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Judgment Sheet

**IN THE LAHORE HIGH COURT LAHORE
JUDICIAL DEPARTMENT**

Case No: W.P. 12255/2014

M.I. Sanitary Store, etc. **Versus** The Federation of Pakistan,
etc.

JUDGMENT

Date of hearing	19.05.2014
Petitioners by	M/s Shafqat Mehmood Chohan, Abdul Quddus Mughal, Mian Muhammad Athar and Malik Hafiz Muhammad Arshad, Advocates in Writ Petitions No.12255/2014, 12665/2014 and 12663/2014. Mr. Waheed Riaz, Advocate in Writ Petitions No.13552/2014 and 13123/2014. Mr. Waqar Hussain, Advocate in W.P. No.13124. Mr. Monim Sultan and Usman Malik, Advocates in W.P. No.13138/2014.
Respondents by:	Mian Muhammad Irfan Akram, Deputy Attorney General for Pakistan. Mr. Ahmed Sheraz, Advocate for respondent NTC. Mr. Muhammad Raheel Kamran Sheikh, Advocate for respondent No.3 in Writ Petitions No.12255/2014, 13124/2014, 13138/2014, 13123/2014, 12663/2014 and 12665/2014. M/s Muhammad Saad Khan and Rahman Aziz, Advocates for respondent No.3 in W.P. No.12255/2014.

Syed Mansoor Ali Shah, J:- This judgment will decide the instant petition, as well as, connected writ petitions mentioned in

Schedule “A” as all these cases raise common questions of law and facts.

2. The petitioners have impugned “Preliminary Determination and Levy of Provisional Antidumping Duty on Import of Wall/Floor Tiles in Glazed/Unglazed, Polished/Unpolished Finish Originating in and/or Exported from People’s Republic of China” (“**Preliminary Determination**”) imposed by the National Tariff Commission (“**NTC**” or “**Commission**”) dated 03.04.2014 under Anti Dumping Duties Ordinance, 2000 (“**Ordinance**”) on two grounds, namely; (i) that the term of one of the Members of the Commission namely Niamatullah Khan lapsed on 10.09.2013 and, therefore, at the time of the Preliminary Determination, the constitution of the Commission was defective and irregular, rendering the Preliminary Determination *coram non-judice* and without lawful authority. As a consequence issuance of impugned Public Notice, inter-alia, imposing provisional Anti Dumping Duty dated 05.04.2014 is also without lawful authority. (ii) That the Preliminary Determination is in violation of section 16 of the Ordinance, in as much as, cumulative effects of imports from other countries have not been considered.

3. It is submitted that under section 6 of the National Tariff Commission Act, 1990 (“**Act**”) the tenure of the Member of the Commission is three years and he is eligible for re-appointment for another similar term. The petitioners referred to appointment letter of the above-mentioned Member dated 09.09.2010 issued by the Cabinet Secretariat, Establishment Division, Government of Pakistan which reads as under:-

Islamabad, the 9th September, 2010.

NOTIFICATION

Mr. Niamatullah Khan, a BS-21 officer of District Management Group, presently posted as Member, National Disaster Management Authority (NDMA) under the Cabinet Division is transferred and posted as Member, National Tariff Commission (NTC) under Ministry of Commerce with immediate effect **and until further orders** (*emphasis supplied*)

(Iftikhar-ul-Hassan Shah Gilani)
Deputy Secretary to the
Government of Pakistan.

Learned counsel for the petitioners contend that the appointment of a Member in the absence of any tenure lapses after a period of three years and in this case the period of three years lapsed on 10.9.2013 in terms of section 6 of the Act, hence, the said Member was *functus officio* on the date of the Preliminary Determination carried out by NTS on 03.04.2014.

4. Learned counsel for respondent NTC, as well as, the local manufacturer (M/s. Master Tiles Ltd.) submit that section 6 of the Act is subject to the direction of the Federal Government, hence the Federal Government can override the statutory period of three years. Learned Deputy Attorney General appearing for the Federal Government has adopted the arguments of the learned counsel for the NTC.

5. I have heard the learned counsel for the parties and have reviewed the law. The question that requires determination is interpretation of section 6 of the Act which is reproduced hereunder for reference:-

“6. Term of the office of Chairman and members:- Unless otherwise directed by the Federal Government, the Chairman

and a member of the Commission shall hold office for a term of three years and shall be eligible for a re-appointment for a similar term.”

What is the purpose of the phrase “unless otherwise directed by the Federal Government” in the above section, as well as, in the larger context of the Act?

“The aim of interpretation in law is to realize the purpose of the law.....Every statute has a purpose, without which it is meaningless. This purpose, or *ratio legis*, is made up of the objectives, the goals, the interests, the values, the policy, and the function that the statute is designed to actualize. It comprises both subjective and objective elements. The judge must give the statute’s language the meaning that best realizes its purpose.”...The subjective purpose reflects the actual intention of the legislature.....Subjective purpose is not the only purpose relevant to statutory interpretation, especially in situations where we lack information about that purpose. Even when we do have such information, it does not always help us in the interpretive task. Moreover, even when we do find useful information about the subjective purpose, we must keep in mind that focusing on legislative intent alone fails to regard the statute as a living organism in a changing environment. It is insensitive to the existence of the system in which the statute operates. It is not capable of integrating the individual statute into the framework of the whole legal system. It makes it difficult to bridge the gap between law and society. Thus, it does not allow the meaning of the statute to be developed as the legal system develops. Rather, it freezes the meaning of the statute at the historical moment of its legislation, which may no longer be relevant to the meaning of the statute in a modern democracy. If a judge relies too much on

legislative intent, the statute ceases to fulfill its objective. As a result, the judge becomes merely a historian and an archaeologist and cannot fulfill his role as a judge. Instead of looking forward, the judge looks backward. The judge becomes sterile and frozen, creating stagnation instead of progress. Instead of acting in partnership with the legislative branch, the judge becomes subordinate to a historical legislature. This subservience does not accord with the role of the judge in a democracy. The objective purpose of the statute means the interests, values, objectives, policy and functions that the law should realize in a democracy.....Just as the supremacy of fundamental values, principles, and human rights justifies judicial review of the constitutionality of statutes, so too must that supremacy assert itself in statutory interpretation. The judge must reflect these fundamental values in the interpretation of legislation. The judge should not narrow interpretation to the exclusive search for subjective legislative intent. He must also consider the “intention” of the legal system, for the statute is always wiser than the legislature. By doing so the judge gives the statute a dynamic meaning and thus bridges the gap between law and society.¹

6. Applying the tool of purposive interpretation “unless otherwise directed by the Federal Government” leads to the following possible interpretations;

A). That the Federal Government enjoys the power to appoint a Member for an unlimited period which is

¹ Aharon Barak - *The Judge in a Democracy* - Princeton University Press, 2006 (Pp 124, 136, 137, 138 and 142)

over and above the statutory limit of three years envisaged under section 6 or;

B). That the Federal Government enjoys the power to appoint a Member for a period of less than three years, if so required.

7. Option "A" empowers the Federal Government with an unguided, unfettered, uncontrolled and unstructured power under section 6 of the Act to appoint a person as a Member of the Commission for any uncertain period or duration. This unguided power in the hands of the Federal Government, is structurally unjust and carries the potential of being applied detrimentally to the interest of the institution, and the public, dealing with the said institution. Interpretation of a statute must be fashioned in a manner that advances the purpose of the statute. It is axiomatic that transparent, effective and democratic stewardship of the Commission can only be ensured if the tenure of the Members is standardized, fixed and certain. Appointment "till further orders" breeds uncertainty and confusion in the ranks and compromises institutional confidence, continuity and governance. Option A is, therefore, *ex-facie* discriminatory besides being injurious to the growth and development of public institutions.

8. Another dimension of the case, which was not argued, but I feel, requires deliberation and clarity, is whether the Commission could have relied on the maximum-tenure-defence. Under section 6 of the Act, a Member can be considered to have a tenure of six years (including reappointment) and it can be said that "till further orders" extends for a maximum period of six years which in the present case has not yet been exhausted. This method requires that

“re-appointment” is automatic, perfunctory and mechanical and allows the Member to bypass the grooves of competitive recruitment process. Re-appointment by no means can be sidelined as a mindless extension of service of the existing Member. Hence, for the above reasons, “till further orders” cannot be said to stretch over a period of six years.

9. Option B limits and structures the power of the Federal Government to appoint a Member for a period of less than three years, if the circumstances so require. This interpretation helps structure the discretion of the Federal Government. While maintaining the upper time limit of three years, it allows the Federal Government the room to make an appointment for less than the statutory period of three years, if the circumstances so require. These circumstances also require to pass the test of reasonability. In my view, Option B supports public policy, transparency, good governance and institutionalism. I, therefore, hold that “unless otherwise directed by the Federal Government” at best empowers the Federal Government to appoint a person for less than three years, if circumstances so require. As a consequence the appointment notification of Niamatullah Khan dated 09.09.2010 “till further orders” lapsed after three years, hence, the Commission was not validly constituted while giving the Preliminary Determination on 03.04.2014.

10. Having held that the constitution of NTC was defective and irregular at the time of the Preliminary Determination, what is the legal validity of the Preliminary Determination carried out by NTC, under section 37 of the Ordinance? Unlike other laws, there is no provision in the Act that protects the decisions or

determinations of the Commission in case the constitution of the Commission is irregular or defective. Additionally, the Commission exercises a quasi-judicial function in deciding the rights of the parties, hence the legality of its constitution is pivotal to the exercise of its jurisdiction. Reliance is placed on Messrs Khawer Paper Mart through Proprietor v. National Tariff Commission through Chairman and another (2011 PTD 2243) and an unreported judgment of the august Supreme Court of Pakistan in C.P. Nos. 1608 of 2009 and others, titled “Waheed sons Lahore and others v. National Tariff Commission, Islamabad”, which reads:-

“The reading of above provision of law makes it evident in clear terms that the Commission shall comprise of the Chairman and two members and there is no provision of quorum. In the instant case, the record reflects that the decision as to initiation of investigation, the preliminary as well as final determination in question have been made by the Chairman and one Member, therefore, the decisions made as such leading to imposition of duties cannot be termed to be decision of the Commission.”

11. In this view of the matter, the Preliminary Determination dated 03.04.2014 has not been issued by the Commission as mandated under section 37 of the Anti-Dumping Duties Ordinance, 2000. In the absence of any provision saving or protecting such an irregular constitution of the Commission under the Ordinance or the Act, Preliminary Determination dated 03.04.2014 is set aside being *coram non-judice*.

12. In the light of the above declaration I need not address the second submission made by learned counsel for the petitioners regarding violation of section 16 of the Ordinance.

13. This brings me to the procedure of initial appointment of Members and others under section 6 of the Act. This too is not a mechanical act of simple transfer of a civil servant to the Commission. The concerned Ministry of the Federal Government must structure its discretion by identifying key strengths that a Chairman or Member of the Commission must possess to effectively run NTC and then go about selecting a person through an open and competitive process. Appointment to NTC is, therefore, a deliberative act based on selection of the right person for the slot, rather than anointing favourites to the post. Reliance is placed on *Barrister Sardar Muhammad v. Federation of Pakistan and others* (PLD 2013 Lahore 343).

14. For the above reasons, the Preliminary Determination dated 03.04.2014 and the consequent Public Notice dated 05.04.2014 is set aside as being *coram non judice*. This writ petition alongwith connected writ petitions are allowed in the above terms with no order as to costs.

(Syed Mansoor Ali Shah)
Judge

*M. Tahir**

APPROVED FOR REPORTING.

SCHEDULE-A

<u>Sr. No.</u>	<u>Writ Petition No.</u>
1.	W.P. No.12663/2014
2.	W.P. No.12665/2014
3.	W.P. No.13123/2014
4.	W.P. No.13552/2014
5.	W.P. No.13124/2014
6.	W.P. No.13138/2014

(Syed Mansoor Ali Shah)
Judge

*M. Tahir**