IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:
MR. JUSTICE EJAZ AFZAL KHAN
MR. JUSTICE QAZI FAEZ ISA

CIVIL APPEAL NOs. 1242 TO 1245 OF 2013
(On appeal from the judgment dated 26.2.2013 passed in Writ Petition Nos. 5992 of 2010, 8870 of 2010, 8873 of 2010, 4162 of 2010 and 31331 of 2012 passed by the Lahore High Court, Lahore)

Tariq Khan Mazari (*in C.A. No. 1242/2013*)
M/s Punjnad Sugar Mills Limited (*in C.A. No. 1243/2013*)
Arshad Javed Ahmed (*in C.A. No. 1244/2013*)
Begum Syeda Iqbal (*in C.A. No. 1245/2013*)

….Appellants

Versus

1. Government of Punjab through Secretary Industries and others
2. Secretary Industries, Lahore
3. Assistant Economic Advisor-III,
4. JDW Sugar Mills Limited, Lahore.

….Respondents
(*in all cases*)

For the Appellants (*in CA.Nos. 1242 & 1244/2013*)	:	Khawaja Muhammad Farooq, Senior Advocate Supreme Court Syed Rifaqat Hussain Shah, Advocate-on-Record
For the Appellant (*in CA No. 1243/2013*)	:	Mr. Noor Muhammad Chandia, Advocate Supreme Court Ch. Muhammad Anwar Khan, Advocate-on-Record (**absent**)
For the Appellant (*in CA No. 1245/2013*)	:	Mr. Haq Nawaz Chattha, Advocate Supreme Court Mr. Faiz-ur-Rehman, Advocate-on-Record
For Respondent Nos. 1 & 3	:	Mr. Mudassar Khalid Abbasi, Assistant Advocate General Punjab Rao Muhammad Yousaf Khan, Advocate-on-Record (**absent**)
For Respondent No.4	:	Mr. Sikandar Bashir Mohmand, Advocate Supreme Court Mr. Tariq Aziz, Advocate-on-Record (**absent**)
On Court Notice	:	Mr. Sohail Mehmood, DAG

In Attendance	:	Mr. Aitzaz Ahsan, Senior Advocate Supreme Court
	:	Mr. Salman Akram Raja, Advocate Supreme Court
Dates of hearing	:	22nd & 23rd June 2016

JUDGMENT

QAZI FAEZ ISA, J.- Through a common judgment dated 26th February 2013 of the Lahore High Court at Lahore a number of writ petitions were dismissed including those filed by the appellants herein. This Court through the following order granted leave to appeal against the impugned judgment:

> "Leave is granted to consider the scope of the provisions of Sections 3 and 11 of the Punjab Industries (Control on Establishment & Enlargement) Ordinance, 1963 (*the Ordinance, 1963*); whether the government has any power under the aforesaid provisions of law to impose a ban upon the establishment/enlargement of sugar industry as has been done by notification dated 6th December, 2006 and in this context the application of the petitioner has been dismissed by the Secretary, Government of Punjab, Industries Department on 24.1.2011; the correctness of the law enunciated in the judgment reported as Madina Sugar Mills Vs. Secretary, Ministry of Industries and others (PLD 2001 Lahore 506) and the effect of the judgment reported as Arshad Mehmood and others Vs. Government of Punjab through Secretary, Transport Civil Secretariat, Lahore and others (PLD 2005 SC 193) upon the facts of this case in relation to the Ordinance, 1963."

It may however be clarified that The Punjab Industries (Control on Establishment and Enlargement), Ordinance, 1963 was promulgated by the Governor of West Pakistan on 25th January 1963 and was approved by the Provincial Assembly of West Pakistan with amendments on 27th March 1963 and after receiving the assent of the Governor was published in the West Pakistan Gazette (Extra Ordinary) dated 27th March 1963 at pages 1269-1272 as The Punjab Industries (Control on Establishment and Enlargement), Act, 1963.

Notices were also issued to the Attorney General for Pakistan and the Advocate General of Punjab under Order XXVII-A of the Code of Civil Procedure.

2. Khawaja Muhammad Farooq, the learned senior counsel representing the appellants in C.A. Nos. 1242 and 1244 of 2013, Mr. Noor Muhammad Chandia, the learned senior counsel representing the appellant in C.A. No. 1243 of 2013 and Mr.

Haq Nawaz Chattha, the learned counsel representing the appellant in C.A. No. 1245/2013, have assailed the judgment of the High Court. They stated that the appellants had challenged the Notification dated 6th December 2006 ("**the impugned Notification**") issued by the Industries Department of the Government of Punjab, which had imposed a complete ban on the setting up of new sugar mills and enlarging the installed capacity of existing sugar mills in the Province of Punjab. This was done by inserting a new clause 3 in the earlier Notification dated 17th September 2002. The learned counsel stated that though the impugned Notification was issued under section 11 read with section 3 of the Punjab Industries (Control on Establishment and Enlargement), Act, 1963 ("**the Act**") neither of these sections of the Act, or for that matter any other section, envisaged such a ban therefore the same was *ultra vires* of the Act and of no legal effect. It was next contended that an application, seeking permission to establish or expand an industrial undertaking, should be dealt with under section 3 of the Act and can only be rejected after first giving a person an opportunity of showing cause against it or if the grant of the permission is prejudicial to the national interest or it is either injurious to health or could be a source of nuisance for the residents of the local area in which the industrial undertaking is proposed to be set up or expanded and not by simply referring to the impugned Notification.

3. Mr. Noor Muhammad Khan, the learned counsel for the appellant in C.A. No. 1243 of 2013, added to the above contentions by stating that his client had placed reliance upon the Notification dated 15th July 2005, which had permitted the establishment of new sugar mills up to a capacity of 16,000 TCD (tons crushing per day), consequently, the appellant-company was set up to establish a sugar mill with a capacity of 8,000 TCD and it had purchased 255 kanals of land, had applied to a financial institution for provision of finances, and made payment of an amount of two hundred thousand rupees to the financial institution as processing fee. He also referred to the earlier Writ Petition No. 8473/2007 filed by the appellant-company before the Lahore High Court which was dismissed vide order dated 16th April 2008,

by holding that the appellant had, "*an alternate remedy of filing an appeal before the competent authority*". The order of the High Court was impugned in Intra Court Appeal No. 130/2008 which was disposed of vide order dated 26th May 2008, the operative part whereof is reproduced hereunder:

> "2. Having examined the writ petition file and the impugned judgment, we find that the original order i.e. dated 27.8.2007 (Annex-B to the writ petition) is subject to a revision or an appeal under section 7 of the Punjab Industries (Control on Establishment and Enlargement) Ordinance, 1963. The learned counsel was confronted accordingly. He has tried to argue that the order does not fall under section 3 of [*sic*] section 4 of the said Ordinance.
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> 3. Upon our query, the learned counsel has frankly conceded that the said impugned order has the effect of stopping or obstructing of the Industrial Project proposed to be installed by the appellant. This being so, the matter squarely falls under section 3 of the said Ordinance which is subject to a revision under the said section 7. Needless to state that section 3 of the Law Reforms Ordinance, 1972, lays down that the instant ICA would not be competent where the law under which the original order has been passed provides that, inter alia, a revision against the same. The ICA is not competent and is accordingly disposed of."

The appellant aggrieved by the above orders approached this Court in Civil Appeal No. 310-L/2011 which was disposed of vide order dated 30th January 2012, reproduced hereunder:

> "According to the learned counsel for the appellant the notification dated 6.12.2006, on the subject, has also been challenged by the appellant in another writ petition which is still pending before the High Court.
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> 2. In this view of the matter, we are of the opinion that the adjudication of the question involved in this matter is only of academic nature and the adjudication of the substantive notification dated 6.12.2006, is pending in the High Court, this appeal is dismissed.
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> 3. The decision in the writ petition shall not be prejudiced by any finding of the instant appeal."

4. Mr. Mudassar Khalid Abbasi, the learned Assistant Advocate General of the Government of Punjab (hereinafter "**AAG**" and "**Government**" respectively), stated that none of the appellants had availed of the alternate remedy of filing a revision or

an appeal under section 7 of the Act therefore the writ petition was not maintainable before the High Court in terms of clause (1) of Article 199 of the Constitution of the Islamic Republic of Pakistan ("t**he Constitution**"). He also relied upon the above mentioned judgment of the High Court dated 16th April 2008 passed in Writ Petition No. 8473 of 2007 and the order of the Division Bench dated 26th May 2008 passed in ICA No. 130/2008, which had categorically held that the Act provided a venue for the redressal of grievances by filing an appeal or a revision under section 7 and that this Court had not set-aside the said finding, consequently, the writ petitions from which these appeals arise are not maintainable.

He next contended that section 3 of the Act did not permit the establishment of an industrial undertaking without the prior permission in writing of the Government and such permission had not been granted to any of the appellants. He stated that it was within the executive domain of the Government to ensure organized and planned growth of industry and the impugned Notification was issued pursuant to the recommendations of experts and decisions made by committees constituted on the subject which could not be assailed in Court. He further stated that the hitherto before approach of granting permission or declining permission on a case to case basis had created misgiving and had also been castigated by the Lahore High Court in the judgment in the case of Madina Sugar Mills v Secretary, Ministry of Industries (PLD 2001 Lahore 506) and the impugned Notification was in line with the said judgment. By referring to the judgment in the case of Arshad Mehmood v Government of Punjab (PLD 2005 Supreme Court 193) he said that Article 18 of the Constitution, which attends to the freedom of trade and business, does not curtail the power of the Government to restrict any particular industry which was against the national or public interest. He referred to a number of documents to show that sugarcane crop consumed considerably more water than cotton or wheat and that the installed capacity of the existing sugar mills was under utilized, therefore, if additional sugar mills were set up or the existing ones expanded it would encourage farmers to grow sugarcane in their vicinity which would be bought by the sugar mills and the growing of cotton or other

crops would be discouraged. By referring to the documents on record, he stated that the cotton industry adds considerable value to the harvested cotton and a sizeable portion of the textiles manufactured from it are exported, earning considerable foreign exchange for the country, but the same benefits do not accrue by growing sugarcane and manufacturing sugar. Documents were also referred to show that there was, and is, a considerable shortage of cotton in the country which is adversely impacting the textile industry which has on the one hand reduced foreign exchange earnings and on the other resulted in valuable foreign exchange being spent on the import of raw cotton for consumption by the textile industry. Reference was also made to reports to show that sugarcane as compared to other crops attracts more bacteria and insects which have an adverse impact on other crops. Under such circumstances the Government had decided to stop the erection of new sugar mills as well as the expansion of existing ones and this decision of the Government, incorporated in the impugned Notification, was in the national interest, which was also one of the stated factors to be taken into account when considering an application under section 3 of the Act. Therefore, since every application for the setting up of a new sugar mill or the expansion of an existing one, would be contrary to the national interest, good governance and transparency mandated the issuance of the impugned Notification which had removed all discretion and prevented either favouritism or victimization.

Responding to the criticism of the impugned Notification on the ground that neither section 3 nor section 11 contemplated issuance of such a Notification, the learned AAG stated that even if for the sake of argument, but without conceding, this was accepted the appellants still could not set up sugar mills without the prior written permission of the Government and each and every one of the applications could be rejected on the abovementioned grounds.

He next contended that the decision to permit new sugar mills or expand existing sugar mills was a policy matter and the courts have always declined to interfere with policy matters particularly when no *mala fide* or ulterior motive was

alleged, let alone demonstrated. In this regard reliance was placed on the cases of Nazar Muhammad Choohan v Faiza Asghar (PLD 2011 Lahore 120) and Government of Pakistan v Zamir Ahmad (PLD 1975 Supreme Court 667). The later judgment was also relied upon to contend that Article 18 of the Constitution permits the imposition of a complete ban on any profession, trade or business. In interpreting a similar provision in the Indian Constitution the Supreme Court of India was also of the same view in the case of Narendra Kumar v Union of India (AIR 1960 Supreme Court 430).

The learned AAG responded to Mr. Noor Muhammad Khan Chandia's contention with regard to the Notification dated 15th July 2005 and stated that it had held the field for a period of only one year and five months and both prior to the issuance of the said Notification and after its withdrawal the prior written permission of the Government was required. As regards the amount spent by Mr. Chandia's client he stated that only some land was acquired, the value of which had gone up; and the payment of two hundred thousand rupees, which was the only other amount spent by the said appellant, cannot be categorized as a significant investment to create any vested right in the circumstances of the case.

The learned AAG also referred to the comments filed in the writ petition from which Civil Appeal No. 1245/2013 arises, which had set out the reasons for issuing the impugned Notification, as under:

> "The rationale behind this restriction are given below:
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> - At present, 46 sugar mills exist in the province and there is a deficit of about 35% between requirement and production of sugarcane crop. All the existing sugar mills are working below the installed capacity. The Punjab Province is already over crowded with regard to sugar mills, therefore, sanction for establishment of new sugar mills would not be feasible and lead to over investment.
>
> - Cotton is the backbone of our economy. It ensures economic security as its value added products contribute 60% to foreign exchange earnings.
>
> - Sugarcane crop poses threat to cotton growing areas as it has very strong substitution effect for cotton. Proliferation of Sugar Mills in the Province would adversely affect production of cotton. Government of the Punjab constituted and notified a Location Policy committee headed by the Chief Secretary,

Punjab to deliberate upon the policy of Government regarding establishment of new sugar mills to maintain a balance between production of sugar and protection of cotton growing areas of the Proving in the public interest. On recommendation of committee, ban was imposed on establishment of new sugar mills and enhancement of capacity of existing sugar mills throughout the province vide Industries Department's Notification dated 6.12.2006, which is reproduced as under:

> "No new sugar mill shall be set up and no enlargement in capacity of the existing Sugar Mills is allowed in the Province."

Prime Minister's Secretariat (Public) Islamabad, vide U.O No. 3 (2)/E-I-II/08 dated February 9, 2008, also advised the provincial governments to consider imposing complete ban on new installation and expansion of sugar mills for at least 5 years owing to following cogent reasons (Annex-F):

i) Sugarcane is water intensive crop requiring 18-20 irrigations for proper growth. Ground water sources are already depleted; increase in sugarcane area will only worsen the situation.

ii) Sugarcane is already substituting cotton and wheat in many areas.

(iii) Sugarcane crop nourishes pests and bacteria, detrimental to cotton crop.

In response, Industries Department vide letter dated 24.3.2008, endorsed the concerns of Prime Minister's Secretariat and informed that government of the Punjab has already banned establishment of new sugar mills throughout the province.

It is added here that in view of growing number of prospective entrepreneurs in the sugar sector, a summary was moved to the Chief Minister (Annex-G), who was pleased to constitute a High Powered Committee headed by Senior Advisor to the Chief Minister to examine the issue regarding lifting of ban imposed on establishment of new sugar mills and enlargement in the capacity of existing sugar mills. The committee met on 08.04.2011 (Annex-H). After thorough deliberations, the committee recommended continuing the ban on establishment of new sugar mills and enlargement in the capacity of existing sugar mills throughout the Punjab."

5. Mr. Aitzaz Ahsan, the learned senior counsel was permitted to make submissions on behalf of the Pakistan Cotton Ginners Association, supported the submissions of the learned AAG and supplemented his contentions by stating that districts of Southern Punjab were traditionally cotton growing areas and in recognition of this fact notifications, including Notifications dated 4th September 2003, 9th October

2003, 1st April 2004, 12th October 2004, and finally the impugned Notification, were issued stopping the setting up of new sugar mills and expanding the installed capacity of the existing ones to ensure that cotton crop is not substituted with sugarcane. Attending to the Notification of 15th July 2005, on which certain appellants placed reliance, he stated that it was an aberration and was issued contrary to the advice of the experts and could be categorized as *mala fide* as it was designed to benefit certain parties and on such an aberration, which was against the national interest, a case for the sugar industry could not be raised. According to him prior to the issuance of the impugned Notification the matter was attended to in an arbitrary manner by allowing the applications of some while disallowing those of others and at times for ulterior reasons.

He further contended that the expansion of the areas growing sugarcane has been economically, agriculturally and ecologically, disastrous. The cotton industry is the backbone of industrialized Pakistan, making value addition to the raw material (cotton) and earning considerable foreign exchange for the country, which heavily relies on such earnings. By referring to a number of documents he stated that it is established there is a huge shortfall of raw cotton in the country which is adversely impacting the production of yarn and textiles which has also reduced the foreign exchange earning potential of the country. As regards the agricultural benefit of growing cotton, as compared to sugarcane, the learned counsel stated that land on which sugarcane has been planted cannot be utilized for a second crop since the stubble remain rooted to the soil whereas the land on which cotton is grown can be utilized. He referred to the reports of experts who had determined that the food security of the country is undermined when sugarcane is grown. On the ecological front he contended that sugarcane used excessive water, as compared to other crops, and since Pakistan is a water-stressed country this should be discouraged. He also referred to the judgment in the case of East and West Steamship Co. v Pakistan (PLD 1958 Supreme Court 41) to state that the power to regulate any industry, trade or

business includes the power to prohibit it if it is aimed at preserving the public interest.

Many of the documents and reports referred to by the learned counsel were somewhat dated, therefore, we queried whether the economic, agricultural and ecological factors which had prevailed with the Government at the time of issuance of the impugned Notification were still applicable. In response the learned counsel stated that the situation had exacerbated further and referred to an article / report published in daily Dawn on 3rd June 2016 which was based on the 'Pakistan Economic Survey 2015-2016', published by the Government of Pakistan, wherein it was stated that cotton constituted 21 per cent of the economy, however, it had recorded a growth of only 0.19 per cent in the said financial year on account of insufficient cotton crop, production of which had dropped by 6.25 per cent and the country managed to produce only 10.07 million bales of cotton whereas the previous years' production was 13.96 million bales.

6. Mr. Sikandar Bashir Mohmand, was permitted to make submissions on behalf of JDW Sugar Mills Limited, supported the contentions of the learned AAG and those of Mr. Aitzaz Ahsan. He stated that the Act provides for a regulatory framework for the sustainable growth of industry in an organized and planned manner and the impugned Notification was in accordance therewith, which even otherwise was in the exclusive domain of the executive authority of the Government. He further stated that even under the proviso to section 3 of the Act an application for setting up of a new sugar mill or expanding an existing one can be rejected if it is contrary to the national interest. The documents on record show that there was sufficient material to support the decision of the Government taken in the national interest, which had culminated in the issuance of the impugned Notification. He also relied on the judgment in the case of East and West Steamship Co. v Pakistan (above) which had interpreted Article 12 of the earlier Constitution, which was similar to Article 18 of the 1973 Constitution,

and in doing so had concluded that the words "lawful trade or business" envisaged the imposition of a ban on any business or trade if it was in the public or national interest to do so.

7. Mr. Salman Akram Raja, the learned ASC, had submitted an application (CMA No. 2977/2016) on behalf of Ittefaq Sugar Mills Limited to be impleaded as a party, as according to him a decision in this matter may adversely affect the said company as it had sought the relocation of its sugar mills installed in District Pakpattan to District Bahawalpur at a place near the border with District Rahim Yar Khan. Without granting the said application we permitted him to make his submissions on behalf of the said Company. JDW Sugar Mills Limited and Hamza Sugar Mills Limited, presumably the competitors of Ittefaq Sugar Mills Limited, had filed Writ Petition No. 12879 of 2015 seeking to restrain the said shifting whereas Ittefaq Sugar Mills Limited had filed Writ Petition No. 18827 of 2015 wherein the impugned Notification has been assailed though in the alternative it has been stated that the impugned Notification does not restrict the relocation of existing sugar mills. Both these petitions we are told are still pending before the Lahore High Court. The petitioners in Writ Petition No. 12879/2015 are opposing the proposed shifting as it would increase the installed capacity of sugar mills in the Southern Punjab Districts which they state is not sustainable as the available installed capacity is already under utilized. However, Mr. Salman Akram Raja controverted their objection. He also referred to a document to show that the cultivation of sugarcane crop in the area has considerably increased if the figures for the years 2005-2006 are compared to those of 2014-2015. It appears that there is a tussle between two different sugar mills' owners regarding the relocation of an existing sugar mill, whereas the matter considered by us is the determination of the legality of the impugned Notification which has imposed a ban on the setting up of new sugar mills and also expanding the installed capacity of existing ones. Therefore, it would not be appropriate for us to express any opinion on

this aspect of the matter which has as yet not been decided by the Lahore High Court where the said two writ petitions are pending adjudication.

8. The questions for determination before us are: (1) whether the impugned Notification could have been issued under the Act, (2) whether despite the issuance of the impugned Notification the Government was required to give reasons for declining an application received under section 3 of the Act, (3) whether the issuance of the impugned Notification was within the domain of the executive authority of the Government and therefore immune from challenge, (4) whether there were valid reasons for issuing the impugned Notification and (5) whether such reasons were sufficient to constitute public or national interest.

9. Before proceeding to answer the abovementioned questions it would be appropriate to reproduce the referred to provisions of the Act, the impugned Notification, Notification dated 17th September 2002 and Notification dated 15th July 2005.

The Act:

> "**Preamble**.
> Whereas it is expedient to provide for the organized and planned growth of industries in the Punjab, in the manner hereinafter appearing;"
>
> "**3. Restrictions on establishment of industrial undertakings.**
> No person shall establish or cause to be established any industrial undertaking or enlarge or cause to be enlarged any existing industrial undertaking except with the previous permission in writing of Government.
>
> Provided that the application of any person for the grant of such permission shall not be rejected:
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> (a) without giving such person an opportunity of showing cause against it; or
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> (b) unless the Government is satisfied, on the basis of information available to it and after making such inquiry as it may deem fit, that the grant of permission to such person will be prejudicial to the national interest, or injurious to the health of or a source of

nuisance for, the residents of the local area in which the industrial undertaking is proposed to be set up or, as the case may be, the industrial undertaking which is proposed to be enlarged is situated."

"7. Revision and appeal.
(1) Any person feeling aggrieved by an order passed by Government or by any officer or authority under section 3 or section 4, may, within thirty days of the date of the order, apply to Government for a revision of the order.

(2) Any person feeling aggrieved by an order passed by the Director under section 4 may, within thirty days of the date of the order, prefer an appeal to Government.

(3) If in any case it shall appear to Government that any order passed by Government or the Director, as the case may be, be set aside or modified, Government may pass such order thereon as may be deemed fit:

Provided that no such order shall be passed unless, in the case of an appeal, the appellant and in any other case the party to be affected adversely, has been given reasonable notice to appear and be heard.

(4) Subject to any order passed by Government under the last preceding sub-section the order passed by Government or the Director under section 3 or section 4, as the case may be, shall be final."

"**11. Exemption**.
Government may, by notification in the Official Gazette, exempt any industrial undertaking or class of industrial undertakings from all or any of the provisions of this Act or the rules."

Impugned Notification dated 6th December 2006:

"Government of Punjab Industries Department
Dated Lahore, the 6th December, 2006

NOTIFICATION

No. AEA-III-3-5/2003 (Vol-III):- In exercise of the powers conferred upon him under Section 11 read with Section 3 of the Punjab Industries (Control on Establishment & Enlargement) Act, 1963, the Governor of the Punjab is pleased to order that in supersession of Notification No. AEA-III-3-5/2003, dated 15th July, 2005, notified in the Extraordinary issue of the Punjab Gazette published on July 20, 2005; the following amendment shall be made in the Government of the Punjab, Industries Department Notification No. AEA-III 3-9/91 dated 17.09.2002, with immediate effect:

AMENDMENT

For Clause 3, the following shall be substituted:

"No new sugar mill shall be set up and no enlargement in capacity of the existing Sugar Mills is allowed in the Province."

Secretary Industries Department"

Notification dated 17th September 2002 (published in The Punjab Gazette on 30th September 2002):

"Lahore Monday September 30, 2002
Government of Punjab
Industries, Mines & Minerals Department

NOTIFICATION

No.AEA-III.3-9/91:- In exercise of the powers conferred upon him under Section 11 of the Punjab Industries (Control on Establishment & Enlargement) Act, 1963 and in supersession of the Punjab Government Notification No.AEA-III-4-1/85, dated 26 October, 1986, amended up to 12th February, 2000, the Governor of the Punjab is pleased to exempt all industries and areas from the provisions of Section 3 of the said Act except as notified hereunder:-

1. No Industrial unit mentioned in Schedule 'A' of this notification or industrial unit exceeding a total cost of Rs. 100.00 million (Rupees Hundred million) shall be set up within 10 miles (16 KMs) of the International Border.
2. No Industrial unit shall be set up in areas affected by flood flowing transversely in the strip of one mile of either side across the Grand Trunk Road from Shahdara Town to Muridke Town, without prior permission of the Provincial Government.
3. No new Sugar Mill shall be set up and no existing Sugar Mill be enlarged in the districts of Multan, Sahiwal, Vehari, Khanewal, Pakpattan, Lodhran, Bahawalpur, Rahimyar Khan, Bahawalnagar, D. G. Khan, Rajanpur, Layyah, Muzzaffargarh and Okara.
4. Each District Government may declare "negative area" for industry. Such "negative area" be determined by a District Committee after consultation with all stakeholders in light of general policy guidelines to be issued by the Industries Department and exemptions allowed under Schedule 'B' of this Notification.
5. No Industrial Unit mentioned in Schedule 'C' of this Notification shall be set up any where in the Punjab without prior approval of the Government.

6. The Government reserves the right to refuse establishment / enhancement of any Industrial undertaking which is in contravention of the public interest, ecology or any other law / rules for the time being in force.

7. The Government may relax any of the provisions of this notification in case of a particular unit or industry or class of units of industries.

Secretary to Government of Punjab
Industries, Mines & Minerals Department"

Notification dated 15th July 2005:

"Government of Punjab Industries Department
Dated Lahore, the 15th July 2005.

NOTIFICATION

No. AEA-III-3-5/2003. In exercise of the powers conferred upon him under Section 11 read with Section 3 of the Punjab Industries (Control on Establishment & Enlargement) Act, 1963, the Governor of the Punjab is pleased to order that in supersession of Notification No. AEA-III-3-5/2003, dated 12-10-2004 notified in the Punjab Weekly Gazette October 20, 2004; the following amendment shall be made in the Government of the Punjab, Industries Department Notification No. AEA –III-3-9/91 dated 17-09-2002, with immediate effect:

AMENDMENT

For Clause 3, the following shall be substituted:

i) The establishment of new sugar mills upto the capacity of 16,000 TCD is allowed in the province.

ii) The sugar mills are not allowed to enlarge existing capacity over 16,000 TCD.

Secretary Industries Department"

10. The purpose of enacting the Act is proclaimed in its preamble which is, "*to provide for the organized and planned growth of industries in the Punjab*". The most significant provision of the Act is its section 3 which states that the prior permission in writing of the Government is to be obtained before establishing or enlarging any industrial undertaking. The proviso to the section 3 however states that an application seeking permission shall not be rejected without giving an opportunity of showing cause against it (clause (a) of the proviso) or the Government is satisfied, "*on the basis of information available to it … that the grant of permission … will be prejudicial to*

the national interest, or injurious to health or a source of nuisance for, the residents of the local area" in which it is to be set up or enlarged (clause (b) of the proviso). However, the Government may, in exercise of powers under section 11, "*exempt any industrial undertaking or class of industrial undertakings from all or any provision of this Act or the rules*". We were informed that no rules have been enacted so far.

11. The impugned Notification has been issued under section 3 read with section 11 of the Act and has effectively placed a complete ban on the setting up of new sugar mills or expanding the existing ones. There is some merit in the contention of the appellants that section 11 is an enabling provision rather than a disabling one, therefore, a ban on a class of industrial undertakings could not have been imposed thereunder. However, such an interpretation would not in itself enable the appellants to set up or expand any industrial undertaking because section 3 clearly requires the previous permission in writing of the Government. There is also not a serious challenge to the proposition that each and every application could be rejected by the Government on the ground that it was "*prejudicial to the national interest*". The Government has instead issued the impugned Notification restricting the establishment of new sugar mills as well as expanding existing ones. Let us consider the ambit of the proviso first. The proviso enables the Government to reject applications if it is satisfied on the basis of *information* and any *inquiry* that it may deem fit to conduct that it is *prejudicial to the national interest* or is *injurious to health* or is *a source of nuisance*. Accordingly we proceed to consider the information available with the Government and the inquiries made by it before it had issued the impugned Notification.

12. The Ministry of Food, Agriculture and Livestock of the Government of Pakistan reviewed the position that had emerged after the issuance of the Notification dated 15th July 2005, by the Government of Punjab, and recommended (on 8th September 2005) that the said Notification be withdrawn and, "*a country-wide complete ban on installation and expansion of sugar mills may be imposed immediately by all the provinces*". It also called upon the Provincial Governments to

constitute provincial committees for the preparation of comprehensive guidelines on the subject. The recommendations were made on the basis of the following documented reasons:

> "4. The new Policy has been examined by the Ministry of Food, Agriculture, and Livestock and its views on the mater are as follows:
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> i. Sugarcane is a tropical crop as it requires high rainfall and moderate temperature for optimum growth. Pakistan does not have the tropical climate and irrigation resources needed to attain comparative advantage in the cultivation of sugarcane. Therefore, it is not in our economic interest to promote this crop, particularly in the areas in which it displaces cotton and wheat.
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> ii. Sugarcane is typically sown during the months of February-March and harvested during November-March. Its life cycle has a span of around one year. It needs almost 18-20 irrigations for proper tillering and growth. Cotton and wheat rotation over the same period requires around 10-12 irrigations. Sugarcane is thus a highly water intensive crop not suited to our cropping system and rainfall patterns. In a future scenario where water resources will become scarcer. It is neither advisable nor prudent to replace cotton/Wheat rotation with Sugar Cane.
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> iii. As a consequence of its water intensive nature, sugarcane in the cotton zone is grown in the areas where ground water is sweet as canal water alone cannot meet the total requirement. Water shortage and low rainfall in previous years have led to excessive ground water pumping. Experts are already raising serious concerns regarding depletion of our ground water resources. Any increase in sugarcane area in the cotton zone will only worsen the situation. Availability of sweet groundwater is a major source of irrigation in southern Punjab, an area which produces the bulk of our cotton and wheat crops. These areas are serviced by non-perennial irrigation canals that run only for six months, leaving the farmer totally dependent on the aquifer for the remaining months of the year. Any adverse change in the aquifer in the core cotton growing area will, therefore, jeopardize our economic future.
>
> iv. Sugarcane further loses its economic potential when it is grown under the dry and hot conditions of "cotton zone". In such an environment, it substitutes out our most important crops i.e. cotton and wheat and its irrigation requirements are further increased due to the low rainfall and hot weather conditions. Frequent irrigations under hot and dry conditions significantly raise humidity levels and create ideal conditions for rapid multiplication of pests – conditions not favorable for the cotton crop. These were the factors that had led to the imposition of the ban on installation of sugar mills in the "cotton zone". These factors have now become even more important in view of our "Textile Vision", changing world

scenario for textile competitiveness, and rapid expansion in our textile sector in the recent past.

v. In order to achieve the targets of textile vision 2010, we need all the available land under cotton cultivation. Billions of dollars of investment has taken place in the textile sector during the last five years on the firm commitment of the Government that industry-friendly policies assuring uninterrupted and adequate supply of all raw materials will be formulated. Consequently, demand for raw cotton has substantially increased in the recent past. The Federal and Provincial Governments should implement policies and programs which encourage growers to bring more area under cotton instead of curtailing the area and switching to other crops.

vi. The Punjab Government had itself initiated a program of "Revival of Cotton in old Cotton area" in 2002 to increase cotton acreage in Punjab and as a part of the policy had actually revised its definition of "cotton zone" by including new districts in the negative list and banning the setting up of sugar mills in these districts. An abrupt reversal of policy will shake the confidence of the textile industrialists which we can ill afford at this crucial stage. APTMA has already expressed serious concern based on rumours about the change in the Policy (annex C). It will take up this issue with the Government at all levels more vigorously once they receive official Notification. We will not be able to defend this shift in Policy given our previous policy statements."

13. The Cane Commissioner of Punjab had also opposed lifting the ban on the establishment of new sugar mills and expanding the capacity of existing ones. In coming to this decision he gave the following reasons which are contained in his letter dated 4th April 2009:

"1. The Punjab Sugar Industry include 46 sugar mills out of which 45 are functional. The crushing capacity of the 45 functional sugar mills is 3,21,900 metric ton per day. Due to non availability of sufficient sugarcane these mills have never utilized their crushing capacity 100% even in the year 2007-08 when there was a bumper crop of sugarcane. In that year the sugarcane crushed was 3,30,63,564 metric ton during 150 crushing days as against requirement of 4,82,85,000 metric ton of sugarcane for 100% utilization of crushing capacity of sugar mills. In the sugarcane glut season the mills could run only @ 65 to 70% of their crushing capacity.

2. The maximum sugarcane growing area falls in Bahawalpur and Faisalabad Divisions. The number of sugar mills in these Divisions are 7 & 16 having a crushing capacity of 87,000 & 1,04,000 metric ton per day, respectively. These sugar mills despite their having been located in the

favourable sugarcane growing area, have never managed utilize their mills crushing capacity fully.

3. Sugarcane is a high water delta crop. It can not possibly be horizontally propagated and extended."

14. The Government had sought the comments and views of the Agriculture Department on the "Establishment of New Sugar Mills" which were conveyed by the Secretary Agriculture under cover of letter dated 20th February 2008, from which the following extracts have been reproduced:

> "Sugarcane and cotton are two important cash crops of the Punjab besides rice. However, in the main cotton belt sugarcane has emerged as a competing crop with its inroad in traditional cotton belt i.e. Rahim Yar Khan due to establishment of new crushing unit in the areas. This trend has enormous economic and ecological consequences. Sugarcane is a one year crop and it requires high delta of water compared to cotton as Punjab falls under arid climate whereas sugarcane is a tropical crop. Moreover, in case of cotton, wheat can be grown after cotton picking which substantially contribute to the food security of the country and generate surplus for the deficit areas. The wheat grain in cotton belt is of high gluten and free from seed born disease.
>
> Cotton ensures economic security as its value added product contributes 60% to the foreign exchange. There is a widening gap in demand and supply due to which country has to import cotton to meet the domestic requirements evident from data below.
>
> In future, import of cotton will not be cost effective due to expansion in textile sector of India and China.
>
> The country requires about 18 millions bales of cotton by the year 2015 and 80% of it has to be produced in the Punjab Province. This target can be achieved through increase in production per unit area and expansion in area. Therefore, we need to maintain the current level of areas under cotton and also ensure 1 % expansion in areas every year. The expansion of sugarcane in the Province is evident from the table below. The mills capacity is already much higher compared to the cane supply."

15. A Committee was constituted by the Chief Minister of Punjab which included the Chief Secretary, Secretary Industries, Secretary Agriculture, and Secretary Food as well as the representatives of the Lahore Chamber of Commerce and Industries and representatives of the Punjab Sugar Mills Association. The said Committee, in its meeting held on 8th April 2011, recommended the "*ban on establishment of new sugar*

mills and enlargement in capacity of existing sugar mills of any category throughout the Province." In supporting the ban the Secretary industries stated:

> "…the imposition of ban on sugar mills by the Government of the Punjab was in line with the position of Federal government namely that promotion of sugarcane production was not in the national interest in view of its substitution effect on cotton and wheat crops and its harmful role, being a water intensive crop, in the depletion of ground water resources. He pointed out that crushing capacity of sugar mills in the province was underutilized to the extent of a 36% deficit between crushing capacity of sugar mills and availability of sugarcane in Punjab."

The view of the Chief Secretary of the Province was recorded in the minutes of the meeting as under:

> "…applications to setup new / mini sugar mills were mostly for setting up units in cotton growing belt of Punjab. The attraction of this area for the investors was mainly on account of high sugarcane recovery and if this trend is encouraged, the demand for additional sugarcane would come at the expense of the cotton crop. However, as sugar requirements of the province could easily be met from existing capacity of sugar mills, addition of new / mini sugar mills is not needed. He was of the view that the ban on the establishment of new sugar mills may be continued."

The Secretary Agriculture endorsed the above view adding, *"that lifting of ban on establishment of sugar mills would affect production of cotton which was presently 13 million bales and the country's demand was 15-16 million bales."*

16. It is therefore quite clear that the decision of the Government, disallowing the setting up of new sugar mills and expanding the capacity of existing ones, was taken after considerable deliberations and was in conformity with the advice of experts of the relevant departments, including Agriculture, Food and Industries. The decision of the Government is also in accordance with the views of the Government of Pakistan. The factors taken into consideration in coming to such a decision, as gleaned from the referred to documents, included the following ecological / environmental, agricultural, industrial and financial ones:

- Punjab has an arid climate whereas sugarcane is best grown in tropical zones;
- Sugarcane consumes far more water than other crops;
- The water required for growing sugarcane in non-perennial irrigation canal areas is made up by tapping into groundwater / aquifers inducing water scarcity by depleting aquifers;
- Sugarcane stubble remains rooted in the soil after it has been cut therefore the second (wheat) crop cannot be grown on such land whereas it can be grown on the land from which cotton is harvested;
- Sugarcane adversely affects food security;
- Sugarcane substitutes cotton and wheat;
- Existing sugar mills have underutilized capacity;
- Textile industry is being starved of locally available cotton;
- Cotton bales are imported by using scarce foreign exchange;
- Textiles are a major foreign exchange earner; and
- International price of sugar is cheaper than the local price therefore sugar does not have export potential.

17. In order to ascertain whether some or all of the aforesaid factors, which had led to the ban being imposed, still prevailed, we examined the current data on the subject. The Cane Commissioner of the Punjab as recently as 24th July 2015 pointed out that even though sugar mills were operating well below installed capacity the production of sugar was considerably more than its consumption, stating that:

> "4. Pakistan is producing above 5 MMT of sugar per annum and has excess installed crushing capacity (3,47,900 MT / Day - Punjab) than domestic consumption, whereas the annual domestic consumption is 4.4 MMT on the basis of 200 million population and average per capita consumption of 22 kgs per annum."

The sugar glut could also not be reduced by exporting it because:

> "5. International price of sugar are $360-375 M. Ton and domestic price are $500 per M. Ton during 2015."

The "Pakistan Economic Survey 2015-2016", published by the Finance Division of the Government of Pakistan, also does not depict an encouraging situation.

The financial year (FY) 2015-2016 discloses excessive sugarcane production and a deficit cotton crop which is adversely affecting the cotton ginning and textile industry with negative financial consequences, as can be seen from the following extracts taken from the said report:

> "During FY 2016, the performance of agriculture sector as a whole remained dismal as it witnessed a negative growth of 0.19 percent against 2.53 percent growth during the same period last year. The growth of crops declined by 6.25 percent, while the other sub component of Agriculture sector like Livestock, Forestry and Fishing posted positive growth of 3.63 percent, 8.84 percent and 3.25 percent, respectively. The growth of sub Sector of crops included important crops, other crops and cotton ginning remained negative as it posted a growth of -7.18 percent, -0.31 percent and -21.26 percent which impacted negatively on crops as a result became the reason of negative growth of Agriculture sector. The last negative growth in Agriculture was witnessed in 2000-01, when agriculture growth declined to 2.18 percent. Important crops having a share of 23.55 percent in agricultural value added has witnessed negative growth of 7.18 percent on account of large decline in cotton production (27.83 percent), rice production (2.74 percent) and maize production (0.35 percent) during 2015-16 against negative growth of 0.52 percent during the same period of last year. While only wheat and sugarcane production witnessed a positive growth of 1.58 percent and 4.22 percent respectively, as compared to last year. Other crops contributed 11.36 percent in value addition of agriculture witnessed a decline of 0.31 percent during 2015-16 against positive growth of 3.09 percent during the same period last year due to decline in the production of pulses, fruits and oilseeds posting negative growth of 12.49 percent, 2.48 percent and 9.56 percent, respectively. With drop in cotton production by around 27.83 percent this year the Cotton ginning having a share of 2.32 percent in value addition of agriculture has suffered badly and posted a negative growth of 21.26 percent compared to 7.24 percent growth during the same period last year." (at pages 24 and 25)

> "Cotton being a cash crop and a essential source of raw material to the textile, enables the textile industry to survive and expand its base. The cotton has share of 1.0 percent in GDP and contributes 5.1 percent in agriculture value addition. This year the production of cotton massively declined therefore, to maintain the supply chain of cotton to the textile industry, the import of raw cotton during July-March 2015-2016 has increased to 345.363 thousand tonnes compared to 97.354 thousand tonnes during same period last year showing a growth of 254.75 percent while in value terms it reached to US$ 588.236 million against US$ 224.647 million witnessing growth of 161.85 percent. During 2015-16, the cotton crop was sown on an area of 2917 thousand hectares, showing a decrease of 1.5 percent over last year's area of 2961 thousand hectares. Cotton production for the year 2015-16 stood at

> 10.074 million bales against 13,960 million bales last year showing a decline of 27.8 percent." (at page 26)

The excessive availability of sugar is further confirmed by the statement of the Economic Advisor of the Government of the Punjab, which is based upon the statistics provided by the Sugar Advisory Board of the Ministry of Industries and Production, Government of Pakistan, filed by the learned AAG:

> "As per latest (2015-16) statistics of Sugar Advisory Board, Ministry of Industries & Production, Islamabad the requirement of sugar per person per annum is 20 kg. Thus for the Punjab population of around 100 million, the sugar requirement is approximately 2MM tons per annum and the population based sugar requirement of Pakistan is approximately 4 MM tons per annum. The detail of Sugar Production and Demand is as under:

	Pakistan	Punjab
Production of Sugar	5.681 Million Metric Ton	2.900 Million Metric Ton
Demand of Sugar	4.0 Million Metric Ton	2.144 Million Metric Ton
Surplus Sugar	1.681 Million Metric Ton	0.756 Million Metric Ton"

Thus, the situation that had prevailed prior to the ban being imposed appears to have been further aggravated. Therefore, not only has the ban been justified but also its continuance is imperative.

18. Before proceeding to answer the questions formulated in paragraph 8 (above) it would be appropriate to attend to the preliminary legal objection taken by the learned AAG that the appellants had not availed of the alternate remedy of revision / appeal. In our opinion availing of the said remedies would be an exercise in futility in the presence of the impugned Notification as it is not expected that a Government functionary could, or even should, take a decision contrary to the Government's policy decision incorporated in the impugned Notification of not permitting the setting up of new sugar mills or expanding the existing ones. Moreover, it was rightly noted by Jawwad S. Khawaja J, when he was a judge of the Lahore High Court, in the case of Madina Sugar Mills (above), the havoc caused when discretion was given and how it was abused. The judgment sets out the history of the law and how appallingly matters

of national importance were attended to as amply demonstrated by the following extracts therefrom:

> "3. From time to time the Provincial Government has issued notification in exercise of its powers under section 11 of the Ordinance. The first such notification, which bears relevance to the present case was issued on 2-10-1986 and is hereinafter referred to as the "Original Notification". By means of the Original Notification, all industries and areas in the province were exempted from the application of section 3 of the Ordinance except those specified in the said Notification itself. As a consequence, border areas, areas prone to flooding and urban areas among other specified locations, were retained within the regulatory ambit of section 3 of the Ordinance while in the remaining areas of the Province, industries could be set up (subject to certain industry-wise restrictions) without obtaining the prior permission of the Government under section 3 of the Ordinance. The area-wise restrictions, which find mention in paragraphs Nos.1 to 4 of the Original Notification, reflect what is officially termed as the "Location Policy" of the Punjab Government." (at pages 508-509)

> "5. After the Original Notification the Location Policy underwent numerous changes, primarily it would appear, effecting the sugar industry. On 3-11-1988 as Notification (the "First Amending Notification") was issued whereby the sugar industry was brought into the Location Policy of the Government through the incorporation of paragraph 2(a) in the Original Notification. Paragraph 2(a) stipulated that no sugar mill would be allowed to be set up in a defined negative area comprising of the divisions of Multan, Bahawalpur and D. G. Khan and the district of Okara." (at page 509)

> "7. What happened subsequent to the First Amending Notification is a story of distasteful cronyism which was indulged in by the incumbent Chief Ministers of the time which undermined the well-considered Location Policy of the Government and sacrificed the State and public interest to the business, commercial and political interests of persons who were influential politically or otherwise. It appears that as and when the Government in power wished to favour such influential persons, the Location Policy was modified without much ado and wholly in disregard of the considerations, which had prevailed in the formulation of the Location Policy in the first place. New sugar mills as a result, were allowed to be set up in the negative area comprising of the divisions of Bahawalpur, Multan and D.G. Khan and the District Okara." (at page 510)

> "9. … It has become apparent from an examination of the official record that each of the notifications mentioned in the preceding paragraph, was issued to accommodate influential persons desirous of setting up sugar mills in the negative area. These notifications are not based on any valid justification for modifying the Location Policy. No committees were constituted nor was any data, information or opinion gathered

> to justify deviation from the Location Policy, which had been formulated after the in-depth and extensive deliberations preceding the First Amending Notification as set out in paragraph 6 above. The learned Advocate-General at the very outset conceded that he could not defend what had happened during the past. He did, however, argue that any failing of mis-governance in the past could not be made the basis for allowing it to continue in the future also." (at page 511)
>
> "16. However, having so held I am not oblivious of the abusive manner in which the well-considered Location Policy of the Government was tampered with for considerations which clearly were based on favouritism and were not motivated by the interest of the State. I have little doubt that if any of the notifications mentioned in paragraph 8 had been challenged in Court, at the relevant time, on the ground of arbitrariness and unreasonableness, such challenge would have merited serious consideration. In this context I find that the Final Notification represents a salutary correction of the waywardness with which the Location Policy of the Government was undermined in the past. It is not for this Court to sit in judgment over the policy decision of the Government once the Court concludes that the process through which such policy decision was arrived at was not open to exception." (at page 513)

We could not agree more with the aforesaid observations with regard to the sad state of affairs that prevailed. The cherished objective of transparency in governance was obfuscated. Unfortunately, the incumbent Chief Minister/s have continued on the path of favoritism as it transpires that despite the said judgment a number of sugar mills were given permission to be set up. In this regard, in response to our query, the learned AAG placed on record letter dated 24th June 2016 of the Economic Advisor of the Government of Punjab which shows that during the period that the Notification dated 15th July 2005 held the field a sugar mill of a capacity of 12,000 TCD was set up in District Muzaffargarh and another of a capacity of 16,000 TCD was set up in District Rahim Yar Khan. Alarmingly two sugar mills were also allowed to be set up after the issuance of the impugned Notification which had forbidden the setting up of new sugar mills; one of a capacity of 12,000 TCD in District Rahim Yar Khan and another of a capacity of 15,000 TCD in District Mianwali. These facts came to the fore incidentally and are not the subject matter of these appeals therefore it would not be appropriate to state any thing further in this regard as the same may be subject matter for investigation and litigation.

19. The appellants have also questioned the constitutionality of the impugned Notification, even though no challenge was made on this score in the prayer clause of the petition before the High Court. It has been contended that the impugned Notification violates the appellants' fundamental right contained in Article 18 of the Constitution to conduct the business of setting up sugar mills and manufacturing sugar therefore the said ban must yield to the Constitution. To appreciate the contention it would be appropriate to reproduce the said provision of the Constitution, as under:

> **"18. Freedom of trade, business or profession.**
>
> Subject to such qualifications, if any, as may be prescribed by law, every citizen shall have the right to enter upon any lawful profession or occupation, and to conduct any lawful trade or business:
>
> Provided that nothing in this Article shall prevent-
>
> (a) the regulation of any trade or profession by a licensing system; or
>
> (b) the regulation of trade, commerce or industry in the interest of free competition therein; or
>
> (c) the carrying on, by the Federal Government or a Provincial Government, or by a corporation controlled by any such Government, of any trade, business, industry or service, to the exclusion, complete or partial, of other persons."

The case of Government of Pakistan v Zamir Ahmad Khan (PLD 1975 Supreme Court 667) considered the licensing regime enabling import of cinematograph films and the amendment made therein pursuant to which the respondents were disqualified from importing films. A three member bench of this Court considered the scope of Article 18 of the Constitution. It also considered whether the issuance of a license can be claimed as a right even if it was contrary to the policy objective of the Government and whether a writ can be issued which would defeat the policy that was competently made by the Federal Government. Muhammad

Gul J, delivered the courts opinion, and it would be appropriate to reproduce the following extracts therefrom:

> "It will be appropriate to examine in the first instance, whether the respondent can invoke any provision of the Constitution in the Chapter relating to the Fundamental Rights for the grant of licence for the import of films. Article 18 of the Constitution, which relates to the freedom of trade, business or profession, which corresponds to Article 15 of the, Interim Constitution, and which incidentally held the field at the relevant time, assures the citizens the right to enter upon any "lawful profession or occupation" and "to conduct any lawful trade or business". It is important to point out that the word "lawful" qualifies the right of the citizen in the relevant field. This clearly envisages that the State can by law ban a profession, occupation, trade or business by declaring it to be unlawful which in common parlance means anything forbidden by law. Prostitution, trafficking in women, gambling, trade in narcotics or dangerous drugs are common place instances of unlawful profession or trade. These are inherently dangerous to public health or welfare. Therefore, on the wording of Article 18 of the Constitution, the right to enter upon a profession or occupation or to conduct trade or business can hardly be described to be a constitutional or fundamental right when such right may be denied by law. In this respect our Constitution stands in sharp contrast with the corresponding provision of the Indian Constitution which omits the use of word "lawful" in the relevant provision." (at page 672)

> "…law is well settled that in the generality of cases, licence (simpliciter) is a privilege and not a legal right; much less there is a legal duty for its grant. Therefore, exceptional cases apart, *mandamus* would not issue in such cases. Speaking generally in such cases the emphasis is on policy, and any discretion vesting in the authorities is directed towards attaining the policy objective." (at page 677)

> "Indeed, the Government has all along since the inception of the Ordinance, frequently and materially altered import policies. These policies are determined generally with reference to the domestic needs their priorities, availability of foreign exchange and multitudes of other factors of which the Federal Government is the sole arbiter in exercise of its executive authority. The decision taken, falls within the realm of policy making. These policy decisions are binding on the subordinate administrative authorities as a matter of duty. In all such cases, orders made must conform to the policy decisions of the Government. The amendment made on 10-8-1972 in item No. 49 signified a change in policy and the respondent was informed that he was being refused licence because of "the change in policy" and not because of any other reason. On these facts, it is not possible to subscribe to the proposition that a writ of *mandamus* would lie against the Licensing Authority which would have the effect of defeating the policy,

> competently made by the Federal Government." (at pages 677-678)

The above judgment was referred to and approved (at page 223) in the seven member bench judgment of this Court in case of Arshad Mehmood v Government of Punjab (PLD 2005 Supreme Court 193). However, the point for determination in Arshad Mehmood's case was quite different, which was to consider the constitutionality of section 69-A introduced in the West Pakistan Motor Vehicles Ordinance, 1963 in pursuance whereof the appellants had been prevented from plying their transport vehicles despite holding valid route permits. This Court held that since the exclusion of the appellants by franchise holders pursuant to section 69-A was a 'classification' not permissible under Article 25 (the equality provision of the Constitution) section 69-A of the said Ordinance was "violative of Article 25 of the Constitution".

20. In the cases heard by us the appellants were not already operating sugar mills but were proposing to set up new ones. The owners of existing sugar mills were also prevented from expanding their sugar mills. The decision to impose the ban was not to benefit or punish anyone but to ensure the organized and planned growth of the industry, which may include the factors noted in paragraph 16 above, even though by imposing a ban the existing sugar mills may have obtained an advantage of reduced competition. The decision to impose the ban was taken after long deliberations and on the advice of experts and we have not been shown any *mala fide* or ulterior motive of the Government in taking this decision. On the contrary, it may well be stated that if the Government had not finally acted it would have further devastated the environment and food security as well as undermining the economy. When the Government stopped the expansion of the sugar business it did not offend Article 18 of the Constitution since the rights guaranteed thereunder are "subject to such qualifications" that have been "prescribed by law". The Act starts with the position of not permitting the setting up of any industry except by the prior written permission of the Government and then proceeds to state that the applications seeking such

permission shall not be rejected except for the reasons mentioned in the proviso to section 3. Regretfully the rules which were envisaged in the Act and were to be made by the Government have not materialized despite the Act being in the field for over 53 years. Consequently, anyone can submit an application wanting to set up any industry and each such application is to be dealt with on a case to case basis. This, to say the least, is a most unsatisfactory state of affairs. In this terrain unregulated by rules the Government may reject the applications received by it either under clause (a) or clause (b) of the Act. Under clause (a) the Government has to provide an opportunity to show cause against it. However, under clause (b) the Government may reject an application if it is *satisfied, on the basis of information available to it and after making such inquiry as it may deem fit*. As noted above the Government had inquired into the matter and there was considerable information available with for it to conclude that permitting the establishment of new sugar mills or permitting the expansion of existing ones was *prejudicial to the national interest*. The Government therefore took the decision to prohibit both new sugar mills and the expansion of existing ones and issued the impugned Notification. The decision of the Government was/is in the public and national interest. Such decision was also not motivated by *malice*, *mala fide* nor taken for any ulterior reason. Therefore, it is unexceptionable. In respect of such a decision a writ under Article 199 of the Constitution does not lie. Whilst a notification prohibiting a particular class of industry as noted above may not be issued under section 11 of the Act, there is no reason why it could not be issued under section 3 of the Act, even though section 3 does not specifically mandate the issuance of such a notification.

21. Having answered the first question (formulated in paragraph 8 above) in the affirmative leads us to the second question. Since the Government has issued the impugned Notification, which is based on valid reasons we do not think there would be any point to give reasons for declining an application seeking the establishment of a new sugar mill or expanding an existing one. The impugned Notification is

undoubtedly within the executive authority of the Government, which answers the first part of the third question, however, it would not be immune from a challenge if it could be demonstrated that it was issued for *mala fide* or for ulterior purposes or was against the public or national interest, which answers the second part of the third question. Whilst it may have been difficult to determine the line which separates the legitimate from the illegitimate assumption of such power there was no difficulty in determining this in the present case. As has already been determined that there were valid reasons for issuing the impugned Notification the fourth question stands answered. The fact that there were a number of reasons justifying the issuance of the impugned Notification and each reason in itself sufficient to be categorized as constituting the public or national interest the fifth question too is answered. In conclusion we may state that the legal principles enunciated in the case of Madina Sugar Mills (above) were correct.

22. That for the aforesaid reasons these appeals are dismissed, however, because such a matter had not been earlier decided by this Court and there was some uncertainty about it there shall be no order as to costs.

Judge

Judge

Announced in open Court
At Islamabad

On 25th July, 2016

By Justice Ejaz Afzal Khan, J.

APPROVED FOR REPORTING
(Zulfiqar)