

HCJD/C-121
JUDGMENT SHEET

ISLAMABAD HIGH COURT
ISLAMABAD

WRIT PETITION NO. 1987 of 2015.

National Feeds Ltd.

VERSUS

Competition Commission of Pakistan, etc.

Petitioners by : **Ch. Khurshid Ahmed, advocate.**
Respondents : **Mr Azid Nafees and Mr Aftab Ahmed Butt, advocates.**
Date of Hearing : **15-04-2016.**

ATHAR MINALLAH, J.- Through this consolidated judgment, I shall decide the instant petition along with the petitions listed below as common questions of law and facts are involved.-

- i) W.P. No.1986/2015, M/S Punjab Feeds Ltd. Versus Competition Commission of Pakistan, etc.
- ii) W.P. No.1990/2015, Supreme Feeds Pvt. Ltd. Versus Competition Commission of Pakistan, etc.
- iii) W.P. No.2277/2015, Hi-Tech Feeds Pvt. Ltd. Versus Competition Commission of Pakistan, etc.
- iv) W.P. No.2278/2015, Asia Poultry Feeds Pvt. Ltd. Versus Competition Commission of Pakistan, etc.

2. The petitioners are juridical persons, incorporated under the Companies Ordinance, 1984 (hereinafter referred to as the "***Ordinance***"). They are, inter alia, engaged in the business of the manufacture and production of poultry feed. The petitioners have challenged respective notices, dated 09-06-2015, issued by the Competition Commission of Pakistan (hereinafter

referred to as the "**Commission**"). The impugned notices require the petitioners to submit information, while the reason stated is that 'concerns have been raised before the Commission that despite a decrease in price of poultry feed inputs, the price of feed has been constantly increasing'.

3. The learned counsel for the petitioners has contended that; the earlier show cause notice dated 15.07.2010 was issued to the Pakistan Poultry Association (hereinafter referred to as the 'Association') and the same was decided vide order dated 16.08.2010; an order was passed imposing fine of Rs. 50 million, which was assailed by filing petitions under Article 199 of the Constitution and FAO No. 180 of 2010; the notices dated 31.03.2014, 15.10.2014, 08.02.2015 and 06.08.2015 seek the same information as had been sought vide notice dated 09.06.2015; the notices are in violation of section 37 (2) of the Competition Act 2010 (hereinafter referred to as the "**Act of 2010**"); the Commission is not vested with the power or jurisdiction to monitor the prices of commodities; the Commission has a specific role and the same has been explicitly mentioned in the Act of 2010; the Commission cannot conduct a roving inquiry; a complaint can only be entertained if it is made by an authorized person or entity specified under sub-section (2) of section 37; the impugned notices have been issued merely to harass the petitioners; the registered Association representing the petitioners has not been put to notice by the Commission.

4. The learned counsels appearing on behalf of the Commission have argued that; the petitioners cannot be treated as aggrieved persons since the notices have been issued pursuant to the powers conferred under section 36 of the Act of 2010; the earlier notices or proceedings were in a different context;

the impugned notices have been issued on the complaint made by a consumer of poultry feed received through the National Accountability Bureau; the petitions are motivated and based on malafide; the relief sought in the facts and circumstances of the case is premature; the Commission has wide powers under section 37 of the Act of 2010 to initiate an inquiry on its own; the Commission has acted in accordance with law and within the powers vested under the Act of 2010; the petitioners are attempting to avoid the inquiry initiated under section 37 of the Act of 2010.

5. The learned counsels have been heard and the record perused with their able assistance.

6. In order to answer the questions raised by the learned counsels it would be pertinent to examine the scheme and the relevant provisions of the Act of 2010. The preamble of the Act of 2010 describes the object and purpose of the promulgation thereof as to ensure free competition in all spheres of commercial and economic activity, to enhance economic efficiency, to protect consumers from anti-competitive behaviour and to provide for the establishment of the Competition Commission of Pakistan. Chapter-II of the Act of 2010 defines and explains the prohibition of the abuse of a dominant position, certain agreements, deceptive marketing practices and approval of mergers. The Commission has been established under section 12. The powers and functions of the Commission are enumerated in Chapter-IV of the Act of 2010. It, inter alia, provides that initiating proceedings in accordance with the procedures of the Act of 2010 and making orders in cases of contravention of the provisions *ibid* are amongst the powers vested in, and functions to be performed by the Commission. Moreover, the functions and powers include

conducting inquiries into the affairs of any undertaking as may be necessary for the purposes of the Act of 2010. Section 30 prescribes the procedure in relation to the powers vested in the Commission to make an order specified in section 31 in respect of contravention of the provisions of Chapter-II. Section 31 describes the orders which the Commission is empowered to make. Clauses (a) to (d) of sub-section (1) of section 31 describe the various categories of orders which fall within the ambit of the powers and jurisdiction of the Commission. It may be noted that the scope of the orders which the Commission is empowered to make has a nexus with Chapter II. Section 36 provides for the powers vested in the Commission to call for information relating to an undertaking, while section 37 relates to the powers and procedure for making an inquiry or conducting studies by the Commission. The powers conferred under section 36 and section 37 have been circumscribed by the legislature to the 'purposes of the Act'. Chapter-IV prescribes the penalties and the remedies by way of appeals.

7. A cumulative reading of the above provisions clearly shows that the expression 'purposes of the Act' are enumerated in Chapter-II read with sections 28, 29 and 31 *ibid*. The scope of the orders which the Commission is empowered to make, as enumerated in section 31 read with Chapter II, shows the legislative intent for establishing the Commission. Dealing with the abuse of dominant position, prohibited agreements, deceptive marketing practices and mergers are the fundamental functions and powers of the Commission. Likewise, promoting competition through advocacy is also one of the functions of the Commission. The Commission is undoubtedly vested with the power and jurisdiction to initiate proceedings in case of contraventions and to conduct inquiries. However, clause (a) of section 28(1) restricts the contraventions in

relation to which proceedings may be initiated to 'the provisions of the Act', while in conducting inquiries into the affairs of an undertaking the Commission cannot go beyond what may be necessary for the purposes of the Act. This is obvious from the language of clause (c) of section 28(1). As already noted above, the expression 'for the purposes of this Act', refers to the purposes for which the Commission has been established. Likewise, the scope of sections 36 and 37 is, therefore, essentially restricted to the purposes of the Act of 2010. The Commission would be justified in seeking information from an undertaking under section 36 of the Act of 2010, if it is in relation to abuse of dominant position, prohibited agreements, approval of mergers or promoting competition through advocacy. Likewise, the scope of an inquiry contemplated under section 37 can also not go beyond the purposes of the Act of 2010, which have been enumerated above.

8. Section 37 refers to 'inquires' and 'studies'. There is definitely a distinction between these two expressions. An inquiry can be initiated by the Commission, firstly on its own, secondly upon a reference made to it by the Federal Government and thirdly on receiving a complaint in writing from an undertaking or a registered association of consumers. The language of sub section 2 of section 37 is instructive of the legislative intent i.e. the obligations of the Commission or the preconditions for initiating an inquiry alleging contravention of the provisions of Chapter II of the Act of 2010. The said provision explicitly provides that the Commission, before initiating an inquiry, is under an obligation to form an opinion that the application i.e. the written complaint is not frivolous or vexatious nor is it based on insufficient facts or that it is substantiated by prima facie evidence. The Commission, therefore, in forming an opinion in this regard has to apply its mind and proceed under

section 37 to conduct an inquiry on the basis of sufficient facts and prima facie evidence. However, the existence of such preconditions is not contemplated for the purposes of carrying out a study. The power of the Commission to conduct an inquiry on its own is neither unfettered nor can it be interpreted in isolation. The Commission, while acting on its own, cannot proceed on the basis of insufficient facts or when the allegations are not substantiated by prima facie evidence. The legislative intent is obvious when sub sections 1 and 2 of section 37 are read together. Initiating an inquiry for an alleged contravention of the provisions of Chapter II is definitely an adverse action for an undertaking. Besides undermining the reputé of a commercial entity in the market, the inquiry proceedings entails inconvenience and intrusive proceedings. The Commission, therefore, has a statutory duty to exercise powers vested for the purposes of conducting an inquiry in a just, fair manner, particularly on the basis of sufficient facts and when the complaint or allegations are substantiated by prima facie evidence. The Commission may gather sufficient facts or prima facie evidence on the basis of a 'study' conducted under section 37 and then initiate an inquiry on its own. A notice issued under sub sections 1 or 2 ought to disclose the sufficient facts or the prima facie evidence on the basis of which an inquiry is initiated.

9. In the instant case, the arguments advanced by the learned counsels appearing for the Commission and the written comments filed on behalf of the latter are somewhat confused. On the one hand it is claimed that no prejudice has been caused to the petitioners as the impugned notices have been issued under section 36 of the Act of 2010, while on the other it is asserted that an inquiry under section 37(1) has been initiated by the

Commission on its own. The relevant portion from the written comments is reproduced as follows.-

"The letters from the Respondent Commission that have been referred to as 'Notices' in the petition, have only been written to gather information in pursuance of an enquiry that has been initiated under section 37(1) of the Act. It must be noted that the information requested by the Commission deals with a 'rise in price of poultry feed'. It is pertinent to add that each of the letters issued by the Commission to the petitioners, request distinct information".

10. The written comments, dated 14.04.2016 and signed by the Acting Registrar of the Commission, refers to the notices as mere letters issued pursuant to a consumer's complaint forwarded by the National Accountability Bureau, alleging that the feed mill owners had formed cartels and were purchasing ingredients at a low price. The copy of the complaint, pursuant whereof the impugned notices have been issued, has also been attached with the comments as Annexure-A. Perusal of the complaint reveals that it contains vague and indefinite information. The impugned notices also refer to mere concerns raised before the Commission to the effect that despite a decrease in price of poultry feed inputs, the price of feed has consistently been increasing. The allegations are vague and devoid of sufficient facts nor any prima facie evidence has been disclosed requiring initiation of an inquiry relating to the prohibitions mentioned in Chapter II of the Act of 2010. The notices at best can

only be treated as forming a basis for initiating a study rather than an inquiry under section 37. Nothing has been placed on record so as to justify initiating an inquiry under section 37 of the Act of 2010. The Commission has obviously acted in a mechanical manner. Moreover, the impugned notices as well as the complaint are in the nature of making a roving inquiry. It is settled law that authorities vested with powers under a statute cannot use or exercise powers for the purposes of making indiscriminate, roving and fishing enquiries. In this context it is relevant to refer to the judgment of the august Supreme Court titled "*Assistant Director, Intelligence and Investigation, Karachi versus M/S B.R. Herman and others*" [PLD 1992 S.C. 485]. The august Supreme Court, after examining the object of section 26 of the Customs Act 1969, observed and held as follows.-

"The authority can only for specific purposes of determining the legality or illegality call for such information as required by section 26. The authorized officer can call upon any importer or exporter to furnish information in case where such determination is required. It cannot make a roving inquiry or issue a notice by merely shooting in the dark in the hope that it will be able to find out some material out of those documents and then charge the party of irregularity or illegality. The authority has to state and disclose in the notice, the purpose for which the party is required to produce those documents or supply information. Unless such purpose is specified in the notice, it will be a matter of anybody's guess and the accused party

will be put to inquiry without any specific allegation or fact disclosed to him. It does not permit any authority to employ the provisions of section 26 to make indiscriminate, roving and fishing inquiry irrespective of the fact whether any determination of legality or illegality in import, export or funds with which the goods were acquired is to be determined. Even in cases of suspicion of commission of illegality, details should be provided to the party to enable him to have an opportunity to produce all the relevant documents and disclose information. Depending on the facts and circumstances of a case, any notice without disclosing any fact or particulars for which information or documents are required will be in violation of the principles of natural justice and may be struck down as illegal and without jurisdiction."

11. In Dr Akhtar Hassan Khan versus Federation of Pakistan [2012 SCMR 455] the august Supreme Court reiterated in the context of pleading malafides that "--- nor should any enquiry be launched upon merely on the basis of vague and indefinite allegations nor should the person alleging malafide be allowed a roving enquiry into the files of the government for the purposes of fishing out some kind of a case". In Wazirzada versus Chief of Air Staff, Pakistan Air Force [1998 SCMR 1579] it was observed that merely upon vague allegations no roving inquiry can take place. It is, therefore, obvious that an inquiry under section 37(1) cannot be initiated on the basis of vague and indefinite allegations nor on the basis of insufficient information or in absence

of prima facie evidence. The impugned notices definitely do not confront the petitioner with the sufficient facts or prima facie evidence required to initiate an inquiry under section 37 of the Act of 2010.

12. For what has been discussed above, the impugned notices are declared as not having been issued under section 37(1) or (2) of the Act of 2010. However, the notices may be treated as forming the basis of conducting a study under section 37 of the Act of 2010. In case the Commission, after concluding the study, is of the opinion that there are sufficient facts and the complaint is substantiated by, prima facie, evidence alleging contravention of the provisions of Chapter II of the Act of 2010 then it may issue notices to the petitioners regarding the initiation of an inquiry and the sufficient facts or 'prima facie' evidence on the basis of which an opinion has been formed shall also be disclosed therein. This judgment shall not preclude the Commission to issue a notice provided it discloses sufficient facts or prima facie evidence for initiating an inquiry.

13. The petitions are allowed in the above terms.

(ATHAR MINALLAH)
JUDGE

Announced in the open Court on 29-04-2016

JUDGE

Approved for reporting.