

IN THE SUPREME COURT OF PAKISTAN

(Appellate Jurisdiction)

Present:

Mr. Justice Qazi Faez Isa
Mr. Justice Yahya Afridi
Mr. Justice Muhammad Ali Mazhar

Civil Appeal No. 2092 of 2019

(Against the judgment dated 07.02.2018 passed by Peshawar High Court, Peshawar in Writ Petition No. 359-P of 2016)

M/s Lucky Cement Ltd thr. its General Manager,
Peshawar

Versus

Khyber Pakhtunkhwa thr. Secretary Local
Government and Rural Development, Peshawar &
others ...Respondents

For the Appellant: Mr. Salman Akram Raja, ASC
Syed Rifaqat Hussain Shah, AOR

For Govt. of KPK: Mr. Shumail Ahmed But, AG KPK
Mr. Atif Ali Khan, Addl. AG KPK
a/w Eid Badsha, Director, Excise &
Taxation, KPK

For Respondent No. 3: Mr. Sabah-ud-Din Khattak, ASC

Date of Hearing: 14.09.2022

ORDER

Qazi Faez Isa, J. Leave was granted in CPLA No.1198 of 2018 on 21 November 2019 and the instant appeal arises therefrom.

2. The learned counsel for the appellant submits that the appellant is a cement manufacturer which had filed a writ petition before the Peshawar High Court, but the ground of discrimination was not attended to in the impugned judgment. He submits that the challenge to the impugned judgment is primarily on the ground of discrimination, and if the appellant is treated at par with other cement manufacturers the appellant will be satisfied. The learned counsel contends that the appellant was the only

cement manufacturer in the Province of Khyber Pakhtunkhwa ('**the Province**') to be singled out for payment of property tax, and, subsequently, when property tax was imposed on other cement manufacturers, then too the appellant's discrimination persisted as the appellant was placed in category 'B' of the rating area, whereas other cement manufacturers were treated beneficially by placing them in category 'C' or category 'D', which have a lower tax rate. Counsel contends that treating identically placed entities differently gave an unfair advantage to the other cement manufacturers who are the appellant's competitors.

3. The learned counsel submits that Article 25 of the Constitution of the Islamic Republic of Pakistan ('**the Constitution**') does not permit such discrimination and Article 18 of the Constitution entitles the appellant to conduct trade and business which is jeopardized by granting to the appellant's competitors a financial benefit/advantage. In this regard decisions in the cases of *I.A. Sharwani v Government of Pakistan*¹ and *Collector of Customs v Flying Kraft Paper Mills (Pvt.) Limited*² are relied upon. It is further submitted that Section 42(5) of the Khyber Pakhtunkhwa Local Government Act, 2013 ('**the Act**') empowers the Government of the Province, as under:

'(5) Government shall have power to direct a local government to levy any tax, increase or reduce any such tax or the assessment thereof and suspend or abolish the levy of any tax.'

Therefore, once the Government was empowered by the legislature it was incumbent upon it to exercise powers pursuant to section 42(5) of the Act when property tax in the Province was being discriminately imposed. He submits that the buildings of the appellant were no different from those of other cement manufacturers to justify different rates. Reliance in this regard is placed on the cases of *Abu Bakar Siddique v Collector of Customs*,³ *Frederic Guilder Julius v The Lord Bishop of Oxford*⁴ and *M. v Scottish Ministers*.⁵

¹ 1991 SCMR 1041 para 26, p. 1086.

² 1999 SCMR 709, pp. 709B, 710C, and 711D.

³ 2006 SCMR 705, p. 715D.

⁴ (1880) 5 Appeal Cases 214.

⁵ (2012) UK SC 58.

4. We inquired from the learned Advocate-General Khyber Pakhtunkhwa ('AG') whether there was any intelligible differentia or criteria to subject the buildings of the appellant to different rates of tax as compared to those of other cement manufacturers in the Province. He states that though none has been stated in the notifications a difference does exist. He further stated that another cement manufacturer's buildings were also placed in category 'B'.

5. If the imposition of property tax is apparently discriminatory, then to sustain such discrimination the taxing authority/Government must demonstrate that it was justifiable by presenting some identifiable or intelligible criteria and further prove that the same was permissible under the Act (or its predecessor law). In this case there is nothing on record to justify, and thus sustain, the discriminatory imposition of property tax by imposing a higher property tax rate on the buildings of the appellant compared to what was imposed on the buildings of other cement manufacturers.

6. Article 25 of the Constitution mandates *equality before the law* and Article 18 of the Constitution secures the right to conduct *any lawful trade or business*. If both these Articles are read together and applied to the present case it means that the appellant cannot be made to face a more onerous tax regime than its competitors. It would be appropriate to reproduce applicable extracts from the five-member Bench decision of this Court in the case of *I.A. Sharwani v Government of Pakistan*.⁶

'(i) that equal protection of law does not envisage that every citizen is to be treated alike in all circumstances, but it contemplates that persons similarly situated or similarly placed are to be treated alike;

(ii) that reasonable classification is permissible but it must be founded on reasonable distinction or reasonable basis;'

'(v) that a law applying to one person or one class of persons may be constitutionally valid if there is sufficient basis or reason for it, but a classification which is arbitrary and is not founded on any rational basis is no classification as to warrant its exclusion from the mischief of Article 25;

⁶ 1991 SCMR 1041, para 26, p. 1086.

(vi) that equal protection of law means that all persons equally placed be treated alike both in privileges conferred and liabilities imposed;

(vii) that in order to make a classification reasonable, it should be based-

- (a) on an intelligible differentia which distinguishes persons or things that are grouped together from those who have been left out;
- (b) that the differentia must have rational nexus to the object sought to be achieved by such classification.'

The aforesaid principle was enunciated in a service matter but it is equally applicable in matters of taxation. In the case of *Collector of Customs v Flying Kraft Paper Mills (Pvt.) Ltd.*⁷ it was held, by a three-Member Bench of this Court, that, '*while there is a power in the Legislature and other taxing authorities to classify persons or properties into categories and to subject them to different rates of taxes, there is none to target incidence of taxation in such a way that similarly placed persons are dealt with not only dissimilarly but discriminately.*' Therefore, we have no hesitation in declaring that the treatment meted out to the appellant to the extent of imposing property tax on its buildings at a higher rate than which was imposed on the buildings of other cement manufacturers was discriminatory and to such extent it is illegal and *ultra vires*.

7. The Legislature of the Province had granted to the Government of the Province the power under section 42(5) of the Act (reproduced above) which it is to exercise in appropriate cases, including when similarly placed persons/entities/buildings were being treated discriminately or one was given an unfair or unreasonable advantage over another similarly placed. However, the Government did not exercise the power that the Act had granted to it under section 42(5) of the Act. In the case of *Abu Bakar Siddique v Collector of Customs*⁸ it was held that, '*It is settled law that discretion must not be exercised to curtail the purpose of law and offend the statute rather the discretion must be exercised to advance the cause of*

⁷ 1999 SCMR 709, p. 716C.

⁸ 2006 SCMR 705, p. 715D.

*justice in just, fair and reasonable manner. The failure to exercise the discretionary power under the statute without any legal justification would amount to refusal to use such power in an arbitrary and capricious manner.*⁹

8. When the Government was aware of, or had been informed, that discrimination was taking place and an unfair/unreasonable benefit/advantage was given to the appellant's competitors for no discernible reason it was incumbent upon the Government to exercise its powers under section 42(5) of the Act and rationalize matters, and its failure to do so would mean that it was acting *in an arbitrary and capricious manner*, which was not permissible. The United Kingdom's House of Lords had 142 years ago in the case of *Frederic Guilder Julius v The Lord Bishop of Oxford*,¹⁰ held that that, '*giving a power is prima facie merely enabling the donee to act, and so may not inaccurately be said to be equivalent to saying he may act, yet if the object of giving the power is to enable the donee to effectuate a right, then it is the duty of the donee of the powers to exercise the power when those who have the right call upon him to do so.*'¹¹ This principle of interpretation of statutes was approved and reiterated by the House of Lords in the 2012 in the case of *M. v Scottish Ministers*.¹²

9. The only question now remaining for consideration is how to undo the effect of the stated discrimination and unfair treatment meted out to the appellant, and whether the property tax already paid by the appellant, which was in excess of the rates imposed on identically placed buildings can be retained or it must be refunded/adjusted. In this regard the learned counsel representing the appellant referred to the decision (of a three-Member Bench of this Court) in the case of *Pfizer Laboratories Ltd. v Federation of Pakistan*,¹³ wherein it was held '*that the money paid by a citizen to a public authority in the form of taxes or other levies paid pursuant to an ultra vires demand by the authority is prima facie recoverable by a citizen as of right.*' In that decision this Court had referred to the House of Lords decision in the case of *Tower Hamlets London Borough Council v Chetnik Developments Ltd*¹⁴ where it was said '*that the retention of moneys*

⁹ *Ibid*, para 10.

¹⁰ (1880) 5 Appeal Cases 214.

¹¹ *Ibid*, 244.

¹² [2012] UK SC 58 also reported in 2012 Weekly Law Reports 3386.

¹³ PLD 1998 SC 64, para 13, p. 87, para 14, p. 89 and para 19, p. 92.

¹⁴ 1988 (1) AER 961.

*known to have been paid under a mistake at law, although it is a course permitted to an ordinary litigant is not regarded by the Courts as a 'high-minded thing' to do but rather as a 'shabby thing' or a 'dirty trick'.*¹⁵

10. Therefore, for the aforesaid reasons, this appeal is allowed by setting aside the impugned judgment. Consequently, we direct the respondents to treat the buildings of the appellant in like manner to those of other cement manufacturers in the Province for purposes of property tax. Needless to state that if an intelligible differentia or criterion regarding the imposition of property tax on the buildings of cement manufacturers is made in the future, and it is permissible with the applicable law and accords therewith, the taxing authority/Government may impose property tax in accordance therewith. As regards the property tax already paid by the appellant, which was at a rate higher than that which was imposed on the buildings of other cement manufacturers, the difference in such amount is to be repaid to the appellant or adjusted with regard to the appellant's future property tax liability, and this be done within two months

Judge

Judge

Judge

ISLAMABAD
14th September 2022
Mudassar/☆

Approved For Reporting

¹⁵ *Ibid*, para 14.