others	CP D 15 of 2018 : Golden Steel Re-Rolling Mills vs. Federation of Pakistan & Others
CP D 142 of 2018 : Mehboob Re-Rolling Mills vs. Federation of Pakistan & Others	CP D 351 of 2018 : Saeed Steel vs. Federation of Pakistan & Others
CP D 488 of 2018 : Muhammad Iqbal vs. Federation of Pakistan & Others	CP D 489 of 2018 : Faizan Steel & Others vs. Federation of Pakistan & Others
CP D 584 of 2018 : Majeed & Sons (Pvt.) Ltd & Another vs. Federation of Pakistan & Others	CP D 838 of 2018 : Kashif Ayub & Others vs. Federation of Pakistan & Others
CP D 1038 of 2018 : Muhammad Iqbal vs. Federation of Pakistan & Others	CP D 1074 of 2018 : Amin Asim Steel Re-Rolling Mills vs. Federation of Pakistan & Others
CP D 1295 of 2018 : Horizon & Others vs. Federation of Pakistan & Others	CP D 1304 of 2018 : Muhammad Iqbal vs. Federation of Pakistan & Others
CP D 1488 of 2018 : Shaikh Muhammad Ishtiaq vs. Federation of Pakistan & Others	CP D 1684 of 2018 : Muhammad Iqbal vs. Federation of Pakistan & Others
CP D 1902 of 2018 : Asif Kazani & Others vs. Federation of Pakistan & Others	CP D 2007 of 2018 : Ayan Ship Breakers vs. Federation of Pakistan & Others
CP D 2123 of 2018 : Ayan Ship Breakers vs. Federation of Pakistan & Others	CP D 2124 of 2018 : Star Cotton Corp. (Pvt.) Ltd & Others vs. Federation of Pakistan & Others
CP D 2341 of 2018 : Al-Hamza Steel Mills (Pvt.) Ltd. vs. Federation of Pakistan & Others	CP D 2355 of 2018 : Shaikh Muhammad Hanif vs. Federation of Pakistan & Others
CP D 2953 of 2018 : Shabeena vs. Federation of Pakistan & Others	CP D 3123 of 2018 : Naimatullah Steel Works (Pvt.) Ltd. vs. Federation of Pakistan & Others
CP D 3182 of 2018 : Kashif Ayub vs. Federation of Pakistan & Others	CP D 3287 of 2018 : Prime Ship Breakers vs. Federation of Pakistan & Others
CP D 3291 of 2018 : Usama Steel (Pvt.) Ltd. vs. Federation of Pakistan & Others	CP D 3338 of 2018 : S.S. Enterprises vs. Federation of Pakistan & Others
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CP D 3626 of 2018 : Muhammad Moatasim & Others vs. Federation of Pakistan & Others	CP D 3674 of 2018 : Zak Re-Rolling Mills vs. Federation of Pakistan & Others
CP D 3735 of 2018 : Fatima Enterprises & Others vs. Federation of Pakistan & Others	CP D 3736 of 2018 :S.A. Traders vs. Federation of Pakistan & Others
CP D 3737 of 2018 : Abdul Sattar Noor Muhammad & Co. vs. Federation of Pakistan & Others	CP D 3791 of 2018 : A.A. Ship Breakers vs. Federation of Pakistan & Others
CP D 3833 of 2018 : Al-Hamza Steel Mills vs. Federation of Pakistan & Others	CP D 3911 of 2018 : Salam's International vs. Federation of Pakistan & Others
CP D 4247 of 2018 : Shabeena vs. Federation of Pakistan & Others	CP D 4562 of 2018 : Majeed & Sons Steel (Pvt.) Ltd & Others vs. Federation of Pakistan & Others
CP D 4565 of 2018 : Prime Ship Breakers vs. Federation of Pakistan & Others	CP D 4566 of 2018 : Karachi Ship & Spares Co. vs. Federation of Pakistan & Others
CP D 4727 of 2018 : Usman Steel (Pvt.) Ltd vs. Federation of Pakistan & Others	CP D 4791 of 2018 : Imran Ship Breaking Co. vs. Federation of Pakistan & Others
CP D 4826 of 2018 : Asif Kazani vs. Federation of Pakistan & Others	CP D 5337 of 2018 : Faizan Steel vs. Federation of Pakistan & Others
CP D 5338 of 2018 : Usman Steel (Pvt.) Ltd vs. Federation of Pakistan & Others	CP D 5799 of 2018 : Horizon vs. Federation of Pakistan & Others
CP D 5800 of 2018 : Unique Trading Co. vs. Federation of Pakistan & Others	CP D 5802 of 2018 : Abdul Sattar Noor Muhammad & Co. vs. Federation of Pakistan & Others
CP D 6072 of 2018 : Sikandar Steel Re-Rolling Mills vs. Federation of Pakistan & Others	CP D 6143 of 2018 : Hafiz Steel Re-Rolling Mills vs. Federation of Pakistan & Others
CP D 6524 of 2018 : Ayan Ship Breakers vs. Federation of Pakistan & Others	CP D 6617 of 2018 : Fatima Enterprises vs. Federation of Pakistan & Others

CP D 6841 of 2018 : Ghaffar & Co. vs. Federation of Pakistan & Others	CP D 7378 of 2018 : Hafiz Steel Re-Rolling Mills vs. Federation of Pakistan & Others
CP D 7471 of 2018 : Mustafa Steel Re-Rolling Mills vs. Federation of Pakistan & Others	CP D 7472 of 2018 : Mateen International vs. Federation of Pakistan & Others
CP D 7473 of 2018 : Star Cotton Corp. (Pvt.) Ltd vs. Federation of Pakistan & Others	CP D 7715 of 2018 : S.A. Traders vs. Federation of Pakistan & Others
CP D 7716 of 2018 : Sikandar Steel (Pvt.) Ltd vs. Federation of Pakistan & Others	CP D 8063 of 2018 : Prime Ship Breakers vs. Federation of Pakistan & Others
CP D 8091 of 2018 : Rasheed Sons & Others vs. Federation of Pakistan & Others	CP D 8715 of 2018 : Pioneer Steel vs. Federation of Pakistan & Others
CP D 8801 of 2018 : Dadan Steel vs. Federation of Pakistan & Others	CP D 8802 of 2018 : S.S. Enterprises vs. Federation of Pakistan & Others
CP D 8959 of 2018 : Fatima Enterprises vs. Federation of Pakistan & Others	CP D 8960 of 2018 : Imran Ship Breaking Co. vs. Federation of Pakistan & Others
CP D 315 of 2019 : Commercial Metal vs. Federation of Pakistan & Others	CP D 316 of 2019 : Jamauddin & Company vs. Federation of Pakistan & Others
CP D 317 of 2019 : New Choice Enterprises vs. Federation of Pakistan & Others	CP D 379 of 2019 : Ayan Ship Breakers vs. Federation of Pakistan & Others
CP D 391 of 2019 : Star Cotton Corp. (Pvt.) Ltd vs. Federation of Pakistan & Others	CP D 1066 of 2019 : Jamaluddin & Co. vs. Federation of Pakistan & Others
CP D 1311 of 2019 : Imran Ship Breaking Co. vs. Federation of Pakistan & Others	CP D 1744 of 2019 : Nawab Brothers Steel Mills Ltd. vs. Federation of Pakistan & Others
CP D 1907 of 2019 : Star Cotton Corp. (Pvt.) Ltd vs. Federation of Pakistan & Others	CP D 1999 of 2019 : Usman Steel Pvt. Ltd. vs. Federation of Pakistan & Others
CP D 2464 of 2019 : Imran Ship Breaking Co. vs. Federation of Pakistan & Others	CP D 2484 of 2019 : New Choice Enterprises vs. Federation of Pakistan & Others
CP D 2485 of 2019 : New Choice Enterprises vs. Federation of Pakistan & Others	CP D 3759 of 2019 : Usman Steel (Pvt.) Ltd. vs. Federation of Pakistan & Others
CP D 3819 of 2019 : Star Cotton Corp. (Pvt.) Ltd. vs. Federation of Pakistan & Others	CP D 5837 of 2017 : Kausar Ghee Mills (Pvt.) Ltd. vs. Federation of Pakistan & Others