

**IN THE HIGH COURT OF SINDH,  
AT KARACHI**

**C. P. No. D-1136 of 2015**

**Present:**

Ahmed Ali M. Shaikh, CJ  
and Yousuf Ali Sayeed, J

Petitioner : M/s. Lucky Cement Limited

Respondent No.1 : The Chief Minister Sindh  
through Chief Secretary,  
Karachi.

Respondent No.2 : Government of Sindh, through  
Secretary Finance Sindh,  
Karachi Sindh.

Respondent No.3 : Government of Sindh, through  
its Secretary, Labour & Human  
Resources Department, Sindh.

Respondent No.4 : The Commissioner Mines  
Labour Welfare Mines Labour  
Department, Government of  
Sindh.

Respondent No.5 : Assistant Commissioner, Mines  
Labour Department,  
Government of Sindh,

Taimur Ali Mirza, Advocate, for the Petitioner.  
Sandeep Malani, Assistant Advocate General,  
Sindh, for the Respondents.

Date of hearing : 03.10.2022.

## **ORDER**

**YOUSUF ALI SAYEED, J.** - The Petitioner is a cement manufacturing company carrying on such business within the Province, and has preferred the captioned Petition so as to impugn Notification No. SOB/LAB/5-10/2011-12 dated 02.12.2014 issued by the Government of Sindh under Section 3(1) of the Excise Duty on Minerals (Labour Welfare) Act 1967, imposing a cess on certain minerals that are the raw material in such manufacture.

2. As reflected in the Order made on 13.09.2022, whilst various grounds had been raised at the time of filing of the Petition, the arguments that came to be advanced on behalf of the Petitioner on that date constituted a complete departure from the case set up through the pleadings. All those grounds were abandoned and reliance was placed solely upon the principle laid down by the Honourable Supreme Court of Pakistan in the case reported as Messrs. Mustafa Impex, Karachi and others v. The Government of Pakistan through Secretary Finance, Islamabad and others PLD 2016 SC 808 (“**Mustafa Impex**”), as to the exercise of a statutory power vesting in the Provincial Government having to be exercised collectively by the Provincial Cabinet. With reference to that judgment, it was argued that while the relevant provision of the statute vested power with the Provincial Government, the Impugned Notification itself purported to have been issued on the approval of the Chief Minister, hence the same ought to be struck down on that score.

3. Conversely, the learned AAG pointed out that the Impugned Notification predated Mustafa Impex and cited the judgment of a three-member Bench of the Honourable Supreme Court of Pakistan in the case of Pakistan Medical & Dental Council v. Muhammad Fahad Malik 2018 SCMR 1956 (the “**PMDC**”) as well as a yet unreported judgment rendered by a learned Division Bench of this Court in Constitutional Petition No.D-756/17, titled as S. M. Kaleem Makki v. Province of Sindh & others, so as to argue that the principle laid down in Mustafa Impex would only apply prospectively and was thus inapplicable to the matter in hand.
  
4. Confronted with that stance, learned counsel for the Petitioner sought to counter the same through reference to another judgment rendered by the Apex Court in the case reported as Government of Sindh through Secretary Health Department and others v. Dr. Nadeem Rizvi and others 2020 SCMR 1 (“**Nadeem Rizvi**”), where the principle laid down in Mustafa Impex had been applied to a prior notification. He argued that although the PMDC case had not been specifically referred to in that subsequent case, as the later judgment was that of a larger five-member bench, the same should be treated as marking a departure from the PMDC case, signalling that the same had thus impliedly been set aside.

5. In view of the focus of the arguments advanced, we would accordingly confine ourselves to the narrow canvas across which the case has been portrayed and examine the matter solely from the standpoint of whether or not the principle laid down in *Mustafa Impex* would be applicable.
  
6. In the PMDC case, the effect of the *Mustafa Impex* judgment was specifically considered by the Honourable Supreme Court while considering the finding by the Islamabad High Court that the operation thereof (i.e. *Mustafa Impex*) would be prospective and not affect/invalidate prior enactments. In that context, the Apex Court went on to hold *inter alia* that its judgments, unless declared otherwise, operate prospectively, and that the prior enactments that were the subject of the proceedings would remain unimpaired.
  
7. The PMDC principle was then applied by the learned Division Bench in *Kaleem Makki (Supra)*, with the relevant paragraphs from the judgment reading as under:

“15. The dates of the notification and the judgments as relied upon by the Counsel are very crucial. The notification whereby the petitioner was appointed as M.D of STEVTA was issued on 28.6.2016 whereas he was removed as M.D. STEVTA on 20.1.2017. The judgment in the *Mustafa Impex* came on 18.8.2016 (two months after the appointment), however on the day when the judgment of *Mustafa Impex* was announced it was silent as far as its retrospective and prospective effects are concerned. The notifications and the Ordinance which were the subject matter of *Mustafa Impex* were declared ultra vires since they were not accorded and

routed through the Federal Cabinet. The clarity about the prospective effect of the judgment of Mustafa Impex came in the case of Pakistan Medical & Dental Council vs. Muhammad Fahad Malik (2018 SMCR 1956) when in para 24(a) the Hon'ble Supreme Court observed that the judgment of the Supreme Court unless declared otherwise operates prospectively and such amended Ordinance (Which was subject matter of PMDC's case) were not hit by Mustafa Impex case. This judgment came on 12.1.2018.

16. It is the general principle of jurisprudence that the law takes its effect from the date of promulgation and "interpretation of the said law" cannot be subjected to the doctrine of retrospective effects unless expressed specifically in the judgment, therefore, Mustafa Impex's case is to be applied prospectively, in general. It is the existence of law at the relevant time that counts, which may have been interpreted at a later date. Since the deficiency in the appointment notification as far as Provincial Cabinet is concerned, is not questioned no challenge could be thrown.

17. The principle we derive from the conclusion of the aforesaid three judgments is that Mustafa Impex only invalidates those actions retrospectively which were impugned in that lis and not all others, so by virtue of aforesaid principle the notification for the appointment of the petitioner is saved whereas it set a mechanism for future course i.e. issuance of impugned notification. By applying the principle that we derived from the aforesaid Judgments, the removal cannot be sustained. As reproduced above Section 8(4) of STEVTA Act requires that the M.D. shall be appointed for a term of three years and shall be eligible for reappointment for more than one term on the basis of performance provided that the Government on a complaint regarding performance of the M.D. or otherwise reduce the term as the case may be and terminate services. The impugned notification was issued by the Chief Secretary Sindh without any reference to Cabinet's approval as it requires Government's approval, which is defined in the above referred judgments."

8. By contrast, the particular paragraph of the Nadeem Rizvi judgment pointed out by learned counsel for the Petitioner reads as follows:

23. Besides, at the time of the purported transfer to the Province, the administrative control of SZPMI along with its staff and equipment vested with the Ministry of Health and was given to the Cabinet Division vide notification No.F.8-1/94-Estt-I dated 13.02.1994. Therefore falling strictly within the domain of the Federal Government (i.e. Cabinet Division), it could not have been transferred to the Provincial Government. Furthermore, notwithstanding the foregoing, on the basis of the law laid down in the judgment reported as Messrs. Mustafa Impex, Karachi and others v. the Government of Pakistan through Secretary Finance, Islamabad and others (PLD 2015 SC 808) wherein this Court defined the phrase “Federal Government” as the Federal Cabinet comprising of the Prime Minister and the Federal Ministers, the notification No.4-3/2012-Min-I dated 14.02.2012 purportedly issued by the Cabinet Division is held to be illegal for it provides that the “Prime Minister has been pleased to order transfer of administrative control of...” SZPMI to the Government of Punjab.. The Prime Minister alone does not have the power or authority to make such transfer without the approval of the Federal Cabinet as held by the post-remand judgment dated 28.12.2018 passed by the learned Single Judge of the Lahore High Court. Even otherwise there is nothing on record to indicate that the above transfer was approved by the Federal Cabinet. Therefore, the transfer in question was clearly in excess of the powers available to the Prime Minister under the Constitution, the law and the Rules of Business, 1973.

9. Upon examining the PMDC and Nadeem Rizvi judgments and considering the argument advanced by either side with reference to one or the other precedent, it is manifest that the former clearly enunciates a principle of law by the Honourable Supreme Court within the contemplation of Article 189 of the Constitution, whereas the latter, albeit the decision of a larger bench, merely

presents an instance where a notification predating Mustafa Impex was set aside with reference to that case, but without the subject of retrospective application being discussed or any principle being laid down.

10. As to the question of whether the principle laid down through an earlier judgment would stand eroded by a later decision that is rendered in conflict, one may find guidance in the judgment of the Supreme Court of the United States in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 109 S. Ct. 1917 (1989), where it was stated that:

“If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”

11. Viewed from yet another standpoint, a decision passes sub silentio, in the technical sense, when the particular point of law involved in it was not perceived by the Court or present to its mind. The Court may consciously decide in favour of one party because of point A, which it considers and pronounces upon, however, it may be shown that logically the Court should not have decided in favour of the particular party unless it also decided point B in his favour; but point B was not argued or considered by the court. In such circumstances, although point B was logically involved in the facts and although the case had a specific outcome, the decision is not an authority on point B, which is said to pass sub silentio.

12. As such, the contention of learned Counsel for the Petitioner that the prior notification assailed in Nadeem Rizvi's case could not have been struck down on the touchstone of Mustafa Impex unless the Bench was of the view that the principle laid down in that case operated retrospectively is of no avail, as the question of prospective or retrospective application was never debated nor argued in that decision. Thus, in our view, Nadeem Rizvi's case cannot, with utmost respect, be regarded as an authority on the point that Mustafa Impex would apply retrospectively.

13. Under the given circumstances, we are inclined to follow the judgment of the Honourable Supreme Court in the PMDC case, as done by the learned Division Bench of this Court in Kaleem Makki (Supra), and find the contention advanced on behalf of the Petitioners as to retrospective application of Mustafa Impex to be misconceived.

14, The Petition, being devoid of force, stands dismissed accordingly.

JUDGE

CHIEF JUSTICE

Karachi.  
Dated: