

**Judgment Sheet**  
**IN THE LAHORE HIGH COURT AT LAHORE**  
**JUDICIAL DEPARTMENT**

**W.P. No. 5609 of 2011.**

(M/s Khawer Paper Mart. vs. National Tariff Commission etc.)

**JUDGMENT**

DATES OF HEARING: 29.04.2011.

PETITIONER BY: M/s. Shafqat Mehmood Chohan, Mian  
Muhammad Athar and Abdul Quddus  
Mughal, Advocates.

RESPONDENTS BY: Mr. Ahmed Sheraz, Advocate for respondent  
No.1.  
Dr. Pervaiz Hassan and Mr. Rafey Alam,  
Advocates for respondent No.2.  
Ms. Yasmin Sehgal, Deputy Attorney  
General.  
Ata Hussain Shah, Section Officer  
(Litigation), Ministry of Commerce.

**SYED MANSOOR ALI SHAH, J.** This judgment  
also decides Writ Petitions No. 6063 & 6461 of 2011 as  
they raise same questions of law and fact.

2. Brief facts of the titled case are that M/s Packages  
Limited (Respondent No.2) filed a complaint on 29.9.2010  
under section 20 of the Anti Dumping Duties Ordinance,  
2000 (“Ordinance”) before the National Tariff Commission  
(Respondent No.1) (“Commission”) alleging dumping of  
“Certain Papers” originating in and exported from China,  
Indonesia, Japan and Thailand. The said complaint was  
received by the Commission on 13.10.2010 and on the

same day notification of receipt of the application was sent to People's Republic of China. On 2.12.2010 Order for initiation of Anti Dumping Investigation was issued by the Commission under section 23 (4) of the Ordinance and subsequently Notice of decision to initiate investigation was issued under section 27 of the Ordinance.

3. The main contention of the counsel for the petitioner is that the said investigation could not have been initiated as the Commission under the National Tariff Commission Act, 1990 ("Act") was not duly constituted. He submitted that the composition of the Commission according to section 5 of the Act consists of a Chairman not below the status of the Secretary to the Federal Government and two members not below the status of Additional Secretaries to the Federal Government. However, at the time of the notice under section 21 of the Ordinance, the Commission did not have a Chairman and comprised only two members whereas subsequently when Order under section 23 of the Ordinance was issued there was an Acting Chairman who was an Additional Secretary of the Federal Government. Therefore, the investigation initiated is totally without jurisdiction and *coram non judice*.

4. Counsel for the respondents-Commission submitted that initiation of investigation is merely the start of the inquiry and, therefore, does not constitute an adverse order,

hence the petition is not maintainable as the petitioner will be granted ample opportunity to be heard during the process of investigation. He further contended that the statutory remedy is available to the petitioner under section 64 of the Ordinance to file an appeal before the Appellate Court. On merits counsel admitted that Notification dated 13.10.2010 under section 21 was passed when the Commission had two members and no Chairman. It is contended that for the issuance of the Notification under section 21 of the Ordinance, constitution of the Commission is not required as at the time of order under section 23 dated 2.12.2010 the acting Chairman completed the composition of the Commission, hence there is no illegality in the investigation initiated by the Commission.

5. Learned Counsel for the respondent Commission admitted that Mr. Zamir Ahmad, who is holding the post of Chairman on Acting Charge is an Additional Secretary in the Federal Government but contended that under ESTA Code Serial No.127 titled “Appointment on Acting Charge Basis”<sup>1</sup> anybody on acting charge, assumes the role of the post.

6. Counsel for respondent No.2 relying on Rule 8-B(3) of the Civil Servants (Appointment, Promotion and Transfer) Rules, 1973 submitted that where a suitable

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<sup>1</sup> [Authority:- Estt. Division O.M.No.1/9/80-R II(B), dated 12-1-1981 as amended vide O.M.No.1/1/82-R 2 dated 15-8-1983].

officer is not available to fill the post, the Appointing Authority can appoint an officer on acting charge basis. He further submitted that in SRO 1238(I)/73 issued under Rule 3 of the Civil Service of Pakistan (Composition and Cadre) Rules, 1954 an Additional Secretary with two years service as Additional Secretary is eligible for appointment to the cadre post of the rank of the Secretary and the acting Chairman fully meets the said requirement. Hence, the Additional Secretary enjoys the “*status*” of a Secretary. He also relied on Serial No.127 of ESTA Code and reiterated that an officer appointed on acting charge basis assumes full duties and responsibility of the post and exercises statutory, administrative and financial powers vested in the regular incumbent. He further submitted that the term “*Secretary*” has been defined in Rule 2 (xviii) of the Rules of Business of the Federal Government, 1973 which states that a “Secretary” includes an Acting Secretary and where there is no Secretary, an Additional Secretary Incharge of the Division or the Ministry.

7. Ms. Yasmin Sehgal, Deputy Attorney General appeared on behalf of Ministry of Commerce and placed on record Office Memorandum dated 26.4.2011 which reiterated the submissions made by the counsel for the Commission, as well as, the counsel for respondent No.2.

8. Arguments heard and record perused.

9. The questions that require determination in this case are (i) whether the Commission was duly constituted under the law and *a fortiori* (ii) whether the process of investigation set in motion against the petitioner is lawful?

10. The investigative proceedings against the petitioner have so far been under sections 21, 23(4) and 27 of the Ordinance. Under section 21 (i.e., *Notice to governments of exporting country*) on receipt of the complaint, “the Commission shall promptly give notice to the government of each exporting country..” Similarly, under section 23 (i.e., *Initiation of an Investigation*) sub-section (1) “the Commission shall examine accuracy and adequacy of evidence provided...to determine whether there is sufficient evidence to justify initiation of an investigation. Under sub-section (4) “When the Commission is satisfied that: (b) there is sufficient evidence of dumping and injury... the Commission shall initiate an investigation.” Section 27 (i.e., *Notice of decision to initiate investigation*) provides that once the Commission decides to initiate investigation it shall issue notices.

11. All the above provisions require the Commission to exercise discretion. The importance of this discretion gets further underlined as it triggers an invasive and investigative process into the affairs of the petitioner which stand constitutionally protected under the fundamental

rights (articles 9, 18, 23, etc). In this case the absence of Commission resulted in shifting the fulcrum of discretion from the Commission to its officers (no matter how competent and capable they are) which seriously offends the Ordinance, and is no less than playing a fraud on the statute.

12. Was the Commission duly constituted in this case? The meaning of “Commission” for the purposes of the Ordinance is the same<sup>2</sup> as given in the National Tariff Commission Act, 1990 (VI of 1990) (“Act”). Section 5 of the Act gives the composition of the Commission as:

**“5. Composition of the Commission.** The Commission shall consist of a **Chairman** not below the status of Secretary to the Federal Government and **two members** not below the status of Additional Secretary to the Federal Government to be appointed by the Federal Government.”

Bare reading of the above clearly shows that the Commission comprises THREE persons i.e., ONE Chairman and TWO members. Their qualifications are also given. Chairman must not be below the status of a Secretary and Member not below the status of an Additional Secretary. There is no supplemental or supporting provision in the Ordinance that saves the proceedings of the Commission in

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<sup>2</sup> Section 2(b) of the Ordinance.

case its constitution is deficient or irregular. Commission is complete if all the three persons including the Chairman have been appointed and not otherwise.

13. Admittedly, the Chairman was not appointed when notices were issued on 13-10-2010, which under section 21 of the Ordinance were to be issued by the Commission. Thereafter, one Mr. Zamir Ahmed, Additional Secretary to the Federal Government, who was then a Member of the Commission was appointed as ACTING CHAIRMAN of the Commission on 25-11-2010 for three months or till the joining of a regular officer, which ever is earlier. It has been argued that as notice to the Governments of each exporting country under section 21 of the Ordinance is not an adverse order, hence the requirement of the Commission is not necessary. The nature or severity of the notice is irrelevant. It is the source and power of the issuing authority which is in question. Section 21 of the Ordinance clearly states that Commission shall issue notices to the governments of the exporting country and, therefore, the Commission and only the Commission had to deliberate over the complaint and exercise its discretion before issuing such a notice. Notice dated 13.10.2010 in para-2 states:

“.....In this connection, the Commission hereby notifies the esteemed Embassy of the People’s

Republic of China of the receipt of an application  
.... Against alleged dumping of Certain Paper....”

This is factually incorrect and amounts to misrepresentation by the officers of the Commission.

14. Thereafter, Mr. Zamir Ahmed, an Additional Secretary and an exiting Member of the Commission, is appointed on Acting Charge Basis on 25.11.2010. It has been submitted that under Rule 8-B(1) of the Civil Servants (Appointment, Promotion and Transfer) Rules, 1973 if a civil servant is otherwise eligible for promotion but does not possess the specified length of service the authority may appoint him to that post on acting charge basis. This argument was supplemented by reference to Rule 2(xviii) of the Rules of Business 1973 of the Federal Government which defines Secretary to mean an Additional Secretary, if there is no Secretary. Reference was also made to Office Memo dated 12.1.1981 (Sr. No. 127) of the Establishment Code (ESTA Code) to show that a civil servant on acting charge basis enjoys full duties and responsibility of the post and exercises all statutory, administrative and financial powers vested in the regular incumbent.

15. Rules of Business or the Rules made under the Civil Servants Act, 1973 are especially designed for the working of the Federal or Provincial Governments and for regulating the affairs of civil servants, respectively. The above Rules

are to regulate the Governments and have no relevance to a special taxing law that regulates “dumping” in the country. Establishment Code developed under section 25 of the Civil Servants Act, 1973 is a collection of memoranda and instructions. First, it has no application to a statutory authority created under a special law, second, mere administrative instructions cannot override, regulate or control the substantive provisions of the special law (section 5 of the Act).

16. In any case it cannot be used to interpret a special statute, especially when section 5 of the Act is clear and unambiguous. The special law does not provide for a Chairman on acting charge basis or a Chairman who is below the status of a Secretary. It is a settled principle of interpretation that “where there is no ambiguity in the words, there is no room for construction...No single argument has more weight in statutory interpretation than the plain meaning of the words...It is an elementary principle of the construction of statutes that the words have to be read in their literal sense. Thus, generally speaking, words and expressions would be given their plain and ordinary meaning which cannot be cut down or curtailed unless they themselves are clearly restrictive... The courts are enjoined to take the words as used by the legislature

and to give them the meaning which naturally implied.”<sup>3</sup> Further the Ordinance is a special statute with the power to investigate into the trade activity of a business and provides penal powers to impose anti dumping duty in case dumping is established. The Ordinance is, therefore, a taxing statute and has to be construed strictly.

17. More importantly, the qualification of a Chairman are lucidly spelled out in the Ordinance. Chairman has to be a person not below the status of a Secretary of the Federal Government. It was argued that “status” means that a person must be eligible to hold the post and need not necessarily hold the post of a Secretary at the time he is appointed as a Chairman. Reference was made to SRO 1238(I)/1973 dated 22.8.1973 issued under Rule 3 of the Civil Service of Pakistan (Composition and Cadre) Rules, 1954 which gives eligibility threshold for a Secretary, which is as follows:

Cadre of the rank of Secretary	23 years service as Assistant Commissioner or SDO or in an equivalent or higher post or 7 years service as joint Secretary or 2 years service as Additional Secretary.
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18. Section 5 of the Act requires that the Chairman should not be below the “status” of a Federal Secretary. Status

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<sup>3</sup> N.S.Bindra’s- *Interpretation of Statutes*- 10<sup>th</sup> edition-Lexis Nexi Butterworths (pages 432-434)

means a person's legal condition<sup>4</sup> or "...the position that he holds with reference to the rights which are recognized and maintained by the law<sup>5</sup>. According to Chambers Twentieth Century Dictionary- "status" means "state, condition, **position, rank**, importance in society..."<sup>6</sup> According to the English jurist Holland "the Chief varieties of "status" among natural persons may be referred to the following cases: (1) Sex; (2) minority (3) .....(8) **rank, caste and official position**<sup>7</sup>. Legal character, status or position a person occupies is synonymous. Being eligible for a post does not confer the status of the post. Any officer eligible to be a Secretary cannot be said to enjoy the status of a Secretary unless he is appointed to the said post. Status signifies the position held by a person and not the position he might hold in a distant future for which he might be eligible.

19. Similar matter came up before the august Supreme Court of Pakistan in C.P. Nos.1608/2009 and others, titled "Waheed Sons Lahore etc. v. National Tariff Commission, Islamabad". Vide judgment dated 29.10.2009 the august Supreme Court held:-

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<sup>4</sup> Black's Law Dictionary- 8<sup>th</sup> edition.

<sup>5</sup> James Hadley- Introduction to Roman Law 106 (1881)- Black's Law Dictionary- 8<sup>th</sup> Edition page 1447.

<sup>6</sup> Page 4925 Words and Phrases by Mian Muhibullah Kakahel – also see PLD 1982 SC 82 at 87.

<sup>7</sup> PLD 1966 Azad J & K 66

*“The reading of above provision of law makes it evident in clear terms that the Commission shall comprise of the Chairman and two members and there is no provision of quorum. In the instant case, the record reflects that the decision as to initiation of investigation, the preliminary as well as final determination in question have been made by the Chairman and one Member, therefore, the decisions made as such leading to imposition of duties cannot be termed to be decision of the Commission.”*

20. For the reasons given above, this petition is allowed and the investigation proceedings under sections 20, 21, 23(4) and 27 of the Ordinance are declared to be without lawful authority, void *ab initio* and, therefore, set aside.

21. The application / complaint of respondent no.2 can however be taken up afresh once the Commission is duly constituted in accordance with law.

**(Syed Mansoor Ali Shah)**  
Judge

\*A.W.\*

APPROVED FOR REPORTING.