Form No: HCJD/C-121

JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
(JUDICIAL DEPARTMENT)

W.P. No.1544/2020

Pakistan Sugar Mills Association & 17 others

Versus

Federation of Pakistan
through Secretary Cabinet Division & 9 others

Petitioners by	:	Mr. Makhdoom Ali Khan, Sr. ASC. Mr. Salman Akram Raja, ASC. Mr. Shahzad Atta Ellahi, Advocate (through video link). Mr Saad M. Hashmi, Advocate. Malik Ghulam Sabir, Advocate. Mr. Sikandar Bashir Mohmand, Advocate. Syed Zulqarnain Safdar, Advocate.
Respondents by	:	Mr. Khalid Javed Khan, Attorney General for Pakistan. Mr. Tariq Mehmood Khokhar, Additional Attorney General. Mr. Arshad Mehmood Kiani, Additional Attorney General. Syed Muhammad Tayyab, Deputy Attorney General. Mr. Muhammad Nadeem Khan Khakwani, Assistant Attorney General. Mr. Saqlain Haider Awan, Assistant Attorney General. Rai Azhar Iqbal Kharal and Mr. Safdar Shaheen Pirzada, Advocates for applicants in C.M no. 1423/2020 and 1424/2020. Mr. Tariq Mehmood, Director Law, FIA. Mr. Shoukat Ali Khan, Section Officer (FIA) M/O Interior.
Date of Hearing	:	20-06-2020.

ATHAR MINALLAH, C.J.- The constitutional jurisdiction of this Court, vested under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 (*hereinafter referred to as the*

'Constitution'), has been invoked by eighteen juridical persons. Petitioner no.1 is the Pakistan Sugar Mills Association (*hereinafter referred to as the* ***'Association'***), which is a recognized legal representative body of entities engaged in the business of manufacture/production and sale of 'sugar'. Petitioners no.3 to 18 are juridical persons who own, operate and manage respective facilities which they have established for manufacturing / production of sugar (*hereinafter referred to as* ***'Sugar Mills'***). Respondent no.2 is a shareholder of one of the petitioner companies. (Collectively they shall be referred to as the **'petitioners')**. The petitioners have challenged the notification dated 16-03-2020, whereby the Federal Government, in exercise of powers conferred under the Pakistan Commissions of Inquiry Act 2017 (*hereinafter referred to as the* ***'Inquiry Act of 2017'***), had constituted a 'Commission of Inquiry'. The petitioners have further assailed the proceedings/actions of the Commission of Inquiry, including its report dated 21-05-2020, titled "Report of the Commission of Inquiry constituted by the Ministry of Interior To Probe into the increase in Sugar Prices" (*hereinafter referred to as the* ***'Report'***). The decisions taken by the Federal Cabinet in its meeting held on 21-05-2020 and the pursuant thereto "Action Matrix' recommended by *Mr Shahzad Akbar,* Special Assistant to the Prime Minister on Accountability and Interior (*hereinafter referred to as* ***'Respondent no.4'***) and its approval by the Prime Minister of Pakistan, dated 07-06-2020, have also been questioned by urging this Court to declare them illegal, without lawful authority and jurisdiction. In a nut shell, the petitioners are seeking a writ to quash the report of the Commission of Inquiry and restrain the Federal Government from

giving effect to its recommendations or to proceed and take action pursuant thereto.

Background of the case.

2. The importance of 'sugar' in the daily life of a common man in Pakistan cannot be overstated. 'Sugar' is indeed one of the essential commodities for the general public. Historically. shortages and price increases of 'sugar' have remained a matter of great concern for the executive authorities because such factors in the past have led to strong reactions by non commercial consumers of sugar having adverse consequences for the governments. During the proceedings, this Court was informed that only 30% of the total manufactured/ produced sugar in the country is sold to and consumed by the general public while the remaining is utilized by commercial consumers. Any shortage or price hike in the market affecting the non commercial consumers is thus a 'definite matter of public importance' giving rise to a 'direct and vital concern' for the public. Moreover, factors which cause unease, distress or disillusionment amongst sugarcane growers also becomes a matter of public importance for the executive authorities. The sugar industry is one of the major industries in the country. Sugar, therefore, is an integral part of the quality of life for the general public and its availability in the market at an affordable price inevitably attracts the constitutional guaranteed right to life under Article 9 of the Constitution.

3. The current government was voted in by the people of Pakistan in the general elections held in 2018. The court has been informed that there was a sharp hike in the price of sugar during the past two years. This increase in the price of sugar and its consequent ramifications for the non commercial consumers i.e the general public was and, indeed, ought to have been a cause of serious concern for the executive authorities. It led to the ordering of a preliminary inquiry by the Prime Minister of Pakistan on 20-02-2020. The latter constituted a committee headed by *Mr Wajid Zia*, Director General, Federal Investigation Agency (*hereinafter referred to as* ***'Respondent no.5'***), for this purpose. A preliminary report was submitted on behalf of the committee on 04-04-2020. On the basis of the preliminary inquiry, the constitution of a Commission of Inquiry under the Commissions of Inquiry Act 2017 was recommended for verification of the preliminary findings and further thorough probe. Respondent no.5 informed vide letter, dated 09-03-2020, that further verification of the preliminary inquiry was needed. The preliminary report was considered and, thereafter, the Federal Government i.e. the Federal Cabinet approved the constitution of a Commission of Inquiry under the Inquiry Act of 2017 and the decision was given effect by issuing a notification, dated 16-03-2020. The Commission of Inquiry was headed by Respondent no.5 and included five other members. The Terms of Reference of the Commission of Inquiry were explicitly stated in the notification. Later, vide notification dated 25-03-2020, another member was included in the Committee. The Commission of Inquiry, after concluding its proceedings, submitted its Report i.e the report dated 21-05-2020. The

report was placed before the Federal Cabinet in its meeting held on 21-05-2020 and after deliberations the following decisions were taken;

> *"In view of the above, the Cabinet decided/directed as under:*
>
> *i. Special Assistant to the Prime Minister on Accountability and Interior, as per recommendations of the Commission, shall identify actions (Action Matrix) that are to be taken in each of the above category, assign responsibility for such actions along with timelines for implementation. Approval for the same (Action Matrix) would be taken by the SAPM, from the Prime Minister, and subsequently follow up on the decision so that recommendations of the Commission are implemented.*
>
> *ii. The report of the Commission of Inquiry to probe into the increase in sugar price be made public.*
>
> *iii. Conflict of Interest Law must be promulgated to obviate elite capture of the state's resources.*
>
> *iv. Advisors to the Prime Minister and Special Assistants to the Prime Minister should also declare their assets to the Cabinet Secretary on the same pattern as is being done by the Ministers.*
>
> *v. A Committee, under the Minister for National Food Security and Regulation, was constituted to conduct a review of existing sugar policy in the light of the findings of this report and present recommendations to be Cabinet, within four weeks."*

Pursuant to the aforementioned decision, Respondent no.4 proposed the 'Action Matrix' and the Prime Minister was pleased to give his approval. The Petitioners have attached with the petition an unauthenticated copy of a document at pages 902 and 903 (Annexure L-4) asserting it to be approval of the 'Action Matrix'. Perusal of the

record shows that Respondent no.4, through a press conference, announced the filing of a reference by the Federal Government under the National Accountability Ordinance 1999 (*hereinafter referred to as the* ***'Ordinance of 1999'***) besides sending the matter to other authorities. It is noted that the 'Action Matrix' was not placed before the Federal Cabinet for approval. In the present proceedings an injunctive order, dated 11-06-2020, was passed with the consent of the parties. On behalf of the Association it was assured that sugar will be sold to the non commercial consumers i.e the general public at a reduced price. Applications were also filed by sugarcane growers seeking to become parties to the proceedings.

ARGUMENTS

4. *Mr Makhdoom Ali Khan*, Sr. ASC, *Mr Salman Akram Raja*, ASC and *Mr Shahzad Atta Elahi*, ASC were heard on behalf of the petitioners. The latter had joined the proceedings through the video link facility. The gist of their arguments is; the members of the Commission of Inquiry were neither independent nor impartial; the Commission of Inquiry was not constituted in accordance with the mandate of the Inquiry Act of 2017 and that the report has been signed by a stranger/alien to the proceedings; the member who was later nominated was not notified in accordance with the mandatory provisions; the adhoc committee which had initiated the preliminary inquiry was also headed by Respondent No.5; the latter had proposed the constitution of the Commission of Inquiry under the Inquiry Act of 2017; the Prime Minister was not empowered to constitute a non-statutory adhoc committee; the relevant laws such as the Securities

and Exchange Commission of Pakistan Act 1997 expressly ousts the jurisdiction of any other Federal or Provincial agency or body; likewise, under the Competition Act 2010 it is the exclusive jurisdiction of the Competition Commission of Pakistan to initiate proceedings; the constitution of an adhoc committee and its recommendation regarding the constitution of the Commission of Inquiry under the Inquiry Act of 2017 was without lawful authority and jurisdiction and hence void; the request made by Respondent no.5 was illegal and raises grounds of bias; Respondent no.5, before the constitution of the Commission of Inquiry, had already pre-judged the matter which is evident from the fact that vide letter, dated 09-03-2020, he had reached the conclusion that the supply of sugar was controlled by a few sugar mills and that they were involved in manipulating the market sale price; the adhoc committee and its members had already formed their opinion and, therefore, they could not have conducted proceedings in a fair manner as members of the Commission of Inquiry; the discretion exercised by the Prime Minister and the Federal Cabinet was not in consonance with the settled principles; reliance has been placed on *'Saiyyid Abdul A'la Maudoodi v. The State'* [PLD 1964 SC 673], *'Federation of Pakistan v. Muhammad Saif Ullah Khan'* [PLD 1989 SC 166], *'Mian Muhammad Nawaz Sharif v. President of Pakistan others'* [PLD 1993 SC 473]; there was no material before the Federal Government in order to justify the constitution of the Commission of Inquiry; it is implicit in section 3 of the Inquiry Act of 2017 that the Federal Government is under a statutory obligation to exercise its discretion after making an independent decision; Respondent no.5 and members of the committee were not competent to embark upon the inquiry on the

touchstone of the test of 'likelihood of bias'; reliance has been placed on *'Syed Akhlaque Hussain v. Pakistan'* [PLD 1969 SC 201], *'The President vs. Mr. Justice Shaukat Ali'*, [PLD 1971 SC 585], *'Mr. Zulfiqar Ali Bhutto vs. The State'*, [*PLD 1978 SC 125],* *'Ms. Benazir Bhutto vs. The President of Pakistan and another'* [1992 SCMR 140], *'Asif Ali Zardari and another v. The State'* [PLD 2001 SC 568], *'Qazi Abdul Jalil v. NWFP Forest Development Corporation'* [2015 SCMR 1020], *'Dr Arsalan Iftikhar v. Malik Riaz Hussain and others'* [PLD 2012 SC 903]; the Federal Government had no authority to reconstitute the Commission of Inquiry; reliance has been placed on the case titled *'State of Madhya Pradesh, Appellant v. M/s A. & A. Enterprises and others'* [AIR 1993 SC 825]; the report and the recommendations made therein have no legal sanctity because the Commission of Inquiry had failed to observe the standards of fairness and the principles of natural justice were violated, as adverse findings have been given in the impugned report against the sugar mills without the latter being confronted or put to notice; reliance was placed on the precedent law in support of the contention that the principles of natural justice must strictly be followed where the proceedings are likely to affect a person, property or reputation; damage to reputation is a crucial factor which requires strict compliance of the principles of natural justice; reliance has been placed on the judgments from various jurisdictions; the Federal Cabinet i.e. Federal Government, had given approval of the recommendations made in the Report without application of mind and in undue haste; the delegation of powers to Respondent no.5 and the Prime Minister were not in consonance with the law laid down by the august Supreme Court in the case titled *'Messers Mustafa Impex,*

Karachi and others v. The Government of Pakistan through Secretary Finance, Islamabad and others' [PLD 2016 SC 808] and an unreported judgment rendered by a Division Bench of this Court in the case titled *'Federation of Pakistan v. Ms Vadiyya S. Khalil and 2 others'* [ICA No.36/2020]; the 'Action Matrix' was repugnant and in violation of the respective statutes; no authority is vested in the Federal Government to direct the Federal Board of Revenue to conduct the audit of a tax payer; Respondent no.5 nor the Federal Government are empowered to dictate actions to other independent statutory authorities; the Federal Government has no legislative authority in respect of matters relating to sugar nor the executive authority extends thereto; the Federal Government lacks the authority to constitute the Commission of Inquiry into matters which otherwise are within the domain of the provinces.

5. *Mr Khalid Javed Khan*, the learned Attorney General for Pakistan, has argued that; the Prime Minister of Pakistan, in his capacity as the chief executive office holder of the State, was competent to order a preliminary inquiry; the Association and its members function as a strong lobby and individuals having interest in the business wield political influence; the Federal Government headed by the Prime Minister was compelled to initiate an inquiry on account of the unexplained and sharp increase in the price of sugar, because it had inevitably affected the constitutional rights of the general public; protecting consumers from anti competitive behavior falls within the exclusive domain of the Federation; the abuse of dominant position is prohibited under a federal statute i.e. the Competition Act 2010 and,

therefore, the constitution of the Commission of Inquiry under section 3 of the Inquiry Act of 2017 was within the competence of the Federal Government; the other relevant federal statutes i.e. the Sales Tax Act 1990, the Competition Act 2010, the Companies Act 2017, the Income Tax Ordinance, 2001, the Benami Transactions (Prohibition) Act 2017, the National Accountability Ordinance, 1999 or the Federal Investigation Agency Act 1974 are all federally enacted statutes; the Terms of Reference related to matters within the competence of the Federal Government; the Commission of Inquiry and its recommendations are not binding; the scope of inquiry was broad and did not target any individual and thus the question of bias does not arise; Respondent no.5 is one of the most reputed officer and the proceedings of the Commission of Inquiry were conducted in the most transparent and fair manner; the fact finding report, by no stretch of the imagination, prejudices any right of the petitioners; the principles of natural justice are not attracted in case of the proceedings of the Commission of Inquiry constituted under the Inquiry Act of 2017; reliance has been placed on *'Government of Sindh through Secretary Health Department and others v. Dr Nadeem Rizvi and others'* [2020 SCMR 1], *'Tasleem Akhter v. Pakistan through Secretary Revenue, Islamabad and 3 others'* [2010 PLC (CS) 795], *'Zaibtun Textile Mills Ltd. V. Central Board of Revenue and others'* [PLD 1983 SC 358], *'Justice Khurshid Anwar Bhinder and others v. Federation of Pakistan and another'* [PLD 2010 SC 483], *'Shri Ram Krishna Dalmia v. Shri Justice S. R. Tendolkar & others'* [AIR 58 SC 538]**, '***State of Karnataka v. Union of India and another'* [AIR 78 SC 68], *'Syed Saleemul Haq and another v. Pakistan through Secretary, Ministry of Interior, Islamabad*

and 2 others' [PLD 90 Kar 439], *'Messrs Sui Southern Gas Company Ltd. And others v. Federation of Pakistan and others'* [2018 SCMR 802], *'ABP Private Limited and another v. Union of India and others'* (2014) 3 SCC 327, *'M/s. Allen Berry and Co. Private Ltd. And another v. Vivian Bose, and others'* [AIR 60 Punjab 86], *'Saleem Malik v. Pakistan Cricket Board (PCB) and 2 others'* [PLD 2008 SC 650].

6. The learned counsels for the Petitioners and the learned Attorney General for Pakistan have been heard and the record perused with their able assistance.

Judgment

7. The sugar crisis, its implications for non-commercial consumers i.e the general public and the fall out for the executive branch of the State are not disputed. It is also not disputed that 'sugar' is one of the most essential commodities for the general public, particularly the low income strata of the population and the working classes. It is also an admitted fact that shortages and increase in the price of sugar has historically remained a cause of alarm and concern for the executive branch of the State because, as representatives of the people, they remain responsible and thus accountable to them for implementing policies that would ensure availability of essential commodities at affordable prices. Whenever there is a shortage of an essential commodity in the market or there is an increase in its price, the executive branch is not only expected to fulfill its constitutional obligations but it becomes a duty to discover the reasons and to take appropriate measures in order to alleviate the sufferings and hardships

of the people to whom it is accountable. Any matter that affects the general public is indeed a matter of public importance. The sugar crisis, which had led the Prime Minster to order a preliminary inquiry and appoint an ad hoc committee followed by notification of a statutory Commission of Inquiry by the Federal Government were exclusively executive functions. It was indeed a definite matter of public importance, besides being a matter of general interest and of direct and vital concern for the general public. The questions that have arisen out of the arguments advanced at the bar may be summarized as (i) the competence of the executive authorities to order a preliminary inquiry without resorting to constitution of the Commission under the Inquiry Act of 2017, (ii) the status of the Commission of Inquiry, its proceedings and recommendations, (iii) whether the power vested in the Commission of Inquiry constituted under the Inquiry Act of 2017, its proceedings and final outcome, in the form of the Report, attracted observance of the principles of natural justice; (vi) if the answer to the last question is in the affirmative, then the consequences regarding the Report, (v) whether the Commission of Inquiry in the instant case was constituted in accordance with the provisions of the Inquiry Act of 2017, (iv) whether the Federal Cabinet was empowered to delegate its decision making authority to the Prime Minister and Respondent no.4 and, lastly, (vii) whether the press conferences and statements made by Respondent no.4 or other public office holders results in prejudicing the right to fair trial of the petitioners. In order to answer these questions it would be beneficial to examine the relevant law and the precedents.

The Inquiry Act of 2017.

8. The preamble of the Inquiry Act of 2017 describes the object of its promulgation as 'to provide for the constitution of Commissions of Inquiry'. Section 3 empowers the Federal Government to constitute a Commission of Inquiry for the purposes of conducting an inquiry into a definite matter of public importance. The explanation elaborates the scope of the expression 'matter of public importance' as a matter of general interest or direct or vital concern to the public. Sub section (2) of section 3 provides that the appointment of the members of the Commission shall be made through a notification in the official gazette. If more than one member are appointed, then one of them shall be designated as chairman of the commission. Sub section (3) expressly confines the scope of the inquiry to the Terms of Reference specified in the notification. Moreover, sub section (5) provides that the Federal Government shall specify the time period within which the inquiry is to be concluded and it can be extended on the request of the chairman of the commission. On conclusion of the inquiry, the commission ceases to exist as has been provided under sub section (6). Sections 4, 5, 6, 7, 8, 9, 10 and 11 describe the extensive powers of the Commission of Inquiry. It is noted that section 11, by way of a fiction, declares the proceedings of the Commission of Inquiry to be judicial in nature within the meaning of section 193 and 228 of the Pakistan Penal Code, 1860 (*hereinafter referred to as the* ***'PPC'***). Section 14 unambiguously provides that the Commission shall have the power to regulate its own procedure, to fix the place and time for its settings and whether its proceedings shall be open or in camera. Sub section (3) of section 14 explicitly provides that temporary absence of

any member or existence of a vacancy amongst its members shall not prejudice or affect the proceedings of the Commission of Inquiry nor its validity.

9. A plain reading of the provisions of the Inquiry Act of 2017 as a whole makes it obvious that the Commission of Inquiry, constituted under section 3 ibid, is a mere fact finding statutory entity and its scope of jurisdiction for this purpose is strictly confined to the Terms of Reference specified in the notification issued by the Federal Government. The role of a fact finding statutory entity is not restricted to obtaining record, collecting facts through various means such as conducting interviews, examining relevant persons etc. It would be a futile exercise if its role is confined to the above only. After the facts and information have been collected it is followed by the next stage of its collation i.e. managing the data. This involves the stage of analysis and examination thereof. It is implicit in performing this important function to adopt the various means available for this purpose, such as conducting an audit in any form, including forensic. After the evaluation and analysis the final stage is to form an opinion and to make recommendations in accordance with the Terms of Reference specified in the notification issued by the Federal Government. The Commission of Inquiry, under the Inquiry Act of 2017, is constituted on a temporary basis because it ceases to exist after the time specified by the Federal Government. It is not more than a fact finding entity vested with recommendatory functions. Its proceedings are regulated by the Commission of Inquiry. It does not have an appearance of a court nor can it exercise any power to make a final determination. It is only one

of the modes available to the executive branch i.e the government to inquire into matters of public importance to enable formulation of policies or assist in the decision making process. By no stretch of the imagination can the proceedings of a Commission of Inquiry, constituted under the Inquiry Act of 2017, be construed or treated as judicial or quasi judicial because it is neither empowered nor mandated to determine civil or criminal liabilities. Its recommendations to the Federal Government in the context of the specified Terms of Reference are not even binding. The Federal Government may or may not act pursuant thereto. The ordinary rules of evidence are not applicable to the proceedings of a Commission of Inquiry because it does not conduct a trial nor is in any manner vested with jurisdiction to make a determination of a criminal or civil liability. The Inquiry Act of 2017 and the constitution of the Commission of Inquiry there under enables the Federal Government to identify systemic governmental failures, supplement government departments and institutions, formulate policies and propose legislation for consideration of the Majlis-e-Shoora (Parliament). The purpose of constituting a Commission of Inquiry can either be broad or narrow in nature. It is narrow in nature when it is regarding a specific incident e.g. a particular criminal incident which may have shocked or terrorized the public or it may be broad, such as the spread of a disease throughout the country or prevalence of factors affecting the economy.

10. The Terms of Reference in the case in hand cannot be characterized as narrow. They are definitely broad in nature. As will be discussed later, this distinction is relevant in the context of the extent

of applicability of principles of procedural fairness to the proceedings of the Commission of Inquiry constituted under the Inquiry Act of 2017. Unlike statutes promulgated in foreign jurisdictions, in the Inquiry Act of 2017 there is no explicit requirement of observance of the principles of natural justice or hearing nor does it explicitly intend its ouster. The statutory functions performed by the Commission of Inquiry and its recommendations are not of the nature of a trial leading to determination of rights or civil and criminal liability. As a corollary, the recommendations in the form of a report would, therefore, not be ordinarily subject to judicial review unless it can be demonstrably shown to the satisfaction of the Court that the Commission of Inquiry had exceeded its jurisdiction by going beyond the Terms of Reference specified in the notification. Moreover, since the functions and the report are recommendatory in nature and do not create any rights nor take away a right or interest, therefore, a writ in the nature of mandamus or certiorari cannot be granted. A document which is not binding nor makes a determination of civil or criminal liability cannot form a ground of grievance for the purposes of Article 199 of the Constitution. A Commission of Inquiry, not being a court nor a tribunal, is not vested with power or jurisdiction to adjudicate upon rights nor determine liabilities. All that the Commission of Inquiry does is to facilitate the Federal Government in its decision making process or formulation and implementation of policies relating to matters of public importance or matters of general interest to the public or which concerns them. It also serves as a valuable tool available to the Federal Government to probe a specific incident in order to inform the public and remove their doubts. Inquiring or probing a matter of public

importance that falls within its domain is an inherent characteristic of the constitutional role, functions and obligations of the executive branch of the State and such probe or inquiry can be carried out in such manner as it deems appropriate, having regard to what has not been prohibited or restricted. The Inquiry Act of 2017 is one of the statutory modes available for this purpose. Although the rules and procedures applicable to a trial before a court or a tribunal that determines rights and liabilities do not apply to the proceedings relating to the Commission of Inquiry under the Inquiry Act of 2017 nor to its final report, nonetheless, the general duty to be fair and impartial to the parties concerned with the matter is not excluded. It is obvious from the language of sub section (3) of section 14 of the Inquiry Act 2017 that a vacancy or temporary absence of any member or existence of a vacancy amongst the members does not affect the validity of its proceedings. The legislature has not prescribed a quorum for the Commission to proceed under the Inquiry Act of 2017. In the instant case, even if the seventh member had not been notified and had participated in the proceedings or finalization of the final report, it would not have rendered the recommendations as invalid nor give cause to the petitioners to be aggrieved because there was no determination of a civil or criminal liability against them.

11. The seventh member, who was included later, was duly notified. Assuming that the notification had not been issued or published in the official gazette, yet the validity of the proceedings of the Commission of Inquiry and the Report would have remained unaffected on the touchstone of the law laid down by the august

Supreme Court in the case titled *'Nadeem Ahmed v. Federation of Pakistan'* [2013 SCMR 1062]. The limited scope of the Commission of Inquiry and the non binding nature of its recommendations justifies the freedom granted to a Commission of Inquiry to regulate its proceedings. The validity is not affected due to the absence of the notified members. The purpose and object is to collect and, thereafter, collate the information and facts without determining rights, interests or liabilities. The legislature has thus, in its wisdom, given sufficient freedom to seek assistance from any person or to choose the manner and mode for achieving its goal.

Whether the principles of procedural fairness and natural justice are attracted in case of proceedings of the Commission of Inquiry?

12. The learned counsels for the petitioners have forcefully argued that the principles of natural justice were attracted in the case in hand because of the reputational consequences. It was not their case that there has been any determination of rights, interests or liabilities. There indeed was no such direct or indirect consequence. The harm to reputation was the main ground for emphasizing that the principles of natural justice ought to have been observed and each petitioner should have been given a fair opportunity. They placed reliance on judgments rendered by various courts from outside the jurisdiction of Pakistan. As already noted above, the status and scope of the Commission of Inquiry, constituted under the Inquiry Act of 2017, is by no stretch of the imagination in the nature of adjudicating rights, interests or liabilities of individuals or persons. A Commission of Inquiry is

constituted under the Inquiry Act 2017 solely for gathering, analyzing, assessing, evaluating and collation of facts. On the basis of analysis and evaluation of gathered material a tentative opinion is formed and recommendations are made to the Federal Government which are not binding and the Supreme Court of India has used the expression as having 'no force proprio vigore'. Since a Commission of Inquiry does not adjudicate the rights and interests of individuals or persons, therefore, ordinarily the principles of natural justice and procedural fairness would not be attracted. The proceedings are inquisitorial and not adversarial.

13. The august Supreme Court, in the case titled *'Ishtiaq Ahmed Mirza and others v. Federation of Pakistan and others'* [PLD 2019 SC 675], has observed that any commission constituted by the Government or even the Supreme Court, any inquiry or investigation conducted by police or by any other agency and any probe into the matter by any other institution or body can only render an opinion in the matter and it cannot per se be treated as evidence in a case. In the case titled *'Saleem Malik v. Pakistan Cricket Board (PCB) and 2 others'* [PLD 2008 SC 650] the apex Court has observed and held that the commission constituted under the Pakistan Commissions of Inquiry Act 1956 was not empowered to recommend or propose a penalty not provided under the law. The Commission could recommend such punishment as was provided under a statute and not otherwise. It has been further observed that, pursuant to recommendations made by the commission of inquiry, the Board, after providing a proper opportunity of hearing and observing the principles of natural justice,

could pass an appropriate order within the scope of the relevant law. It is, therefore, implicit in the said ruling that there was no obligation on the part of the commission of inquiry to have observed the principles of natural justice.

14. The main thrust of the learned counsels for the petitioners was regarding the reputational damage caused by the proceedings and the Report. It was their case that the Report and recommendations recorded therein has adversely affected the reputation of the petitioners, besides violating the constitutionally guaranteed right of inviolability of dignity. The judgments relied upon from the jurisdiction of India are distinguishable because they have been rendered in the context of the Commissions of Inquiry Act of 1952 and the provisions thereof are distinct from the Inquiry Act of 2017. Moreover, it expressly provides giving reasonable opportunity of hearing and an opportunity to produce evidence in defense to a person whose reputation is likely to be prejudiced or if the inquiry is regarding the conduct of a person. They have placed reliance on a judgment of the Court of Appeal, titled *In re; PERGAMON PRESS LTD.* [1971] 1 Ch. 388, in support of their contention that when reputation is likely to be damaged then the principles of natural justice cannot be dispensed with. I have carefully gone through the judgment and I am afraid that it is of no help to the petitioners, rather, in the facts and circumstances of the case in hand, it affirms the view that reputational damage becomes relevant when the scope of inquiry is narrow and confined to specific individuals. In the aforementioned case from the English jurisdiction, Inspectors were appointed by the Board of Trade to investigate the affairs of an

incorporated company. The Court of Appeal acknowledged that the nature of the investigation was such that could ruin reputations or careers. Lord Denning M.R was of the opinion that having regard to the consequences the 'Inspectors must act fairly'. It was further observed that, before condemning or criticizing a person, the latter should be afforded a fair opportunity. However, the Court did not find the demand of the Directors to examine the statements of the witnesses or to cross examine them as reasonable. It was emphasized that when the investigation is ordered in the public interest it should not be impeded with the kind of demands that were made in that case. It was suggested that before making an adverse criticism of someone, the latter should be provided with a draft for comments. This was found going too far. It was observed that ' This sort of thing should be left to the discretion of the inspectors. They must be masters of their own procedures. They should be subject to no rules save this; they must be fair. This being done; they should make their report with courage and frankness, keeping nothing back. The public interest demands it.'

15. The learned counsels referred to a judgment from the Australian jurisdiction titled '*Ainsworth v. Criminal Justice Commission'* [175 CLR 564]. The appellants in this case were the Managing Director and the incorporated company engaged in the business of manufacture and supply of gaming and poker machines. The Criminal Justice Commission, established under the Criminal Justice Act 1989, had recommended restraining the appellants from participating in the gaming machine industry. No inquiry was made of the appellants nor were the latter notified about the Commission's interest in them. It was

held that the report of the Commission in itself had no legal effect and did not carry any legal consequences, whether direct or indirect. Nonetheless, it was observed that reputation is an interest attracting protection of the rules of natural justice. The Court, however, made a distinction between the report being general or specific in nature and it was observed that 'if its report is specific to the character and reputation of an individual, it must inform the individual of the possible findings and give him a chance to answer'. It was explicitly observed that 'It is now clear that a duty of procedural fairness arises, if at all, because the power involved is one which may 'destroy, defeat or prejudice a person's rights, interests or legitimate expectation. Thus what is decisive is the nature of the power, not the character of the proceedings which attends its exercise.'. The distinction drawn between the scope of the inquiry, whether narrow or broad and whether it is specific to the character and reputation of a person is crucial. This can be further elaborated by referring to the jurisprudence developed by the Supreme Court of Canada relating to the extent of applicability of the principles of natural justice in the context of proceedings of a Commission of Inquiry.

16. The courts in the jurisdiction of Canada have applied the 'public perception standard' in order to determine protection under the principles of natural justice. The public perception standard is based on how a finding would be considered by a reasonably informed member of the public to be a determination of criminal or civil liability. However, in the case titled *'Canada (Attorney General) versus Canada (Commission of Inquiry on the Blood System'* [1997] 3 SCR 440 the

Supreme Court of Canada unanimously held that the public perception standard was not a rule of universal application and would be appropriate when a Commission is investigating a particular crime and not when the scope of investigation is wider. It was acknowledged that, while conducting public inquiries entailing wider investigation, identification of causes and people responsible cannot be avoided or ignored merely because reputations would be harmed. It was affirmed that 'it is inevitable that somewhere along the way, or in a final report, such an inquiry will tarnish reputations and raise questions in the public's mind concerning responsibility borne by certain individuals. The Supreme Court observed that 'If an inquiry is to be useful in its roles of investigation, education and the making of recommendations, it must make findings of fact. It is these findings which will eventually lead to the recommendations which will seek to prevent the recurrence of future tragedies. These findings of fact may well indicate those individuals and organizations which are at fault. Obviously reputations will be affected. But damaged reputations may be the price which must be paid to ensure that if a tragedy ----can be prevented, it will be." The Court thus held that the narrow public perception test would apply to specific types of Commissions and not when the scope is a wider investigation as was in that case, i.e to examine the blood system after thousands contracted HIV and Hepatitis C from blood and blood products. There appears to be a judicial consensus that reputational damage will be a relevant factor to consider protection of the principles of procedural fairness when the scope of investigation is regarding a specific crime or individual and in such type of investigation reputational damage could become a relevant factor for protection of

procedural fairness. It was observed by Lord Denning MR in the case titled *'R v. Secretary of State for the Home Department, Ex parte Mughal'* (1973) 3 All E.R 796 that; "The rules of natural justice must not be stretched too far. Only too often the people who have done wrong seek to invoke the rules of natural justice so as to avoid the consequences."

17. The learned Attorney General has rightly drawn my attention to the judgment of the august Supreme Court of Pakistan consisting of fourteen Hon'ble Judges in the case titled *'Justice Khurshid Anwar Bhinder and others v. Federation of Pakistan and another'* [PLD 2010 SC 483] wherein the principles and law regarding observance of the principles of natural justice have been elaborately explained. Reliance is also placed on *'Irfan Ahmed and others v. Federation of Pakistan and others'* [2016 PLC (CS) 491].

18. A survey of the above precedent law shows that the principles of natural justice are flexible and not rigid. The determination of the application of these principles depends on the facts and circumstances of each case, the nature of the inquiry, the power exercised and its consequences, the subject matter dealt with, whether anything unfair can be inferred if the principles are not observed and whether there is an apprehension of injustice. However, depending on the facts and circumstances, it would be sufficient if the 'elementary and essential principles of fairness' have been fulfilled. A Commission of Inquiry constituted under the Inquiry Act of 2017 is not empowered nor vested with jurisdiction to determine legal liability. It does not

conduct a trial and thus is not bound to observe the procedure that a court or tribunal has to follow. It is a fact finding statutory entity constituted for investigating, analyzing and evaluating the data and make recommendations based on its findings. The recommendations are not binding nor have any legal effect. They do not determine rights, interests or liabilities. It is, therefore, generally not bound to observe the rules and principles of procedural fairness but has to act in a fair manner. Its proceedings must be fair and transparent. The Inquiry Act of 2017 does not make it obligatory to observe the principles of natural justice. Harm to reputation of an individual may become a relevant consideration in certain specific types of inquiries e.g when the investigation is regarding a particular incident and the findings would inevitably name a suspect and not when the scope is wide as is the case in the instant petition.

Did the Commission of Inquiry breach the principles of procedural fairness and whether its proceedings are liable to be vitiated on the basis of 'Bias'.

19. It is obvious from the record that the Commission of Inquiry had completed its proceedings and had finalized the Report on the basis of data and information obtained from various government institutions. They had interviewed experts in the relevant fields and had sought information from witnesses. They had held extensive meetings with the authorized representatives of the petitioner Association. The findings of the audit of selected sugar manufacturing entities were shared and discussed with the respective Chief Executive

Officers or their representatives. The petitioners have placed on record documents which show that the Association had meaningfully participated in the inquiry proceedings. The Terms of Reference makes it obvious that the scope of investigation was not narrow and did not relate to a specific incident nor an individual. At no stage did the Commission embark upon personal attribution of responsibility. The Report and its language also does not name or attribute responsibility to individuals. There is nothing in the Report that can be treated as determination of rights, interests or liabilities. Nothing in the Report implies conclusion of law. The findings and recommendations recorded in the Report, the scope of the Terms of Reference and the broad nature of the inquiry did not require the Inquiry Commission to do more than it did in the context of fairness. It was not required to conduct its proceedings as though a trial was being conducted nor the procedure and rules applicable thereto were applicable. The analysis and evaluation by the Commission of Inquiry and recorded in the Report is indeed not fanciful but supported by data and documents and the sources have also been disclosed. The nature of inquiry entrusted to the Commission of Inquiry and the nature of its proceedings did not require giving notice to more than seventy manufacturers of sugar in the country nor an opportunity to cross examine witnesses or to be confronted with documents relied upon. It appears from the record that the Commission of Inquiry conducted its proceedings professionally and they were eminently fair. The learned counsels drew the attention of this Court to paragraph 100 of the Report and objected to the use of the expression 'day light robbery'. This expression is used as a noun intended to convey blatant and unfair overcharging. It cannot be

construed as determination of guilt. The expression has been used in the report in a particular context and emphasizes the opinion of the Commission regarding over charging the general public and loss of revenue in the form of sales tax. The opinion is based on evaluation of the data and information collected during the course of inquiry. The Commission of Inquiry has not held the industry as guilty nor has determined any liability, but has recommended referring the matter for further verification to the competent authority under the Sales Tax Act 1990. There is nothing in the Report that could be claimed as an unjustified reputational harm caused to the Association or an individual.

20. It is interesting to note that the Report raises serious questions regarding persons who are holding public offices in the current government. The observations made regarding a current Chief Executive of a province ought to be a concern for the latter because it may have reputational consequences for him. The Commission of Inquiry, in the words of Lord Denning MR, had indeed acted fairly and had made the Report 'with courage and frankness'. By no stretch of the imagination can it be implied that the proceedings, the conduct of the members of the Commission of Inquiry or the Report itself reflected apparent bias. In the circumstances and after considering the facts, a fair minded and informed observer will definitely not conclude that there was a real possibility or likelihood of bias. It is, therefore, held that the Commission of Inquiry had conducted the proceedings in the most professional and fair manner and that in the facts and circumstances there has been no breach of the principles of fairness

nor a case of apparent bias is made out. It is reiterated that the Report and the recommendations made therein are not binding either on the Federal Government nor any other statutory authority.

The decision of the Federal Cabinet to delegate powers

21. In the case titled *'Messers Mustafa Impex, Karachi and others v. The Government of Pakistan through Secretary Finance, Islamabad and others'* [PLD 2016 SC 808] the august Supreme Court, after examining the historical perspective and constitutional provisions in great depth, has interpreted the meaning of the expression "Federal Government". The august Supreme Court has, inter alia, declared and held that the Federal Government is the collective entity described as Cabinet, consisting of the Prime Minister and the Federal Ministers. The Secretary, a Minister, nor the Prime Minister are the Federal Cabinet and thus the exercise or purported exercise of a statutory power vested in the Federal Government by one of them is constitutionally invalid and a nullity in the eyes of the law. Moreover, if a statute empowers the Federal Government then jurisdiction cannot be assumed nor power exercised by the Prime Minister by bypassing the Cabinet. It has been further explicitly held that the powers vested in the Federal Government cannot be delegated by the Federal Cabinet to any other person, not even the Prime Minister. The learned Attorney General, taking a fair stance, did not contest this legal proposition and stated that the matter will be placed before the Federal Cabinet for reconsideration.

Initiation of proceedings under various statutes and the status of the Report.

22. The Commission of Inquiry has made recommendations to the Federal Government for initiation of proceedings under various statutes such as the Sales Tax Act 1990, the Competition Act 2010, the Companies Act 2017, the Income Tax Ordinance, 2001, the Benami Transactions (Prohibition) Act 2017, the National Accountability Ordinance, 1999 and the Securities and Exchange Commission of Pakistan Act 1997. All these statutes are self contained legislative enactments and provide for distinct mechanisms to take cognizance and initiate proceedings. The Federal Government, at the most, can refer the matter to the concerned statutory authority for consideration. Even if it decides not to do so the respective statutory authorities cannot be restrained nor are prohibited to initiate proceedings on their own. The statutory authorities are not dependent on receiving a referral from the Federal Government. As an illustration, reference may be made to section 18 (b) of the National Accountability Ordinance, 1999. It explicitly provides that the Bureau is empowered to initiate proceedings in one of three modes (i) receiving a reference from the appropriate government, (ii) on receiving a complaint or (iii) on its own accord. Likewise, section 55 of the Benami Transactions (Prohibition) Act 2017 empowers the Federal Government to issue orders, instructions or directions but the statute also provides for a mechanism to initiate the proceedings. Under the Sales Tax Act 1990, the Federal Board of Revenue and the Commissioner are empowered to initiate audit proceedings. I have not been able to fully appreciate the purpose of seeking a writ in the instant proceedings. For the sake of argument,

even if the Federal Government is restrained from taking appropriate decisions in the light of the recommendations made in the Report, or the Report is quashed, would it amount to restraining respective authorities from initiating independent proceedings in accordance with the provisions of the respective statutes? I am afraid that the answer to this question is an emphatic 'No'. Even if the Federal Government decides not to take any action pursuant to the recommendations made in the Report, the statutory authorities cannot be restrained from fulfilling their obligations and duties under the respective statutes. Such an eventuality is inconceivable because it would virtually amount to suspension of legislative enactments. Moreover, the petitioners must not have any fear or hesitation if proceedings are initiated under a particular statute because the proceedings will be governed by the safeguards of procedural fairness.

Trichotomy of Powers.

23. It has been consistently held by the august Supreme Court that the Constitution of Pakistan has been framed on the foundation of trichotomy of powers between three distinct branches i.e the Legislature, Executive and Judiciary. In the case titled *"Dosani Travels Pvt. Ltd. and others v. Messrs Travels Shop (Pvt.) Ltd. and others"* [PLD 2014 SC 1] it has been observed and held that one of the seminal principles of the Constitution of the Islamic Republic of Pakistan is the concept of trichotomy of powers between the Legislature, Executive and the Judiciary. This principle underpins the rationale that framing of a government policy is to be undertaken by the Executive which is in a better position to decide such matters on account of its mandate,

experience, wisdom and sagacity. The Judiciary, on the other hand, is entrusted with the task of interpreting the law and to play the role of an arbiter in cases of disputes between the individuals inter se and between individuals and the State. It has been emphasized that the Judiciary neither has sword nor power over the purse. The legitimacy and respect of the judgments rendered by the judiciary is dependent on peoples' confidence and in its strict adherence to the Constitution, its integrity, impartiality and independence. In the case titled *"Syed Yousaf Raza Gillani, Prime Minister of Pakistan v. Assistant Registrar, Supreme Court of Pakistan and another"* [PLD 2012 SC 466] the apex Court has eloquently stressed that the constitutional order is founded on the fundamental instruction that each organ must give effect to and act in accordance with the Constitution; insofar as an act of any one of the organs of the State travels beyond the limits laid down in the Constitution, the said organ can be said to have strayed from representing the 'will of the people of Pakistan' and as long as all organs remain within the limits prescribed by the Constitution, they have a legitimate claim to being enforcers and exponents of the will of the people. The august Supreme Court, in the case titled *"Brig. (Retd.) Imtiaz Ahmad v. Government of Pakistan through Secretary, Interior Division, Islamabad and 2 others"* [1994 SCMR 2142], has emphasized that the power vested under Article 199 of the Constitution is a great weapon in the hands of Judges, but the latter must observe the constitutional limits set in the parliamentary system under the principle of trichotomy of powers. It has been explicitly observed as follows:

> *"The power under Article 199 of the Constitution is the power of judicial review. That power "is a great weapon in*

the hands of Judges, but the Judges must observe the Constitutional limits set by our parliamentary system on their exercise of this beneficial power, namely, the separation of powers between the Parliament, the Executive and the Courts". (Lord Scarman in Nottinghamshire C.C. v. Secretary of State (1986) (All ER 199, 204). Judicial review must, therefore, remain strictly judicial and in its exercise, Judges must take care not to intrude upon the domain of the other branches of Government."

Moreover, the august Supreme Court, in the case titled *"Messrs Elahi Cotton Mills Ltd. and others v. Federation of Pakistan through Secretary Ministry of Finance, Islamabad and 6 others"* [PLD 1997 SC 582], has cautioned against unnecessary intrusions by the courts in matters relating to utilities, tax and economic regulation. Likewise, in the case titled *"Messrs Power Construction Corporation of China Ltd. through Authorized Representative v. Pakistan Water and Power Development Authority through Chairman WAPDA and 2 others"* [PLD 2017 SC 83], the august Supreme Court has observed that the courts, in exercise of their powers, ordinarily avoid to interfere with public policy decisions and, rather, exercise judicial restraint. It is, therefore, obvious that exercising judicial restraint in matters which fall within the exclusive domain of the Executive and for which the latter is answerable to the people of Pakistan is inherent in the scheme of the Constitution.

24. We as Judges are not representatives of the people nor accountable for those functions that fall within the exclusive jurisdiction and domain of the Executive branch of the State. In such matters intervention would only be justified if an aggrieved petitioner can demonstrably show violation of constitutionally guaranteed rights. Moreover, the interests of the public at large will prevail over individual rights or interests. The Executive is answerable to the people for performance of its duties and functions assigned under the scheme of the Constitution and, therefore, it should be free from unnecessary interference and intrusions thus warranting exercise of judicial restraint. The case in hand is indeed one such matter where the Executive ought to be given the freedom to alleviate the hardship of the general public because any unnecessary judicial intrusion would delay and impede correcting wrongs by taking public policy decisions.

25. The above are the reasons for my short order, dated 20-06-2020, which is reproduced as follows.-

> *"For reasons to be recorded later, it is declared and the petition is* ***disposed of*** *in the following terms:*
>
> *i. The constitution of the Commission vide notification, dated 16.03.2020, read with notification, dated 25.03.2020 and pursuant thereto its proceedings and report, dated 21.05.2020, have not been found to be ultra vires the Pakistan Commission of Inquiry Act, 2017 nor in violation of the fundamental rights of the petitioners. The report, dated 21.05.2020 was, therefore, lawfully considered*

by the Federal Cabinet in its meeting held on 21.05.2020.

ii. *Keeping in view the principles and law enunciated in the judgment of the august Supreme Court rendered in the case titled "Messrs Mustafa Impex, Karachi and others v The Government of Pakistan through Secretary Finance and others" [PLD 2016 SC 808] and highlighted in the judgment of a Division Bench of this Court, dated 23.04.2020, handed down in ICA No. 36 of 2020, titled "Federation of Pakistan v. Ms Vadiyya S. Khalil and two others", the expression "Federal Government" has been explicitly interpreted as "the collective entity described as the Cabinet constituting the Prime Minister and Federal Ministers". Moreover, it has been held that the functions and powers vested in the Federal Government cannot be delegated.*

iii. *The decision of the Federal Cabinet, dated 21.05.2020, to the extent of delegating its functions and powers to respondent no. 4 i.e. Mr Shehzad Akbar, Special Assistant to the Prime Minister on Accountability and Interior and approval of "Action Matrix" is not in consonance with the law laid down by the august Supreme Court. It is noted that the Federal Government is empowered under section 18(b)(i) of the National Accountability Ordinance, 1999 to send a reference to the National Accountability Bureau but such a decision has to be taken in accordance with the aforementioned law expounded by the august Supreme Court.*

iv. *The learned Attorney General, taking a fair stance, has stated that he would advise the competent authority to submit the proposed action(s) for the consideration of the Federal Cabinet. The Federal Cabinet, after considering the proposed action(s), shall be at liberty to take such decisions as it may deem appropriate. This Court expects that the decisions taken shall be in conformity with the provisions of the relevant statutes e.g. the National Accountability Ordinance, 1999, the Income Tax Ordinance, 2001, the Company Act 2017, etc.*

v. *This Court further expects that, while dealing with the matter, the concerned officials/public office holders will have regard to the principles of due process and fair trial and refrain from acting or making statements that could prejudice the right to fair trial or violate the principles highlighted by the august Supreme Court in the case titled "Suo Motu Case No. 28 of 2018" [PLD 2019 S.C. 01] and by this Court in the case titled "The State v. Dr Firdous Ashiq Awan " [PLD 2020 Islamabad 109]."*

(CHIEF JUSTICE)

Luqman Khan/*

Approved for reporting.