

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.145 of 2023

JDW Sugar Mills Limited & others

Versus

Federation of Pakistan & others

A N D

Suit No.149 of 2023

JK Sugar Mills Private Limited & another

Versus

Federation of Pakistan & others

DATE	ORDER WITH SIGNATURE OF JUDGE(S).
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Suit No.145 of 2023

CMA No.1735/2023 (U/O-39 Rule 1 &2 CPC).

Suit No.149 of 2023

CMA No.1759/2023 (U/O-39 Rule 1 &2 CPC).

Dates of hearing: 13.02.2023, 14.02.2023, 15.02.2023, 16.02.2023, 20.02.2023 and 21.02.2023

M/s Makhdoom Ali Khan, Ali Almani, Khawaja Aizaz Ahsan, Mostafa Abbas Naqvi and Samiur Rehman, Advocates for plaintiffs in Suit No.149/2023.

Mr. Khalid Jawed Khan, Advocate for plaintiffs in Suit No.145/2023.

M/s Abdul Sattar Pirzada, Mamoon N. Chaudhry, Gibran Karim Pirzada and Muhammad Inzimam Sharif, Advocates for defendants No.10, 11, 17, 19, 22, 23, 25, 26, 30, 31, 32, 33, 34, 35, 36, 37 and 38 in suit No.145/2023 and for defendants No.10, 11, 16, 18, 21, 22, 23, 24, 28, 29, 30, 31, 32, 33, 34, 35 and 36 in suit No.149/2023.

Mr. Ovais Ali Shah, Advocate for defendants No.12, 13, 15, 27, 28, 29 and 39, in suit No.145/2023 and for defendants No.12, 14, 25, 26, 27 and 37 in suit No.149/2023.

Mr. Jaffer Raza, Advocate for defendants No.16 and 41 in suit No.145/2023 and for defendants No.15 and 39 in suit No.149/2023.

Mr. Malik Sadaqat Khan, Additional Attorney General and Ms. Mahreen Ibrahim, Assistant Attorney General a/w Mr. Athar Hussain Khokhar, Director General, Ministry of Commerce.

Mr. Zeeshan Edhi, Additional Advocate General Sindh a/w Mr. Zamir Ahmed Jagirani, Cane Commissioner Sindh, Mr. Muhammad

Idrees Khoso, Addl. Secretary (Technical) Agriculture, Supply & Prices Department Govt. of Sindh and Mr. Zulfiqar Ali Vistro, Focal Person for Legal Matters Agriculture, Supply & Prices Department, Govt. of Sindh.

M/s. Manzoorul Haq and Alam Zaib, Law Officer SBP.

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Muhammad Shafi Siddiqui, J.- Security Advisory Board (SAB), in consideration of national stocks of sugar, its domestic consumption and in thoughtfulness of issues that concern with the problems of sugar industry, recommended federal government their mind to export excess sugar. Such recommendations dated 03.01.2023 were based on the sugar stock of 2021-22, sugarcane production estimates for 2022-23 and sugar production estimates for 2022-23 and estimated/projected annual sugar consumption in the country, It seeks permission of the Chairman ECC for convening a meeting by adding the subject agenda. The concerned Ministry of National Food Security & Research informed ECC accordingly of the above data as adjudged by SAB. The recommendations were placed before Economic Coordination Committee who made a decision thereon later ratified by the federal government. The stock disclosed to be in excess was 1,004,689 metric tons of sugar (surplus sugar).

2. Initially by a meeting held on 03.01.2023 it was resolved that 250,000 metric tons of sugar shall be exported and that includes previously approved quota of 100,000 metric ton. Realization of export proceeds was also framed as 60 days from the date of the opening of LC for export of sugar whereas the quota for export was to be determined on the basis of installed crushing capacity of sugarcane of the provinces.

3. Ministry of Commerce vide its Office Memorandum dated 18.01.2023 conveyed an amended view of the ECC on the export of sugar during 2022-23. Based on decision of ECC dated 11.01.2023 in which cabinet reconsidered earlier summary of 03.01.2023, as submitted, it was agreed by ministry via office memorandum and export of 250,000

metric ton of sugar was allowed inclusive of previously approved quantity of 100,000 metric ton on same conditions and has allocated quota for export of sugar to three provinces i.e. Punjab, Sindh and KPK having 61, 32 and 7 percent quota allocation respectively and is further required to be distributed through cane commissioner to the sugar mills. It was initially on first come first serve basis for Punjab and KPK whereas for Sindh it was through cane commissioner. This was a reviewed decision of the ECC and cabinet that claimed to have superseded the earlier decision of 03.01.2023 though summary was common. Revised decision of 11.01.2023 was considered by the Ministry of Commerce in their Office Memorandum of 18.01.2023 and ratified (with above changes) by Office Memorandum of 28.01.2023 of the Ministry of Commerce. The allocation of quota to provinces remained same in terms of its percentage whereas its further distributions through cane commissioner of the provinces were made identical for all provinces i.e. through cane commissioner. Based on the ECC's recommendation of 26.01.2023, Ministry of Commerce through Office Memorandum of 28.01.2023 approved the amendments of ECC's earlier decision in case No.12/02/23 dated 11.01.2023. The only amendment as could be seen is that sugar mill quota was ordered to be allocated through cane commissioner of the respective provinces and that the consignment to be shipped within 45 days of the allocation of the quota.

4. While the manner of distribution of provincial quota has remained same along with two of the provinces i.e. Punjab and KPK, however the formula/discretion exercised by the cane commissioner Sindh, in distributing quota to mills, was different from those of Punjab and KPK. The distribution through cane commissioner in Sindh was based on number of sugar mills to whom identical quota was distributed, notwithstanding the installed crushing capacity, amount of sugarcane

crushed by an industry and the amount of sugar produced and rendered sugar as surplus, in terms of its percentage by the respective mill, whereas the cane commissioner of Punjab and KPK distributed it in terms of sugar mills capacity i.e. the amount of sugarcane crushed/sugar produced by the respective mills. Having 32 functional sugar mills in Sindh, the cane commissioner distributed 2500 metric ton to each sugar mill, which comes to 80,000 MT as received under a policy from federal government.

5. The federal government distributed quota, in terms of respective percentage out of excess/surplus sugar available for distribution as first trench; distribution is as under:-

Of 250,000 surplus sugar

61%	to Punjab	=	152,500 MT
32%	to Sindh	=	80,000 MT
7%	to KPK	=	17,500 MT
	Total		----- 250,000 MT =====

6. On these admitted facts, it is plaintiffs' case that the allocation of quota by cane commissioner Sindh to sugar mills, treating them alike, irrespective of their performance and contribution, which is main criteria when provinces were allocated, is arbitrary, discriminatory, illogical, irrational and does not demonstrate the application and implementation of federal policy in distributing the quota to the sugar mill owners.

7. Mr. Makhdoom Ali Khan, Mr. Khalid Jawed Khan and Mr. Ali Almani argued that following the matrix of distribution of quota to provinces on performance basis (since provinces were also distributed on the same strength per counsel) and that of cane commissioner Punjab and KPK, the mandate should have been followed while allocating the quota to respective sugar mills in Sindh also, in proportionate to the sugarcane

crushed/sugar produced by a mill, which is correct rationale and sounds logical and more importantly carries the intent of federal policy, whereas actions of cane commissioner found violative of federal policy. It is claimed that federal government's policy is not designed for different treatment in different provinces and that also by a cane commissioner.

8. It is claimed that the allocation of quota by cane commissioner Sindh is obviously designed to unfairly and unlawfully benefit a group of mill owners having no significant contribution at all in the process of crushing of the sugarcane and the production of sugar and that they were given benefit at the expense of other mill owners being efficient and contributing to a large extent towards the national need.

9. Plaintiffs' counsel have attempted to demonstrate that the large sugar mills in the province of Sindh have produced sugar in the crushing season 2021-22 up to 200,000 metric ton and based on such production their allocation should have been more than 7,600 metric ton as against sugar mill having production of sugar in crushing season 2021-22 as 9040 metric tons who on the application of policy, if same federal formula is applied, would have got 316 metric ton but has ended up in getting 2500 metric ton by the blessings of cane Commissioner Sindh, which goes on to violate Article 3 of the Constitution as well, besides other.

10. The cane commissioner has put different classes of sugar mills in the same pool and/or has blessed dissimilar sugar mills in the similar way, and thus has caused discrimination which otherwise is not the spirit of federal export policy of sugar. It is submitted by the plaintiffs' counsel that there is no logic and rationale for this identical distribution to different classes of sugar mills contributing to the national need of sugar, besides being not in consonance with the spirit of the policy. It is

argued that cane commissioner is only an instrument to pass an already adjudged quota through its office.

11. Mr. Abdul Sattar Pirzada, Mr. Ovais Ali Shah and Mr. Jaffer Raza have been very vocal in addressing that the Court cannot interfere with the policy matters of the federal government and that it cannot sit in appeal with regard to a policy matter and cannot substitute a policy decision which the Court flavours inappropriate or illogical, to a more appropriate and logical.

12. The arguments, as raised by Mr. Abdul Sattar Pirzada and Mr. Ovais Ali Shah are that any policy adopted by one province (Punjab and KPK) does not provide any basis for determination of question of discrimination; that an attempt has been made to deprive the sugar mills of their vested rights created in pursuance of concluded contracts executed by them in respect of the export of sugar; none of the members of PSMA have objected to the export of sugar on the allocation of quota, as decided by the cane commissioner; that plaintiffs have not raised any objection either before PSMA or cane commissioner and thus have acted contrary to the collective will of PSMA Sindh Zone; the cane commissioner has formulated a policy and made a decision in which the export for sugar has been allocated on a lawful, just, fair and reasonable basis and in a non-discriminatory, unbiased, equitable, consistent and uniform manner.

13. With reference to word “through” used for cane commissioner it is argued that the submission of the plaintiffs is misconceived. Firstly, if the policy is viewed from the perspective of the cane commissioner, the decision/policy does not provide any direction or guidance as to how the quota, provided to the province, is to be distributed. The decision/policy in no manner conveys that the table containing the distribution percentage (for provinces) is in any manner the

method/criteria of distribution of quota within the provinces. The silence and absence of clear direction makes it clear that the cane commissioner was empowered to make its own decision for intra-provincial distribution of quota amongst sugar mills. Secondly, the minutes of 03.01.2023 also used the same word i.e. “through” with respect to PSMA. Whereas the minutes while using the same terms “through” clearly indicate grant of complete discretion to the PSMA. As such, the submission that the word “through” in any way restricts the discretion of the cane commissioner is incorrect.

14. With regard to applicability of Article 3 of the Constitution, in order to prove plaintiffs’ point that they have greater right to the export quota, it is misconceived. Mr. Pirzada insisted that this principle in the Constitution of Islamic Republic of Pakistan, 1973 in fact imported from the constitution of the USSR which tried to encapsulate the socialist principles of Karl Marx, which demands greater restraint for the rich of the society in exploiting the resources of the society at the expense of the less fortunate, which he claimed to be an unbalanced approach.

15. On the grant of injunction, learned counsel for defendants have argued that the policies of the ECC, cabinet and/or the cane commissioner cannot be filled in by this Court as the Court is deciding injunction application. Even if it were to do so, such observation would only be tentative without any binding effect.

CANE COMMISSIONER’S/DEFENDANT NO.8’S RESPONSE

16. The cane commissioner has placed his case on the footing that it has equally distributed the quota to all kind of mills irrespective of their capacity, after completing the exercise as required and on the suggestions of PSMA and on the basis of fairness, which was agreed to and accepted by all; the decision was made in public interest in order to

ensure timely payments to the growers across the province of Sindh, which was affected by heavy rain/flood.

PSMA/DEFENDANT NO.10'S RESPONSE:

17. Defendant No.10/PSMA has argued that the decision of ECC of the federal cabinet dated 03.01.2023 was on the basis of installed crushing capacity as opposed to sugarcane crushed by each sugar mill, which consideration was superseded; filing of the suits was inspired and influenced by decision of cane commissioner Punjab which is also evident from a bare perusal of the prayer clauses of the suit and hence are after thought; cane commissioner's order is passed in public interest to benefit the farmers of the province of Sindh and hence defendants' sugar mills have not raised any objection to such distribution of quota; plaintiffs fall under the command of a single group, which is seeking to avail unjustifiable interests through instant suits; all sugar mills are part of same class and there is nothing to discern between plaintiffs and defendants sugar mills as all are in the same business and members of defendant No.10. Thus, per defendant No.10's response, identical distribution cannot be conceived to be a discrimination; the decision of 11.01.2023 is the same as that of 03.01.2023 except condition No.(ii) which has been replaced with the new one and the novated version does not speak of allocation of quota for export of sugar on the basis of "installed crushing capacity"; there is no reason given for the percentage of provincial distribution to respective provinces and at this interlocutory stage Court cannot question as to the terms of such policy (unless clearly framed as arbitrary) and if it were to question, it would be an interference with the policy.

18. In view of the respective arguments and reasoning placed before this Court by the counsels, there are a few questions which are required to be addressed in order to take the controversy in hand to its logical

end, under the circumstance of the case. These material questions are as under:

- I) *Whether the cane commissioner Sindh has rightly interpreted, appreciated and implemented the policy of the federal government for the distribution of export quota of 80,000 MT of sugar allocated to the provinces by the federation ?*
- II) *Whether, with reference to the subject of export, which is under federal domain, could it be presumed that without deciding as to the formula of allocation of sugar to the respective sugar mills, the cane commissioner is empowered to distribute and allocate sugar as per his policy/discretion ?*
- III) *Whether it was federal government's intent to delegate powers to cane commissioner alone to apply his wisdom, frame a policy of his own for distribution export quota and distribute it as he deems fit and proper ?*
- IV) *What could possibly be done by this Court under the circumstances of the case being time bound?*

19. Heard counsel and perused record.

20. Although a brief history has been discussed above, which facts have not been and could not be disputed by the counsels except cane commissioner's role in distributing quota to mills, I would give a gist in the shape of sequential events, which are material for consideration, as under:-

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|------------|--|
| 03.01.2023 | <ul style="list-style-type: none"> * The ECC of the Federal Cabinet made the following decisions * Allowed export of 250,000 MT of sugar * Quota of export shall be determined on the basis of installed crushing capacity of sugarcane of provinces. |
| 11.02.2023 | <ul style="list-style-type: none"> * The decision dated 03.01.2023 was superseded by the ECC through the decision dated 11.01.2023, wherein it was decided that:- - percentage of quota for export of sugar should be distributed at 61%, 32% and 7% among Punjab, Sindh and KPK respectively. - Manner of distribution of quota would be allocated for |

- Punjab and KPK on first come first serve basis and for Sindh through the cane commissioner of the province.*
- 17.01.2023 * *Federal Cabinet ratified the decision of the ECC dated 11.01.2023*
- 18.01.2023 * *Ministry of the Commerce issued the Office Memorandum in pursuance of the decision of the ECC dated 11.01.2023*
- 20.01.2023 * *State Bank issued EPD Circular on the basis of the decision of the ECC dated 11.01.2023*
- 25.01.2023 * *Cane commissioner, Sindh decided to allocate equal share to the sugar mills situated in the Province of Sindh*
- 27.01.2023 * *The federal cabinet ratified the decision of the ECC dated 26.01.2023, whereby the manner in respect of the allocation of quota for the provinces of Punjab and KPK was amended from the first come first serve basis to through cane commissioner of the provinces*
- 28.01.2023 * *The Office Memorandum was issued in pursuance of the decision dated 26.01.2023*
- 30.01.2023 * *The EPD Circular was issued by the State Bank in pursuance of the decision of the ECC dated 26.01.2023*
- 30.01.2023 * *The cane commissioner, Punjab issued the order in respect of allocation of quota on the basis of data of cane crushed provided by the Punjab Sugar Mills Association*
- 31.01.2023 * *The cane commissioner, KPK issued the order in respect of allocation of quota on the basis of data of cane crushed*

21. The pleadings and the arguments of the plaintiffs' counsel would suggest that they have not thrown a challenge to the policy of the federal government rather seek its interpretation and correct application, as framed by federal government. The manner of allocation of quota of sugar for export to three provinces, as reflected in ECC's decision dated 11.01.2023 and onwards and as ratified by the cabinet on 28.01.2023, (which was designed to be implemented) by an Office Memorandum of concerned ministry dated 28.01.2023 has been left semitransparent and the federal counsel have not attempted to assist this Court as to the basis of provincial distribution on such percentage but it would not be difficult to ascertain since the summary remained the same for such distribution.

22. Mysteriously, neither the Assistant Attorney General Ms. Mehreen Ebrahim who was appearing in the matter since they were served by order of 01.02.2023 nor the Additional Attorney General Malik Sadaqat Khan who appeared along with Athar Hussain Khokhar, Director General, Ministry of Commerce, assisted at all to complete the puzzle. They were unable to demonstrate as to what should be the basis of allocation of quota for export to sugar mills and should it not be on the same formula as applied while allocating quota to provinces respectively. Strangely, even they have stated that they have no idea at all about sugar mill distribution however provincial distribution as per data of sugarcane crushed and sugar produced not denied. In substance federal government is not denying provincial quota on the basis of performance of sugarcane crushed and sugar produced by a province via sugar mills performance but claimed to have no idea about sugar mill distribution. It is perhaps the instructions given by the Ministry to remain inexpressive as even no counter-affidavit to the applications in hand was filed despite seven dates of hearing after notice. Things were drastically changed in the first two weeks of January 2023 and perhaps they were instructed accordingly.

23. Export of any commodity is a federal constitutional mandate and the posed questions have to be seen in this frame as this constitutional mandate cannot be passed on except with clear frame of policy and intent, if could be seen. Keeping this phenomena in mind, I was and am of the view that the “formula” that was applicable while distributing quota to the provinces should form a mirror image while dealing with distribution of quota to the respective sugar mills and perhaps for this reason the wisdom of the federal government in allocating quota on the basis of a formula was kept away by federal counsels. Certainly, when the policy was framed, federal government never wanted a cane

commissioner to frame a policy for them (federal government) for allocating export quota to mills after applying their wisdom.

24. Minutes of 03.01.2023 undisputedly are superseded by the decision of Economic Coordination Committee (ECC dated 11.01.2023. Nevertheless, it was superseded on the basis of same summary as of 03.01.2023 as later it was only “reconsidered”. The summary was presented by Ministry of National Food Security & Research regarding export of sugar during 2022-23. As pointed out by Mr. Ovais Ali Shah the only material thing that escaped when 11.01.2023 decision came out as being an overlapping decision is the basis of provincial distribution i.e. installed crushing capacity of sugarcane of the provinces but the data of provincial distribution remained as it is in the second column (as per Mr. Ovais this does not form part of changes occurred). It was then only left to the extent of first-come-first serve basis for two provinces and through cane commissioner for Sindh province.

25. Mr. Ovais Shah has attempted many ways and applied different formulas, such as population of the provinces, number of sugar mills in Punjab, Sindh and KPK etc. (but all in vain, as he admitted), (except sugarcane crushed and sugar produced in the respective provinces, which exercise was done by Mr. Khalid Jawed Khan and statistics applied exactly). Mr. Ovais Ali Shah fairly conceded that his calculation is nowhere near the given percentage in column 2 of the concluded Office Memorandum of 28.01.2023. This percentage is being viewed since 11.01.2023 when ECC made a decision and more importantly on the same summary data. It cannot be seen as illusory (provincial allocation formula), when the federal government framed this policy and allocated quota. It cannot be conceived that the federal government framed a policy for allocation of quota to three provinces without any rationale, logic and reasoning. It cannot be conceived that in a matter of export,

the federal government would leave the issue of distribution of quota to sugar mills indecisive rather would leave it to cane commissioner who would conceive and frame his own policy and ideas to distribute the quota only as a cane commissioner. One thing is for certain that cane commissioner has to follow the same mandate as applied when provinces were distributed quota. Now, if identical distribution is a justification according to defendants then provincial quota/distribution would fail on the logic. According to cane commissioner's logic, if approved, 250,000 MT sugar should have been distributed equally to all sugar mills of Pakistan as per cane commissioner's formula.

Functional sugar mills of three provinces:

Punjab	=	42
Sindh	=	32
KPK	=	5

Functional sugar mills of Pakistan	=	79

26, Now if all mills are to be distributed identically then the surplus sugar of 250,000 MT should have been divided into 79 parts i.e. $250,000 / 79 = 3164$ i.e. each mill should have got 3165 and Sindh alone would have ended up in getting $3164 \times 32 = 101,215$ MT instead of 80,000 MT. So by no means this formula was correctly applied by cane commissioner when federal government itself has not applied it. Even population based distribution failed, as Mr. Ovais admitted.

27. Mr. Khalid Jawed Khan, learned counsel for plaintiffs, though has not addressed this point at the time when he commenced his arguments but in rebuttal he attempted to place on record a publication (annual report of PSMA) of the Pakistan Sugar Mills Association (PSMA) and according to him the exact formula that could be applicable and rightly so is the cane crushed by the respective sugar mills, as reflected in the annual report of PSMA and this has worked out to be exactly as reflected

in column 2 of the Office Memorandum dated 28.01.2023 i.e. 61, 32 and 7 percent of the available/provided stock of sugar to the three provinces respectively, as referred above. The fact of above calculation alone is not denied by Mr. Pirzada and Mr. Ovais Ali Shah, however, the only response to this was that it was not provided in the plaint, therefore, such application of formula would be an extraneous consideration and even if it is so, it should not be made basis of distribution by cane commissioner. He added that this would amount to inserting new terms in the policy of the federal government even if cane commissioner is bound accordingly. He insisted that cane commissioner had to evolve its own formula for further distribution, even if stats for provincial distribution is approved as figured out by Mr. Khalid Jawed Khan. I have already responded to this defence above that in my view the formula applied for provincial distribution should be followed by cane commissioner as he does not carry a constitutional mandate to frame a policy for export, nor such task was assigned to cane commissioner in the policy.

28. The argument thus has force when it is said that the cane commissioner in Punjab and KPK followed the spirit of federal policy i.e. performance-based criteria as applied by the federal government in allocating the quota to three provinces. The cane commissioner in Sindh applied his own logic, conceived his own idea and applied his own policy; it cannot be said that both of them were right in implementing and interpreting policy; one has to yield its way for the other not only as being illogical and incorrect but also being against federal policy and in such confused state of affairs Court has to strike a balance to find out such logic and rationale to streamline the policy as framed by the federal government but has left it vague for the interpretation of this

Court. Clarifying the obscure and revealing intent of federal government does not amount to rewriting the policy.

29. The decision of the cane commissioner and the applicable criteria i.e. as per cane crushed and sugar produced, was not challenged by small sugar mills in Punjab and KPK, having low crushing capacity or low sugar production capacity; whereas in the Province of Sindh criteria applied by cane commissioner was disputed. The office Memorandum of 28.01.2023 of the Ministry of Commerce provides a very significant line of approach for the cane commissioners i.e. consideration No.1. It reads as under:

“Provincial Cane commissioner shall allocate quota for export of sugar within seven (07) days of the date of issuance of Notification by Ministry of Commerce as per policy already approved by the ECC.”

30. Precisely, it is like; provincial cane commissioner shall allocate quota as per policy already approved. Now if that policy is already approved and existed, Mr. cane commissioner is in no way, could have carved out another of its own. It is argued by Mr. Pirzada vehemently that cane commissioner has been empowered to carve out his own policy, which arguments would not be convincing in the light of above Office Memorandum.

31. ECC never left it to the discretion of cane commissioner that he may frame and carve out his own policy rather cane commissioner had to apply “approved” policy in distributing and allocating quota to sugar mills. This was a decision and policy of the federal government on an exclusive federal subject of “export”, which otherwise left no discretion for cane commissioners and it had to perform functions that were delegated to, in giving effect to the already approved policy.

32. Learned Addl. Advocate General, appearing for Province of Sindh/cane commissioner along with Mr. Zamir Ahmed Jagirani, Cane

Commissioner Sindh and other sugar mills owners have supported the decision of the cane commissioner Sindh that there is no discernable basis for the federal government's allocation of different quotas to each province and that the federal government had delegated its policy making powers to cane commissioner under section 6 of Sugar Factories Control Act, 1950 and that since this was policy matter this Court cannot review cane commissioner's policy of distributing the quota identically among all mills on the basis of their installed crushing capacity, sugarcane crushed and sugar produced, whatever the case may be.

33. First of all this argument is contrary to the basic concept of policy making powers as this federal subject cannot be left at the mercy and whims of cane commissioner to carve out his own ideas; it would then go on to prove that the federal government had made two criteria for the distribution of quota; one based on crushing capacity and sugar produced and the other at the desire and whims of another cane commissioner which is not in line with the wisdom, calculation made and rational of the federal government applied while allocating quota to the provinces. It would overturn the constitutional distribution of powers between federation and provinces. The cane commissioner is supposed to implement the federal government's policy and not to create his own policy for federal government.

34. Specific words used in the decision are also decisive. The decision states that the federal government has decided (i) percentage of allocation of quota for the export of sugar and (ii) that the manner of distribution of quota to the mill owners shall be through the cane commissioner and (iii) that this would be done as per policy already approved by the ECC. Mr. Khalid Jawed Khan emphasized on the word "through" i.e. quota has to pass through commissioner and not "by" the Commissioner

35. Mr. Ovais Ali Shah's Argument that the word "through" was also used in the minutes of 03.01.2023 when the quota was likely to be distributed through PSMA would take him nowhere; in case the situation "through PSMA" would have prevailed, it would have meant the same i.e. distribution on the basis of formula already recognized by federal government through PSMA. The federal government only stated that the manner of distribution would be through cane commissioner i.e. the distribution of the allocated quota would be through the office of cane commissioner and not by the cane commissioner or (by PSMA, had it been so). The cane commissioner could not have carved out his own policy, no matter how best it would have been. The position of the cane commissioner within the federal government's policy is at par with that of State Bank of Pakistan i.e. only instrumental in conveying what is meant. Both are instruments for implementing the policy of the federal government.

36. To support the above understanding of policy, let's see it from another angle. What was irrational and illogical was erased on 11.01.2023 when the ECC reviewed 30.01.2023's recommendations and decided that the quota allocated to Punjab and KPK be distributed through cane commissioner instead of first come first serve basis. The effect of this clarity, given by the ECC was that the federal government wanted its implementation in the same way and same manner and not differently and cannot be left at the mercy and whims of different cane commissioners or as to who would approach cane commissioner first or whatever is decided by cane commissioner would be the correct interpretation of policy. So the cane commissioner's role was defined to be in a frame. The intention of the federal government is clear that they never wanted to leave it at the desire and whims of cane commissioner.

37. Thus, the performance based formula is the only rationale, exactly applied when the provincial quota is calculated as per statistics of PSMA i.e. sugarcane crushed and sugar produced by a mill as it is this cumulative effect of sugar mills of a province which contributed towards provincial quota. It might have not been pleaded that the rationale of distribution of quota to provinces was on the basis of sugarcane crushed and sugar produced as it was originally on installed crushing capacity only, but the Court cannot be ignorant of such facts when it is clarified in rebuttal and data corresponds, in order to reach to a just and fair conclusion. In dispensation of justice Court cannot overlook these facts and figures particularly when statistics are based on public document and also when in this case particularly Mr. Pirzada on his request was asked to respond to these calculations, he only ended up in saying that it may be so, but ministry's decision under consideration is silent about it nor such statistics were produced as refused by this Court at the time of rebuttal. He however has also not denied that such crushing statistics may be available on the website of his client PSMA for whom he is appearing. If the formula of distribution of export quota to provinces is based on the sugarcane crushed and the sugar produced, to which I agree, then it leave no room for the cane commissioner to test his wisdom; he had to mirror the image of the formula that he saw in the second column of distribution when the provinces were given their respective quotas¹. Thus the method, reasoning and logic of allocation, be it intra-provincial or inter-provincial, remains same.

DELEGATION OF POWERS

38. Though I have discussed this issue above summarily, but I would give my detailed reasoning separately as under:-

¹ Baloch Distillery & Sugar Mills v Secretary Industries & Commerce Department (PLD 2017 Sindh 313)

39. The federal government would never and rather cannot delegate its policy making powers to the cane commissioner as it is its constitutional mandate. Seeking assistance of such machinery (cane commissioner) is one thing and identifying a policy view, based on that assistance is another. In the later, the concept of carving out policy remains with the federation, which has a constitutional mandate. Also being the reason that this policy of the federal government does not provide for any of such delegation under the Constitution, and secondly that the subject of export of goods falls within the exclusive domain of the federal government in terms of Article 142A(2) of the Constitution read with Entry 27 Part-I of the Federal Legislative List. Even otherwise the reading of the documents, be it of 03.01.2023, 11.01.2023, 18.01.2023 or 28.01.2023 leave no room that the federal government even thought of delegating such powers to the wisdom of cane commissioner and not even to Province of Sindh and/or concerned ministry.

40. Reliance was placed by learned Addl. A.G. to Section 6 of Sugar Factories Control Act, 1950. This section allows the provincial government to confer on the cane commissioner such other powers and duties as may be prescribed. Firstly it relates to powers and duties that may be conferred by the provincial government and not by the federal government. Secondly the word “prescribed” is defined in the Act of 1950 to mean “prescribed by Rules”. No rules have been prescribed conferring policy making powers on the cane commissioner whereas statute alone does not permit cane commissioner to act accordingly.

41. If the arguments with regard to delegation of powers to the cane commissioner in framing and carving out of policy is appreciated, it would require, the constitutional distribution of powers between federation and provinces and cane commissioner, to be rewritten and

/or amended. Under the circumstances of the case, cane commissioner had to perform ministerial and mechanical functions for implementing federal policy.

42. Mr. Sattar's reliance on the case of Muzaffar Khan² is not convincing since the relevant subject considered therein fell within provincial domain and thus two provinces' policy could vary which is not the case here.

43. Similarly, in the case of Farasatullah³ there is no cavil that Court should always be very careful in interfering with the policy decision of the province and federal government as long as it is within the frame of Constitution and this is why courts have always safeguarded its jurisdiction jealously and has expanded it according to the constitutional demands.

EQUAL TREATMENT

44. Another aspect of the matter is highlighted by Mr. Abdul Sattar Pirzada that this distribution through cane commissioner in identical proportion i.e. 2500 MT each sugar mill is neither illogical nor irrational and it cannot be read as contrary to the policy even if inter-provincial distribution of quota is read differently as identical distribution by cane commissioner is meant for one class i.e. sugar mills which cannot be distinguished on any other count.

45. In this regard I am now left to see whether all sugar mills of Province of Sindh could be treated as one class or on the basis of their efficiency, capacity, output etc., be it installed crushing of sugarcane, sugarcane crushed during a season or sugar produced in a season etc. by applying test of intelligible differentia. Although this conclusion may not be relevant as I have concluded that federal policy is based on contribution and this formula has to carry forward through cane

² Muzaffar Khan v. Government of Pakistan (SCMR 2013 304) at 313

³ Province of KPK v. Farasatullah (2020 PLC (CS) 1423)

commissioner when it comes to distribution of quota millwise, however, this independent distribution identically is also not on equality.

46. The Aman Ullah Khan⁴ and Mejee Flour & General Mills⁵ have discussed in detail as to how the classification could be exercised i.e. it ought to be based on intelligibly differentia and there is no second opinion in applying such principles while classifying the sugar mills under consideration.

47. I will read the defence first before going deeper. The defence that was taken by the cane commissioner in distributing quota, as he desired, was that due to heavy rain it was considered that all sugar mills be accommodated identically, enabling them to pay the dues of cane growers in time without any hesitation. If this reason is believed and the logic behind is approved, which cane commissioner conceived to ensure payments to the cane growers on time, then it necessarily follows that mills crushing a greater amount of sugarcane and produce more sugar be allocated a larger quota (as it was in terms of federal policy), as they have more cane growers to pay. It is not conceivable that equality is being applied strongly in this way, by following federal policy, despite the fact that one sugar mill has produced 2,18,590 MT of sugar in a year having more cane growers to pay, and another mill has produced 9040 MT of sugar having less sugarcane growers to pay. I am sure no one has any doubt in mind that the sugar mill producing 2,18,590 MT had more responsibility to pay to sugarcane growers than the one producing 9040 MT sugar.

48. It was also argued that the cane commissioner allocated the quota based on districts which were more affected by floods and where the sucrose content of sugar was higher. Although it is extraneous to conceive as there is no data available nor argued by anyone and no

⁴ Aman Ullah Khan v. Federal Government of Pakistan (PLD 1990 SC 1092)

⁵ Government of NWFP v. Mejee Flour & General Mills (1997 SCMR 1804)

evidence produced, yet its applicability would yield in the way of those having greater capacity of crushing sugarcane and producing more sugar than those having less capacity both ways.

49. The chart produced by the plaintiff in paragraph 20 of the plaint reveals a data which speaks for itself. It is not denied that there are 32 sugar mills operating and functioning in Sindh in the year 2020-21 and out of which plaintiffs' three mills produce a significant amount of sugar in Sindh. Mr. Makhdoom Ali Khan, based on that data of paragraph 20, gave an understanding of figure that 3 mills of plaintiffs produce more sugar than 18 other mills together. The data/chart is produced for the convenience as under:-

	Operational sugar mills in the Province of Sindh	Sugar production of sugar mill in crushing season 2021-22	Allocation based on production in crushing season 2021-22	Allocation in impugned cane commissioner's decision dated 25.1.23	Variance in MT	Variance in %
1	JK	218,590	7,631	2,500	-5,131	-67
2	J.D.W.-III (GHOTKI)	209,498	7,314	2,500	-4,814	-66
3	DHARKI	196,560	6,862	2,500	-4,362	-64
4	ALLIANCE	154,937	5,409	2,500	-2,909	-54
5	HABIB	119,531	4,173	2,500	-1,673	-40
6	AL-NOOR+C15	98,110	3,425	2,500	-925	-27
7	S.G.M.	97,497	3,404	2,500	-904	-27
8	MEHRAN	95,642	3,339	2,500	-839	-25
9	FARAN	92,862	3,242	2,500	-742	-23
10	BANDI	89,150	3,112	2,500	-612	-20
11	KHAIRPUR	82,865	2,893	2,500	-393	-14
12	THARPARKAR	75,349	2,631	2,500	-131	-5
13	MIRPURKHAS	70,460	2,460	2,500	40	2
14	SHAHMURAD	66,683	2,328	2,500	172	7
15	SANGHAR	61,785	2,157	2,500	343	16
16	AL-ABBAS	53,945	1,883	2,500	617	33
17	RANIPUR	53,779	1,878	2,500	622	33
18	SAKRAND	53,774	1,877	2,500	623	33
19	SINDH ABADGAR'S	52,507	1,833	2,500	667	36
20	DEWAN	50,790	1,773	2,500	727	41
21	MATIARI	47,451	1,657	2,500	843	51

22	KIRAN	43,525	1,520	2,500	980	65
23	ARMY WELFARE	36,286	1,267	2,500	1,233	97
24	TANDO ALLAHYAR	35,600	1,243	2,500	1,257	101
25	DIGRI	30,778	1,075	2,500	1,425	133
26	CHAMBER	18,320	640	2,500	1,860	291
27	BAWANI	17,992	628	2,500	1,872	298
28	NEW DADU	17,930	626	2,500	1,874	299
29	NAUDERO	13,645	476	2,500	2,024	425
30	ANSARI	13,393	468	2,500	2,032	435
31	LARR	13,195	461	2,500	2,039	443
32	KHOSKI	9,040	316	2,500	2,184	692
	Total	2,291,467	80,000	80,000	-	-

50. Province of Sindh got 80,000 MT for export based on the figures of sugarcane crushed and sugar produced and if plaintiffs' capacity is excluded this quota of 80,000 would have reduced by 27%. If that is the reasoning assigned in allocating quota to provinces why can't this continue as a rational in treating different mills differently based on the crushing capacity and the sugar produced which is an intelligible differentia. After all the federal government considered it logical to distribute it accordingly on such intelligible differentia otherwise it was very convenient for them to have excess sugar distributed amongst sugar mills of Pakistan identically; nothing would have prevented federal government in conceiving that idea but it did not.

51. Different people cannot be treated alike when the law permits these distinctions. So when the federal government has not carved out policy for allocating quota by treating all mills alike why would a cane commissioner be permitted to do so.

52. All sugar mills are not equal in terms of their capacity in many ways. Respective owners of the sugar mills have invested more in their mills, developed greater capacity, installed efficient plants and manage them more efficiently and work harder than those who are less

productive, less efficient and do not manage their efficiency and production. Could a mill producing 2,18,590 MT of sugar in a year be at par with one producing 9,040 MT of sugar for allocating export quota. For any other issues they may be classified as one but not for export quota based on performance and productivity. Do they deserve similar quota of export? The logic and rational would not let it happen. Being rich and poor is not the question here and one should not be carried away and distracted by this emotional argument as this is not applicable here. The counts under consideration is the capacity, production and contributing to the national needs/requirement. For identical treatment the class on above parameter has to be the same.

53. The fundamental principle is that constitution prohibits class legislation but permits reasonable classification for the purpose of legislation which classification must specify the twin test of classification on intelligible differentia which distinguishes persons or things that are grouped together from those that are left out. The group of differentia must have a rational nexus to the object sought to be achieved by a statute in question as is observed in the case of D.S. Nakara⁶.

54. While following this principle Hon'ble Supreme Court of Pakistan in I.A. Sharwani⁷ laid down the following principles of law after taking into consideration several pronouncements of Supreme Court of Pakistan and India, which are as under:-

26. From the above cited cases the following principles of law are deducible:-

(i) that equal protection of law does not envisage that every citizen is to be treated alike in all circumstances, but it contemplates that persons similarly situated or similarly placed are to be treated alike;

⁶ D.S. Nakara v. Union of India (AIR 1930 SC 130)

⁷ I.A. Sharwani v. Government of Pakistan (1991 SCMR 1041)

(ii) that reasonable classification is permissible but it must be founded on reasonable distinction or reasonable basis;

(iii) that different laws can validly be enacted for different sexes, persons in different age groups, persons having different financial standings, and persons accused of heinous crimes;

(iv) that no standard of universal application to test reasonableness of a classification can be laid down as what may be reasonable classification in a particular set of circumstances, may be unreasonable in the other set of circumstances;

(v) that a law applying to one person or one class of persons may be constitutionally valid if there is sufficient basis or reason for it, but a classification which is arbitrary and is not founded on any rational basis is no classification as to warrant its exclusion from the mischief of Article 25:-

(vi) that equal protection of law means that all persons equally placed be treated alike both in privileges conferred and liabilities imposed;

(vii) that in order to make a classification reasonable, it should be based--

(a) on an intelligible differentia which distinguishes persons or things that are grouped together from those who have been left out;

(b) that the differentia must have rational nexus to the object sought to be achieved by such classification.

55. In the case of Mejee Flour & General Mills (Supra - Footnote 5) the Hon'ble Supreme Court concluded that it is conscious of the settled principle inherent in the clause providing equality before law that mere differentiation or inequality of treatment does not per se amount to discrimination.

56. Case of State of Maharashtra⁸ also dilates upon the equal treatment to unequals. Paragraph 24 of the judgment is as under:-

“24. Section 2(f)(b), also, suffers from the infirmity of according equal treatment to unequals. Take a simple example : A plot of land may be vacant in the true sense of the term, that is to say, wholly unbuilt upon. Another plot of land may have a small structure built upon it in

⁸ State of Maharashtra v. Kamal Sukumar Durgule (AIR 1985 SC 119)

accordance with the Municipal rules and regulations. The first plot of land attracts drastic provisions of the Act merely by reason of the fact that nothing has been built upon it at all, while the second plot of land is entirely outside the scope of the Act for the reason that some tiny structure is standing thereon. Such a classification betrays lack of rationale.”

57. In the case of Ahmed Yar Chohan⁹ Division Bench of Lahore High Court while discussing issue of treating unequal as equals the bench formed its view as under:-

10. It would be against the concept of equality if the unequals are treated as equals. The equality can be enforced only among the citizens who are similarly placed. Equality is for equals. Equality of opportunity may be absolute or relative. Absolute equality of opportunity exists where all the contestants are required to overcome the same difficulties, as for example, in a high jump contest the bar is placed at the same height for all the competitors. Relative equality takes into account the varying capacities and situations of the contestants and the difficulty of the task is varied so that the same effort is required of each of the contestants to take benefit of the opportunity: for example, in a handicap race the faster man has to run a longer distance. The circle of inequality cannot be broken by shifting the inequities from one man to his neighbour. The white collared jobs for which the reservations exist are concentrated in intellectual spots. Their availability is meager and even if adequate do not reach the vulnerable sections of the society. Reservations, after all, seek to mitigate effects of social disadvantage, not to eliminate its causes.

58. In the case of Uttar Pradesh Power Corporation¹⁰, Supreme Court of India laid down the test that equals cannot be treated unequally and also that unequals cannot be treated equally.

19. Similar is the view formed by the Hon'ble Supreme Court in the case of Shuja Sharif¹¹.

60. In a situation where an executive is required to exercise its discretion in implementing a policy, as stated, it must be structured and

⁹ Ahmed Yar Chohan v. Federal Public Service Commission (1998 MLD 1832)

¹⁰ Uttar Pradesh Power Corporation (2008) 10 Supreme Court Cases 139

¹¹ Federation of Pakistan through Secretary Ministry of Communication Islamabad v. Shuja Sharif (2023 SCMR 129)

the seven instruments for such structure as highlighted in the case of Aman Ullah Khan (Supra - Footnote 4) are (i) open plans, (ii) open policy instruments, (iii) open rules, (iv) open findings, (v) open reasons, (vi) open precedents, and (vii) fair informal procedure which are missing in the performance of the cane commissioner while implementing the policy.

62. In the case of Baloch Distillery & Sugar Mills (Supra - Footnote 1) Bench of this Court emphasized that the policy matter falling within the exclusive domain of executive requires consideration of various factual aspects and therefore, normally are not interpreted by Courts unless such policy is perverse, arbitrary, in violation of “constitutional mandate”, “law” or is patently mala fide. The conclusion drawn by the Bench was that the judicial consensus seems to be that the functionaries of any organization cannot be allowed to exercise discretion on their whims, sweet will or in an arbitrary manner rather they are bound to act fairly, evenly and justly. Adding to the conclusion drawn by the benches, if such parameters are camouflaged, the Courts are empowered to make it visible which does not amount to interfering with the policy. Discretionary powers exercised in arbitrary and capricious manner is not immune from judicial review¹². In view of above principles, I am of the view that the cane commissioner has illegally and unlawfully applied and interpreted federal policy entrusted to him for the compliance and not to carve out his own policy. The questions as framed are all answered against defendants.

63. As far as execution of the contracts are concerned, as relied upon by some of the sugar mill owners, needless to say that those contracts are privately executed documents and would not be of any benefit to anyone. Insofar as Letter of Credit of Bank of Sindh is concerned, the

¹² Abu Bakar Siddique v. Collector Of Customs, Lahore (2006 SCMR 705)

quantum of Letter of Credit is such that the designated quota likely to be provided, would be covered by the Letter of Credit.

64. The injunctive order as prayed for in the instant applications, if allowed in consideration of above principles, would not only leave the position as it is but would also not serve any purpose. I am aware about the limitations of the principles in dealing interlocutory application for injunction as highlighted in order in the case of Haji Ibrahim¹³. The limitations discussed are not absolute. The order itself suggests ways and means to treat the situations and events. Paragraph 16 of the *ibid* order, while discussing the situation of granting mandatory injunction, suggests that there is no absolute bar in granting such relief and the Court should not lay down absolute proposition when such are not necessary and consequently forged fetters for itself but such exercise of discretion should be limited to rare and exceptional cases. Such orders of injunction or for that matter any interlocutory order of commanding and directory nature are passed, where rights sought to be protected are clear and/or based on comprehensive undisputed report and not where it is doubtful, cloudy or needed trial. Judgment further discussed that a mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and could be passed only in clear cases either where the Court thought that when the matter ought to be decided at once or where injunction was directed at the simple summary act which could be easily remedied or where defendant had attempted to steal a march on the plaintiff.

65. In the case of *Dorab Cawasji Warden*¹⁴, the guiding principles as laid down for grant of mandatory injunction at interlocutory stage are as under:

¹³ *Haji Ibrahim v. Abdul Qadir Lakhani* (PLD 2023 Sindh 11)

¹⁴ *Dorab Cawasji Warden v. Coomi Sorab Warden* (AIR 1990 SC 867)

“(1) The plaintiff has a strong case for trial. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction.

(2) It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money.

(3) The balance of convenience is in favour of the one seeking such relief.”

66. In a situation where the grant of interim injunction is under consideration in frame of Order XXXIX Rule 1 and 2 read with Section 94, inherent powers under section 151 CPC should not lose its sight. It is discussed in detail in the case of Salma Jawaid¹⁵ and it was discussed therein that different case has its own different set of facts and again and again new situation comes before the Court and, observed; *“I may repeat, it is not possible to lay down specific principle restricting the powers of Court to exercise their inherent jurisdiction in certain specified situation or for certain reasons only. If this were done it would only impede the administration of justice and restrict the development of law”*.

67. The judgment was cited in the case of Balagamwala Oil Mills Ltd.¹⁶ where the law is approved by learned Division Bench. The exact observation of the Division Bench is as under:

“We are inclined to agree with Mr. Mansoor Ahmed Khan that in a fit case the Court may grant interim injunction even if the case does not fall within the four corners of the well settled principles under Order 39, rules 1 and 2, C.P.C., if the facts of the case so demand, in order to foster the cause of justice. Nasir Aslam Zahid, J. in the case of Mst. Salma Jawaid and 3 others v. S.M. Arshad and 7 others, reported in PLD 1983 Karachi 303, has inter alia held that the Court can grant temporary injunction or appoint receiver by exercising inherent powers in the interest of justice after making reference to section 94 and 151 C.P.C.”

68. Learned counsel has relied upon the judgment in the case of M.I. Cheema¹⁷ wherein Hon’ble Supreme Court held that in a fit case Court

¹⁵ Salma Jawaid v. S.M. Arshad (PLD 1983 Karachi 303)

¹⁶ Balagamwala Oil Mills Ltd. v. Shakarchi Trading (PLD 1990 Karachi 01)

can grant an order in nature of final conclusion which is permissible though generally Court cannot grant interim relief which a party may be entitled upon final adjudication of the case but if dictates of justice so demands in an appropriate case, the discretion could be exercised.

69. In (2004) 4 SCC 697 such situation was also discussed by the Hon'ble Supreme Court of India in case of Deoraj v. Maharashtra. The relevant discussion of the Hon'ble Supreme Court of India is as under;

“12. Situations emerge where the granting of an interim relief would tantamount to granting the final relief itself. And then there may be converse cases where withholding of an interim relief would tantamount to dismissal of the main petition itself; for, by the time the main matter comes up for hearing there would be nothing left to be allowed as relief to the petitioner though all the findings may be in his favour. In such cases the availability of a very strong prima facie case - of a standard much higher than just prima facie case, the considerations of balance of convenience and irreparable injury forcefully tilting the balance of the case totally in favour of the applicant may persuade the court to grant an interim relief though it amounts to granting the final relief itself. Of course, such would be rare and exceptional cases. The court would grant such an interim relief only if satisfied that withholding of it would prick the conscience of the court and do violence to the sense of justice, resulting in injustice being perpetuated throughout the hearing, and at the end the court would not be able to vindicate the cause of justice. Obviously such would be rare cases accompanied by compelling circumstances, where the injury complained of is immediate and pressing and would cause extreme hardship. The conduct of the parties shall also have to be seen and the Court may put the parties on such terms as may be prudent.”

70. Now this debate is not concluding here to benefit any party to whom quota was allocated or would be allocated following above understanding of policy, but the end beneficiary is the federal government as the policy ensured prompt foreign exchange in about 45 days of opening of Letter of Credit. We need to understand that the subject matter is of such a magnitude that it requires immediate and

¹⁷ Government of Pakistan v. M.I. Cheema (1992 SCMR 1852)

conclusive attention of Court. Cane commissioner misunderstood when he applied his wisdom without following the limitations that they are under. Federal government is also equally responsible in not assisting this Court and clarifying the intent of policy to the cane commissioner as adjudged above. Politics should not invade policy matter meant for public interest in a way that fundamental and secured legal rights of citizen would get prejudiced. This case seems to be one of those, unfortunately. Thus, not being an ordinary situation I not only inclined to grant injunction restraining cane commissioner to act in such manner and distribute quota arbitrarily, but would expect prompt makeup for the losses by adhering to the above conclusion drawn by this Court, as far as sugar mills quota is concerned i.e. distribution on performance based i.e. sugar crushed and/or sugar produced which is the only justified formula provided by federal government when policy was made and applied. Since it is time bound issue and since sugar has its best use if consumed in two years' time, it is expected that cane commissioner would respond and submit reallocation within two weeks' from date of this order. The applications are allowed as under:-

- A) The allocation of quota for export of sugar in the identical terms i.e. 2500 MT to every sugar mills of Sindh through cane commissioner, ignoring sugarcane crushed and the sugar produced by mills, is illegal and unlawful;
- B) The cane commissioner is under obligation to implement the policy in letter and spirit as required by the federation and as couched/framed in this order above.

Dated: 07.03.2023

J U D G E