

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:

MR. JUSTICE EJAZ AFZAL KHAN

MR. JUSTICE QAZI FAEZ ISA

CIVIL PETITION NO. 1067 OF 2016

(Against the judgment dated 23.12.2015 of the Peshawar High Court, Peshawar passed in Writ Petition No. 3982-P/2015).

The Federation of Pakistan through Secretary, Ministry of National Food Security and Research, Islamabad.

... Petitioner

VERSUS

Agritech Limited and others.

... Respondents

For the Petitioner:

Mr. Sajid Ilyas Bhatti,
Deputy Attorney General for Pakistan.
Syed Rifaqat Hussain Shah, AOR.
Mr. Abid Javed, Secretary, Ministry of National Food Security and Research, Islamabad.
Mr. Imtiaz Ali Gopang,
Deputy Food Security Commissioner.
Mr. Abdul Samad, Research Officer.

For the Respondents:

Mr. Salman Akram Raja, Advocate Supreme Court.
Mr. Mehmood A. Sheikh, AOR (**absent**).

On Court Notice:

Mr. Ashtar Ausaf Ali, Attorney General for Pakistan.

Dates of Hearing:

24th, 25th, 26th & 27th May 2016.

JUDGMENT

QAZI FAEZ ISA, J.- The Federation of Pakistan through Secretary, Ministry of National Food Security and Research, Islamabad has belatedly filed this petition, nineteen days after the prescribed period of limitation, assailing the judgment dated 23rd December 2015 of a Division Bench of the Peshawar High Court, Peshawar, whereby the petition filed by the respondent No. 1 and 2 was disposed of.

Civil Miscellaneous Application No. 2485 of 2016

2. Through this application the delay in filing of the petition is sought to be condoned. This Civil Petition No. 1067 of 2016 was filed on 8th April 2016 assailing the impugned judgment dated 23rd December 2015, certified copy whereof was provided to

the petitioner on 20th January 2016. The office has noted that the petition is barred by nineteen days. Mr. Sajid Ilyas Bhatti, the learned Deputy Attorney General for Pakistan (“**DAG**”), stated that the delay was neither wilful nor deliberate and occurred for factors completely beyond the control of the petitioner. The reason for the delay in filing the petition and the basis for seeking it to be condoned is contained in paragraph 2 of the said application, which is reproduced as under:

“2. That the competent authority Mr. Seerat Asghar, the Secretary of the Department has been retired on 14.01.2016. The post remained vacant till ____ [left blank] when the present Secretary took over the charge and issued the direction to file the present CPLA after the examining the relevant record then the Department started processing and after fulfilling the required formalities now the present CPLA is being filed with certain delay.”

The learned DAG placed reliance upon the case of Government of Punjab v Muhammad Rafique Shah (2013 SCMR 1468) to support his contention that since the matter was of public importance the delay, as in the cited precedent, may be condoned.

3. Mr. Salman Akam Raja, the learned counsel for the respondent Nos. 1 and 2, has strongly opposed the application and stated that no reason whatsoever has been given to condone delay; that the retirement of Secretary of the Department was not an unforeseen event; that upon his retirement and on the same day acting charge was handed over to the Additional Secretary; and that a Secretary was permanently appointed to the post on 20th February 2016. Therefore, there was no justifiable reasons for filing the petition on 8th April 2016. It was also pointed out that initially the petitioner had accepted the decision and had subjected the Company to the verification process as stipulated in the impugned judgment, by dispatching a team from the Pakistan Standards and Quality Control Authority to ascertain whether the Single Super Phosphate (“**SSP**”) fertilizer manufactured by the Company contained the prescribed minimum phosphatic content of 18 per cent, however, for some inexplicable reason the petitioner belatedly elected to file this petition. He further stated that the delay of each and every day has to be explained which has not been done by the petitioner. He placed reliance on the cases of Province of East Pakistan v Abdul Hamid Darji (1970 SCMR 558), Government of Pakistan v

Malbrow Builders Contractors (2006 SCMR 1248), Food Department v Ghulam Farid Awan (2010 SCMR 1899) and Parvez Musharraf v Nadeem Ahmed (Advocate) (PLD 2014 SC 585).

4. In the judgment in the case of Government of Punjab v Muhammad Razaqat Shah (above) which was cited by the learned DAG it was noted that the matter was of public importance as it affected a large number of Government employees, and this fact coupled with the fact that another appeal, filed within time and in respect of the same matter, was pending therefore this Court had exercised its discretion to condone the delay in filing the subsequent appeal. However, since there is no other pending case the said citation is not attracted. We have also gone through the application which does not provide any reasonable ground justifying the delay to be condoned. The working of the Government neither stops, nor should stop, upon the retirement of a Secretary of a Government department. If at all the successor had not been appointed the petition could have been filed by the person holding charge of the office. In any event, since the post of the Secretary had been filled in on 20th February 2016 there was more than sufficient time for the Government to approach this Court. All the more so, if, as contended by the learned DAG, the matter was of public importance. Therefore, this is not a case wherein it would be appropriate to exercise our discretion to condone the delay. Consequently, the application seeking to condone the delay in filing the petition is dismissed. However, since we spent some time in hearing this matter on merit and had also heard the learned Attorney General on the constitutional and legal questions that had emerged it would be appropriate to highlight the same and the respective contentions of the parties.

5. A writ petition was filed by Agritech Limited (“**the Company**”) and its Works Manager. The Company manufactures fertilizer at its plant situated in Haripur, District Hazara of the Khyber Pakhtunkhwa Province. The SSP fertilizer manufactured by the Company and which is in dispute is manufactured by using locally mined rock containing phosphate. The Company alleged that by utilizing the locally mined phosphorous rock it was producing SSP fertilizer the phosphatic content whereof was 18 per cent, as has been

confirmed by the Pakistan Standards and Quality Control Authority, a statutory body set up under The Pakistan Standards and Quality Control Authority Act, 1996, therefore, it was also entitled to the subsidy provided to other manufacturers and importers of phosphatic fertilizers, including SSP fertilizer.

6. The subsidy was provided vide two notifications issued by the Ministry of National Food Security and Research Government of Pakistan dated 15th October 2015 and 3rd November 2015 respectively, which are reproduced hereunder:

“Government of Pakistan
Ministry of National Food Security and Research

Islamabad the 15th October, 2015

NOTIFICATION

No.F. 1-11/2012/DFSC-II/ Fertilizer. In the light of Finance Division’s letter No. 1(7) CF-C/2015-2147 dated: 15-10-2015, the Competent Authority, Ministry of National Food Security & Research is pleased to notify, with immediate effect, the salient features of the subsidy on Di-ammonium Phosphate (DAP), Nitrophos (NP) and NPK fertilizers (based on P contents) as per detail below:

- i. Subsidy shall be paid @ Rs.500/- per 50 kg bag of DAP (one time subsidy), Rs. 217/- per 50 kg bag of Nitrophos and NPK fertilizers (based on P contents) and will continue till the pledged amount is exhausted.
- ii. Subsidy shall be paid after the sale of bagged DAP, Nitrophos and NPK fertilizers on the basis of sales tax invoice and sales tax returns submitted by the manufacturers/ commercial importers.
- iii. Release of amount of subsidy shall be ensured within 15 working days of generating sales tax invoice. The subsidy claim of each manufacturer/ commercial importer shall be sent to the Ministry of National Food Security & Research, Islamabad by Federal Board of Revenue (FBR).
- iv. The Federal Government’s share of Rs. 10 billion, Punjab Government’s share of Rs. 7 billion and Balochistan’s share of Rs. 0.4 billion has already been agreed in principal, whereas Sindh and Khyber Pakhtunkhwa Governments will be approached again for their due contribution.
- v. Ex-Karachi price would be printed on each bag of DAP which include freight. The country would be divided in 6-7 zones for determining freight charges.

- vi. The importers/manufacturers would immediately cancel the dealership if a dealer or his sub-dealer is found guilty of overcharging or tying the product with other fertilizers.
- vii. The DAP, Nitrophos and NPK fertilizers manufacturers / importers will ensure wider public awareness about the fertilizer prices. They would also launch mega media coverage through print and electronic sources for this purpose.
- viii. Provincial Governments would be responsible for the strict monitoring.

(Imtiaz Ali Gopang)
Deputy Food Security Commissioner”

“Government of Pakistan
Ministry of National Food Security and Research

Islamabad the 3rd November, 2015

NOTIFICATION

No.F. 1-11/2012/DFSC-II/ Fertilizer. The Competent Authority, Ministry of National Food Security & Research is pleased to notify, with immediate effect, the salient features of the subsidy on Single Super Phosphate (SSP), based on P content of the product as per detail below:

- i. Subsidy shall be paid @ Rs.196/- per 50 kg bag of SSP fertilizer (based on P content) and will continue till the pledged amount is exhausted.
- ii. The Provincial Governments stressed that they would not give subsidy on SSP manufactured from the local rock.
- iii. The subsidy would be given to SSP fertilizer manufactured by using imported rock. The Phosphatic content should not be less than 18%.
- iv. Subsidy shall be paid after the sale of bagged SSP fertilizer on the basis of sales tax invoice and Sales Tax Returns submitted by the manufacturers/ commercial importers.
- v. Release of amount of subsidy shall be ensured within 15 working days of generating Sales Tax invoice. The subsidy claim of each manufacturer/ commercial importer shall be sent to the Ministry of National Food Security & Research, Islamabad by Federal Board of Revenue (FBR), Islamabad.
- vi. Subsidy would only be given to those commercial importers and manufacturers, who are already registered in tax regime of the FBR before 30th June, 2015.
- vii. Ex-Karachi price would be printed on each bag of SSP which include freight. The country would be divided in 6-7 zones for determining freight charges.

- viii. The importers/manufacturers would immediately cancel the dealership if a dealer or his sub-dealer is found guilty of overcharging or tying the product with other fertilizers.
- ix. The SSP fertilizers manufacturers/importers will ensure wider public awareness about the fertilizers prices. They would also launch mega media coverage through print and electronic sources for this purpose.
- x. Provincial Governments would be responsible for the strict monitoring.

(Imtiaz Ali Gopang)
Deputy Food Security Commissioner”

The aforesaid notifications are hereinafter referred to as the “**15th October 2015 Notification**” and “**3rd November 2015 Notification**” respectively and collectively as “**the Notifications**”.

7. As per numbered item iii of the 3rd November 2015 Notification the subsidy was only to be, “*given to SSP fertilizer manufactured by using imported rock*”. The respondent Nos. 1 and 2 who manufactured SSP fertilizer using local rock were aggrieved and filed a petition under Article 199 of the Constitution of the Islamic Republic of Pakistan (“**the Constitution**”) before the Peshawar High Court, Peshawar, since the manufacturing plant of the Company was situated in the said Province and the raw material utilized for manufacturing of SSP fertilizer was also mined from within the territorial jurisdiction of the said High Court. The case of the Company and its Works Manager (respondent Nos. 1 and 2 herein) before the High Court, which was repeated by Mr. Salman Akram Raja their learned counsel, was that merely because fertilizer was manufactured by using ‘*imported rock*’ or that fertilizer was imported in its finished form does not constitute intelligible criteria, entitling receipt of the subsidy to the exclusion of others. Therefore, the subsidy should also be given to those manufacturing fertilizer having a phosphatic content of 18% or more or else it should not be given to any as otherwise the Company would not be able to sell its fertilizer in a market made uncompetitive on account of the subsidy. The 3rd November 2015 Notification stipulates that, “*The phosphatic content should not be less than 18%*”, therefore, the further stipulation of the fertilizer to be manufactured by using *imported rock* did not stand to

reason and this was done simply to exclude those manufacturers of SSP fertilizer who were utilizing local rock. He further stated that whereas the Company's fertilizer had been tested, and it was established to have phosphatic content in excess of 18 per cent, no test was carried out on the fertilizer that had been manufactured by its competitors by using imported rock or on the imported fertilizer to ascertain their phosphatic content. Therefore, the reasoning of the High Court, which partly allowed the petition, could not be faulted. In this regard reference was made to paragraph 7 and the concluding paragraph 10 of the impugned judgment, reproduced hereunder:

“7. As per the notification dated 3.11.2015, it was the Provincial Government which opposed the subsidy on SSP manufactured from the local rock and that is how the Federal Government through the impugned notification has granted subsidy to the manufacturers of SSP fertilizer using ‘imported rock.’ In a situation where the Additional Advocate General representing the Government of Khyber Pakhtunkhwa supported the stance of the learned counsel for the petitioners, we wonder as to which representative of the Government of Khyber Pakhtunkhwa opposed the subsidy on the SSP manufactured from the local rock. Secondly, this catchy phrase ‘imported rock’ also goes unexplained both in the notification as well as in the comments furnished by the Federation. Had it been some particular ‘imported rock’ from a particular country or countries with their names duly mentioned in the notification, then, of course, it could be understandable that some country or countries have rocks or reserves containing phosphatic content of high value and quality and which is not available anywhere in Pakistan. However, it appears that the impugned notification dated 3.11.2015 was issued in a rather hurried manner without caring for the impending questions and queries which were to arise later on. The same per se raise questions and, of course, eyebrows about the bonafide of the impugned notification. As a suffix it was added after the phrase ‘imported rock’ that “the phosphatic content should not be less than 18%”, meaning thereby that the benchmark or the ultimate threshold while evaluating the value and quality of SSP fertilizer is its 18% P-content and certainly not the mere use of ‘imported rock’ from some unspecified country.

10. Now coming to the lis before us. In this regard, the authorities that be are in a typical catch-22 situation. Since the phrase ‘imported rock’ from some unspecified destination goes unexplained at the respondents’ end, as per clause iii of the impugned notification, then it is the 18% P-content in SSP fertilizers which should be the litmus test or the sine qua non for qualifying for the subsidy announced by the Federal Government through the impugned notification dated 3.11.2015 on the SSP fertilizers. Whether a manufacturer of fertilizer uses an imported rock or a domestic rock, it is the end product which is to be examined and analyzed in order to meet the requisite 18% P-Content. Simultaneously it cannot be legally argued that manufacturing plants using imported rock

would be granted subsidy without any laboratory analysis of the quality of their end product. By the same corollary it can be safely said that the classification made between fertilizer made from imported rock and fertilizer made from domestic rock does not constitute intelligible differentia having rational nexus to the very object of the subsidy scheme announced by the government. Certainly it is the 18% P-Content in the end product or so to say that SSP fertilizer which is relevant and not the source of the raw material. In order to evaluate and analyze the desired 18% P-Content in an SSP fertilizer, we understand that the product should be subjected to undergo the requisite test by a statutory body i.e. Pakistan Standards and Quality Control Authority Standards Development Center (Chemical Division) and if a product or a fertilizer meets the standards of the said authority and possesses 18% P-Content, then there should be no legal justification to deny the manufacturer the subsidy as per the impugned notification dated 3.11.2015.

In view of the foregoing discussion, this petition stands disposed of in the above terms.”

8. That when this case came up for hearing on 12th May 2016, the following order was passed:

“When the learned DAG came to the rostrum to explain his case a query was made as to what is the law empowering the Ministry of National Food Security & Research and Ministry of Finance to give subsidy to manufacturer of fertilizer; what is the mechanism therefor, what is the rationale behind it and who are the recipients and beneficiaries thereof. The learned DAG wants to submit a concise statement explaining the points listed above and asks for three day’s time to do the needful. **Re-list on 18.05.2016.**”

When the case came up for hearing on 18th May 2016 further questions cropped up, therefore, it was considered appropriate to issue notice to the learned Attorney General for Pakistan in terms of Order XXVII-A of the Code of Civil Procedure; the order of the said date is reproduced hereunder:

“Whether the grant of subsidy on fertilizer can be packaged within the niceties of Article 84 of the Constitution of the Islamic Republic of Pakistan is a question which incidentally cropped up in the petition filed by the Federation questioning the judgment of the Peshawar High Court extending the subsidy to the respondents. The learned Attorney General for Pakistan accepts the notice in terms of Order XXVII-A CPC. Since the learned Attorney General is not available tomorrow and day after tomorrow, let this case be listed for hearing on **24th May, 2016.**”

9. Mr. Ashtar Ausaf Ali, the learned Attorney General for Pakistan, stated that, though the subsidy was not a part of the Annual Budget Statement and had also not been incorporated in the Finance Act, the Federal Government could exercise its executive powers under Article 84 of the Constitution to authorize the expenditure incurred in providing the said subsidy. Article 84 is reproduced hereunder:

“84. If in respect of any financial year it is found:

- (a) that the amount authorized to be expended for a particular service for the current financial year is insufficient, or that a need has arisen for expenditure upon some new service not included in the Annual Budget Statement for that year; or
- (b) that any money has been spent on any service during a financial year in excess of the amount granted for that service for that year;

the Federal Government shall have power to authorize expenditure from the Federal Consolidated Fund, whether the expenditure is charged by the Constitution upon that Fund or not, and shall cause to be laid before the National Assembly Supplementary Budget Statement or, as the case may be, an Excess Budget Statement, setting out the amount of that expenditure, and the provisions of Articles 80 to 83 shall apply to those statements as they apply to the Annual Budget Statement.”

He further stated that the Federal Government intended to lay before the National Assembly a Supplementary Budget Statement in the month of June 2016, therefore, once this was done the requisite compliance with Article 84 of the Constitution would have been made. He also referred to Article 164 of the Constitution which finds mention under ‘Miscellaneous Financial Provisions’ and is reproduced hereunder:

“164. The Federation or a Province may make grants for any purpose, notwithstanding that the purpose is not one with respect to which Majlis-e-Shoora (Parliament) or, as the case may be, a Provincial Assembly may make laws.”

10. Mr. Aitzaz Ahsan, a senior counsel of this Court and an experienced Parliamentarian was present in Court when this matter was being argued by the learned Attorney General for Pakistan, therefore, we called upon to assist the Court on the question whether the subsidy could be granted without the prior authorization of the National Assembly? He responded by stating that the language of Article 84 of the

Constitution enables the Federal Government to authorize expenditure which has exceeded the budgeted amount already approved by the National Assembly or when some emergency-type situation has arisen necessitating expenditure to be made, however, the matter of the said subsidy is not covered by the language of Article 84, particularly when the subsidy was envisaged at the time of presenting the Budget. He further stated that though the present and past governments had sought to have recourse to Article 84 in such type of situations, this wrong practice should be rectified and the prior approval of the National Assembly must be sought before making any expenditure in such type of situations, which are not covered by the language of Article 84 of the Constitution.

11. That another aspect of the case, noted by us, is that the Notifications have not been issued under any statute or rule. The learned Attorney General for Pakistan stated that as the provision of the subsidy was authorized by the Federal Cabinet the concerned Secretary of the Federal Government was empowered to issue the Notifications. This fiat of governance however was not supported by precedent.

12. We are cognizant of the fact that the issues noted in the orders dated 12th and 18th May 2016 were not raised before the High Court and have also not been addressed in the impugned judgment. We were also informed that the Government has already disbursed more than half of the designated amount of the subsidy and that it is committed to place the expenditure made on account of the said subsidy before the National Assembly in terms of Article 84 of the Constitution in the month of June 2016. Under such circumstances, it may not be appropriate to dilate on the abovementioned issues in the present case wherein these issues had incidentally arisen.

13. The Hon'ble High Court's observations, with regard to classification based on "imported rock" and "intelligible differentia having rational nexus to the very object of the subsidy scheme", contained in the aforesaid paragraphs 7 and 10 have not been controverted, probably because they could not be. The criteria that can be quantified should be quantified and it must be objective and reasonable. The High Court also noted that the Government was giving selective effect to the Notifications as it had not been

ensured that in the fertilizer, in respect whereof the subsidy was provided, the “*phosphatic content should not be less than 18%*”. The huge amount of subsidy made it all the more necessary to ensure that only those who met the stipulated criteria availed of it. The learned DAG, the Attorney General and the officials present in Court candidly conceded that all those wanting to avail of the subsidy pursuant to the Notifications must have their fertilizer products subjected to testing to determine that they meet the minimum prescribed phosphatic content. We were also informed that no one has assailed the stipulation with regard to minimum phosphatic content prescribed in the Notifications.

14. We therefore convert this petition into an appeal and modify the impugned judgment only to the extent that all those wanting to avail of the subsidy mentioned in the Notifications must also have their fertilizer products subjected to undergo the same test as mentioned in the penultimate sentence of the impugned judgment (reproduced above in paragraph 7). With such modification in the impugned judgment the appeal is disposed of. There shall be no order as to costs.

JUDGE

JUDGE

Bench-III

Announced in open Court

on 6th June 2016

at Islamabad.

Qazi Faez Isa, J.

Approved for Reporting

(*M. Tauseef*)