

JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD  
(JUDICIAL DEPARTMENT)

**W.P. No. 755 of 2020**

Engro Fertilizers Limited

*Vs.*

Competition Commission of Pakistan and 3 others.

**W.P. No. 705 of 2020**

Fauji Fertilizer Company Limited

*Vs.*

Federation of Pakistan and 4 others.

**W.P. No. 765 of 2020**

Fauji Fertilizer Bin Qasim Limited

*Vs.*

Federation of Pakistan and 4 others.

**W.P. No. 841 of 2020**

Pakarab Fertilizer Limited and another

*Vs.*

The Competition Commission of Pakistan and 4 others.

**W.P. No. 842 of 2020**

Fatima Fertilizer Company Limited and another

*Vs.*

The Competition Commission of Pakistan and 4 others.

Petitioners by : Mr. Saad M. Hashimi Advocate for the Petitioner in  
W.P. NO. 755 of 2020.  
M/s Mouood Fiaz, Syed Asad Haider, Rameen  
Sohail Qureshi Advocates for the Petitioners in W.P.  
Nos. 705 and 765 of 2020.  
Mr. Umer Akram Chaudhary Advocate for the  
Petitioners in W.P. No. 841 and 842 of 2020.

Respondents by : Barrister Munawar Iqbal Duggal, Additional  
Attorney General.

M/s Imran Farooq and Raja Zamir Ahmed, AAGs.  
M/s Afnan Karim Kundi and Adeel Aftab Chaudhry  
Advocates for the Respondent/CCP.  
Hafiz Naeem, Senior Legal Advisor CCP.  
Mr. Shahzad Hussain, Registrar CCP.

Date of Hearing : 18-4-2025.

**SAMAN RAFAT IMTIAZ, J.-**

1. The aforementioned Petitions involving common questions of facts and law are being decided vide this consolidated judgment.
2. The Petitions have been filed assailing the (i) Letters dated 11-12-2019 (**“Impugned Letters”**) issued to each of the Petitioners seeking certain information; and (ii) the Order dated 24-2-2020 (**“Impugned Order”**) passed pursuant to Section 36 of the Competition Commission Act, 2010 (**“Competition Act”**) directing the Petitioners to comply with the Impugned Letters. The Petitioners allege that the Impugned Letters and the Impugned Order have been issued/passed in contravention of the Competition Act and constitute fishing and roving inquiry which is not permitted by law. In addition, the Petitioner in W.P. No. 755 of 2022 has also challenged the Notification dated 19-06-2019 (**“Impugned Notification”**) whereby certain powers have been delegated by the Commission as being in contravention of the Competition Commission Act.
3. The brief facts, as per the Memoranda of Petitions, are that the Competition Commission of Pakistan (**“Commission”**) (impleaded as the Respondent No. 1 in W.P. Nos. 755, 841 and 842 of 2020 and as Respondent No. 2 in W.P. Nos. 705 and 765 of 2020) issued the Impugned Notification pursuant to Section 28(2) delegating *inter alia* its powers under Sections 36 and 37 to various officers of the Commission. The Impugned Letters were issued by Mr. Qasim Khan, [Joint Director] (impleaded as the Respondent No. 2 in W.P. No. 755 of 2020, the

Respondent No. 3 in 841 and 842 of 2020 and as Respondent No. 4 in W.P. Nos. 705 and 765 of 2020) to each of the Petitioners directing them to provide certain information without mentioning any provision of law entitling the Commission to demand the same and without showing why such information is necessary or useful for the purposes of the Competition Act and which information the Petitioners in W.P. Nos. 755, 841, and 842 of 2020 describe as confidential. The Petitioners responded in writing contending that the Commission is not permitted under the law to seek information outside the scope of the Competition Act.

4. However, Mr. Qasim Khan, Mr. Shahzad Hussain, and Ms. Aqsa Suleman (impleaded as the Respondent Nos. 2, 3, and 4 in W.P.s No. 755 of 2020, 841 and 842 of 2020 and as Respondent No. 3, 4 and 5, in W.P.s No. 705 and 765 of 2020), in purported exercise of delegated authority, passed the Impugned Order under Section 36 of the Competition Act, directing the Petitioners, once again, to provide the information sought by way of the Impugned Letters. The Impugned Order states that the information is being collected in order to conduct enquiry into the affairs of the undertakings for the purpose of the Competition Act and that in case the Petitioners fail to comply, penalties will be imposed on them. The Impugned Letters and the Impugned Order have been challenged by the Petitioners as being illegal, ultra vires, and void *ab initio*. The Petitioners assert that they have no alternate adequate remedy available, hence these Petitions.

5. The Federation has been impleaded as Respondent No. 1 in W.P. Nos. 705 and 765 of 2020. During the proceedings, W.P. No. 755 of 2020 was treated as the leading case and as such hereinafter the parties will be referred to by the same party numbers as assigned thereto in the said Petition for the sake of convenience.

Arguments on behalf of the Petitioners:

6. The learned counsel for the Petitioner in W.P. No. 755 of 2022 read out the Impugned Letter to highlight that it does not refer to any provision of law under which it has been issued. Subsequently, the Respondents issued the Impugned Order wherein Section 36 of the Competition Act was referred to for the first time. The learned counsel for the Petitioners emphasized that Section 36 of the Competition Act may be invoked by the Commission only through issuance of a general or special order whereas the Impugned Letter has been issued by the Respondent No. 2 unilaterally. The learned counsel for the Petitioners referred to a Resolution dated 5-11-2019 (**“Resolution”**) (appended with the Commission’s comments in W.P. No. 765 of 2020) whereby it was resolved that a three member committee is constituted to review the fertilizer industry in terms of Section 28(1)(c) read with Section 37 of the Competition Act to ascertain the state of competition in the sector. The learned counsel for the Petitioners pointed out that the contents of the Impugned Letter and the contents of such Resolution are not in consonance with each other. The learned counsel for the Petitioner submitted that even otherwise the direction to provide details and reasons of each instance of price increase/decrease of fertilizers from July, 2018 till 11.12.2019 under serial No. 1 of the Impugned Letter is vague and generalized which shows that the Commission is not even aware if there is an increase or decrease in price of fertilizers during the relevant period lending credence to the objection that the same constituted fishing and roving exercise. He relied upon the case of *National Feeds Limited vs. Competition Commission of Pakistan and others*, 2016 CLD 1688 to argue that a notice under Section 36 cannot be issued on the basis of vague and indefinite allegations. He submitted that the information regarding cost required under serial No. 2 of the Impugned Letter as per proforma attached thereto is not connected with any purpose under the Competition Act and constitutes fishing and roving exercise whereas serial No. 3 of the Impugned Letter calls for audited financial statements for the years 2016-

17, 2017-18 and 2018-19 which the Commission does not need to ask the Petitioners for as they are public documents. He explained that the scheme of the Competition Act is such that the Commission must first initiate an enquiry under Section 37 of the Competition Act and then seek information under Section 36 *ibid*, if so required.

7. In respect of maintainability, the learned counsel for the Petitioners relied upon *National Feeds Limited (Supra)* whereby notices issued by the Commission under Section 37 of the Competition Act were set aside. He submitted that the said Judgment also pertained to notices under Section 36 *ibid*. Thus he argued that the Constitutional petitions are maintainable to challenge notices issued under Section 36 of the Competition Act. The learned counsel for the Petitioners further submitted that the Petitioners are indeed 'aggrieved persons' as the Impugned Letters and Order purportedly issued under Section 36 *ibid* are beyond the jurisdiction of the Commission. He argued that the Commission's arguments regarding maintainability are self-contradictory as on one hand the Commission is arguing that the Petitioners are not aggrieved persons under Article 199 of the Constitution but on the other hand they are asserting that an alternate remedy was available in terms of Section 42 of the Competition Act which too is available to aggrieved persons.

8. The learned counsel for the Petitioners in W.P. No. 841 of 2020 and 842 of 2020 submitted that the entire process adopted by the Commission is non-transparent which is unbecoming of a regulator. He referred to the Resolution dated 5-11.2019 submitted by the Commission as part of their comments and highlighted that there is no clarity as to whether an enquiry has already been initiated or whether it is to be initiated. In this regard he highlighted that the subject of the Resolution dated 5-11-2019 indicates that enquiry is to be initiated whereas the concluding paragraph according to the learned counsel for the Petitioners indicates that it has already been initiated. He submitted that in case of the latter situation the Petitioners have not received any information of initiation of enquiry. He also referred

to the use of the word 'review' in such Resolution and contended that no power of review vests in the Commission under the Competition Act. He submitted that the Commission does have power to conduct 'studies' for promoting competition under sub-section (1)(b) of Section 28 but the Impugned Order refers to sub-section (1)(c) of Section 28 of the Act which pertains to enquiry. He argued that *National Feeds Limited (Supra)* holds that the Commission would be justified in seeking information from an undertaking under Section 36 of the Competition Act if it is in relation to abuse of dominant position, prohibited agreements, approval of mergers or for promoting competition through advocacy. He submitted that such information must be sought in relation to the functions and powers of the Commission under Section 28 of the Competition Act whereas, for the reasons aforesaid the Resolution neither specifies what function the Commission is resolving to exercise vide the Resolution nor for what purpose. He also pointed out that in *Competition Commission of Pakistan and others vs. Dalda Foods Limited* 2023 SCMR 1991 and *National Feeds Limited (Supra)* the enquiries were initiated pursuant to complaints received by the Commission whereas no such complaint has been filed against the Petitioners in these cases to the best of their knowledge.

9. The learned counsel for the Petitioners in W.P. Nos. 765 of 2020 and 705 of 2020 referred to the comments filed by the Commission whereby they have themselves attributed alternate reasons for the increase in price and argued that the comments are speculative which shows that the entire exercise is fishing and roving. He also highlighted that the Commission vide its comments relies upon *National Feeds Limited (Supra)* yet no reasoning has been provided in the Impugned Letters or Order for the information sought therein as held in such judgment. Last but not least he pointed out the additional note appended with the Judgment in *Dalda Foods Limited (Supra)* wherein it has been explained that power of the Commission under Section 36 is not a 'proceeding' within the meaning of term as used in Section 33 and that such powers cannot be added to the

powers of the Commission under Section 36 as it would impact the constitutionally guaranteed rights to conduct lawful trade of the citizens of Pakistan.

Arguments on behalf of the Commission:

10. The learned counsel for the Commission commenced his arguments by objecting to the maintainability of the Petition. He argued that the Petitioners are not 'aggrieved persons' within the meaning ascribed to the said term under Article 199 of the Constitution as the Impugned Letters and the Impugned Order simply seek certain information. He contended that as such the Impugned Letters and Order do not even constitute show-cause notices which as per settled law are not considered adverse action that can be challenged in writ jurisdiction while bypassing departmental remedies. Without prejudice to the argument that the Petitioners are not aggrieved persons the learned counsel for the Commission submitted that if at all the Petitioners felt aggrieved by the Impugned Letters and Order being orders under Section 36, an appeal could have been filed against the same under Section 41 of the Competition Act whereby an order made by any Member or authorized officer of the Commission can be assailed before an Appellate Bench of the Commission. He submitted that under Sections 42 of the Competition Act any order passed by two Members of the Commission or the Appellate Bench may be assailed before the Appellate Tribunal and under Section 44 an order passed by such Appellate Tribunal can be challenged before the Supreme Court of Pakistan. As such, he emphasized that the Legislature, in its wisdom, did not include the High Court at any stage. He argued the Petitioners have not given any explanation as to why such remedies are not adequate.

11. On merits, the learned counsel for the Commission relied upon Section 36 of the Competition Act to show that the Commission is empowered to call for information relating to an undertaking where it considers it necessary or useful for the purposes of the Competition Act by

general or special order. He clarified that the terms ‘general order’ and ‘special order’ are not defined in the Competition Act. He explained that the term ‘useful’ as used in Section 36 of the Competition Act is of wider connotation than ‘necessary’. According to him such requirement is fully met as the information sought was due to increase in price that was noted which could be as a result of an agreement fixing the purchase or selling price of the Petitioners’ goods in violation of Section 4 and also a contravention of Section 3. The learned counsel also relied upon *Dalda Foods Limited (Supra)* to emphasize that the Commission is a regulator and Section 36 of the Competition Act enables the Commission to collect and gather information the exercise of which does not fall within the ambit of ‘proceedings’ under Section 30 of the Competition Act and does not trigger any penal consequences. It was also held that the Commission bears the responsibility to collect the market information to ensure effective enforcement of the Competition Act. He contended that it is undisputed that the Petitioners before this Court collectively constitute 93% of the market of fertilizer and as such fall within the definition of ‘dominant position’. In this regard he emphasized that the Impugned Letters and Order simply ask for certain information which is necessary and useful to ascertain whether there is any abuse of dominant position as per Section 3 which the Commission not only has the power to do but is its duty to ensure. He submitted that under Section 4 of the Competition Act no undertaking or association of undertakings shall enter into an agreement etc., fixing the purchase or selling price of any goods or services and as such the Petitioners may have violated sub-section (4) as well.

12. He submitted that under Section 28(2) the Commission has the power to delegate any of its functions or powers to its Members or Officers as it deems fit. He highlighted that the Impugned Letter has been issued by Mr. Qasim Khan, Joint Director and the Impugned Order has been issued by Mr. Shahzad Hussain, Director General, Mr. Qasim Khan, Joint Director and Ms. Aqsa Suleman, Assistant Director, who were authorized by the



Commission by way of Resolution dated 5-11-2019 and as such argued that the Impugned Letters and Orders were not without jurisdiction. He denied that the Impugned Letters were issued or that the Resolution was passed to initiate an enquiry notwithstanding the reference to Section 37 therein. He categorically submitted that the officers who issued the Impugned Letters were not authorized to initiate an enquiry under Section 37 of the Competition Act. He argued that the Petitioners' reliance upon the *National Feeds Limited (Supra)* is misconceived as it was not in respect of any notice issued under Section 36 nor was any objection raised by the Commission on maintainability in such case.

13. The learned counsel for the Commission emphasized that the information sought by way of the Impugned Orders is not secret. He submitted that under Section 246 of the Companies Ordinance, 1984 ("**Companies Ordinance**") such information could have been sought by the Securities and Exchange Commission of Pakistan ("**SECP**") and in default of compliance the company would have been liable to payment of fine. He submitted that that since such provision is no longer in the Companies Act, 2017 ("**Companies Act**") it is the Commission who can ask for the same. In addition he argued that the Petitioners have not disputed that the information sought for is necessary and useful. Cost is an important factor in determination of price which becomes all the more important in case of the Petitioners as they are part of a heavily subsidized industry wherein the cost varies between companies yet there appears to be price parallelism and as such it is a cause of concern for the Commission whose function it is to ensure that there is no abuse of dominant position which directly affects consumers.

14. Mr. Shahzad Hussain, Registrar of the Commission emphasized that fertilizer is an essential raw material for the farmer and combined with the fact that it is a subsidized industry it is all the more important for the Commission to be vigilant. He has also submitted that there is a history of price parallelism in this industry and heavy fines have previously been

imposed upon some of the Petitioners notwithstanding the fact that they are under litigation. He explained that in any other sector, businesses would be fully entitled to reap even hundred percent of profit but in a subsidized industry it does raise concerns and therefore, the Impugned Letters are not unjustified or illegal. Last but not least, he submitted that prior to the Impugned Letters the Commission had sent other notices/letters asking for various information including explanations for the price hike observed in the relevant period. In response the Petitioners were able to explain the price hike partly but not fully hence, the Impugned Letters.

Arguments by the Additional Attorney General:

15. Given the subject matter of the Petitions and the submissions made by the learned counsels it was considered necessary to issue notice under Order XXVIA, CPC to the Attorney General for Pakistan. The learned Additional Attorney General adopted the arguments advanced by the learned counsel for the Commission in respect of maintainability of the Petitions. In addition, the learned Additional Attorney General referred to *Dalda Foods Limited (Supra)* in which the Supreme Court differentiated between 'enquiry' and 'proceedings' as defined in the Competition Act. He relied upon various provisions of the Competition Act to argue that the Commission is not only empowered to call for information but that it is their function to ask for such information in order to ensure that no violation of the Competition Act takes place. He has specifically highlighted the non-obstante clause included in Section 56 of the Competition Act and that there is no discrimination as all fertilizer companies have been asked the same exact information which is in line with the functions and the *raison d'être* of the Commission as enshrined in the preamble and Section 3 of the Competition Act. He has also highlighted Section 51 of the Competition Act which provides for confidentiality and submitted that first of all the Petitioners cannot invoke confidentiality against a regulator especially considering that the information sought is essential for the Commission to perform its functions;

and secondly, such information is not to be released by the officers and members of the Commission on account of their statutory duty to maintain confidentiality.

16. Next he refers to Companies (Maintenance and Audit of Cost Accounts) Regulations, 2020 (**“Companies Regulations, 2020”**) which also includes the fertilizers companies as per its schedule and requires such companies to submit to the Securities and Exchange Commission of Pakistan (**“SECP”**) audited cost statements periodically and in case of violation authorizes the SECP to impose penalty. He therefore argues that since the Petitioners are mandated to provide such information to the SECP it cannot be described as confidential. Moreover, the learned counsel for the Commission relied upon Section 50 of the Competition Act to submit that the information sought can even otherwise be obtained by the Commission from the SECP.

Petitioners’ arguments in rebuttal:

17. The Petitioners’ counsel in W.P. No.705 and 765 of 2020 in rebuttal submitted that Section 51 of the Competition Act does not protect the confidentiality of the Petitioners’ information as once such information falls in the hands of the Commission it may end up with the public in case any member of the public invokes the provisions of the Right of Access to Information Act, 2017. He relied upon Section 2(33) and Section 223 of the Companies Act which delineate the scope of financial statements.

18. The learned counsel for the Petitioners in W.P. No. 841 and 842 of 2020 adopted the arguments made in rebuttal by the learned counsel for the Petitioners in W.P. Nos. 705 and 765 of 2020 and in the alternative submitted that even if the Commission justifies the Impugned Letter and Resolution as part of an enquiry the pre-conditions of an enquiry have not been satisfied as laid down in *Dalda Foods Limited, Karachi (Supra)*. He highlighted that the Impugned Resolution makes no mention of “study” therefore, in case the Commission tries to justify it as “study” such study

would be a case of non-delegation and as such illegal. He referred to the information sought by the Commission vide Annexure-A to the Impugned Letter dated 11-12-2019 whereby information regarding raw material has been sought and submitted that the same constitutes proprietary information which if reverse engineered by the competitors can result in substantial detriment to the Petitioners. He relied upon *Hydri Ship Breaking Industries Limited vs. Sindh Government and others*, 2007 MLD 770 to assert that no effective alternate remedy is available to the Petitioners.

19. The learned counsel for the Petitioners in W.P. No. 755 of 2020 submitted that the reply submitted by the Commission in respect of challenge to the maintainability of the instant Petitions is self-contradictory as on one hand they have described the Petitions as premature by alleging that there is no adverse order against the Petitioners and on the other hand stated that in case of any grievance and alternate remedy is available under the Competition Act which is available only against orders. He contended that the Impugned Resolution is not an order as per Section 24 of the General Clauses Act, 1897 (**“General Clauses Act”**) as in order to constitute such an order it must contain reasons. He relied upon *Muhammad Amin Muhammad Bashir Limited vs. Government of Pakistan and others*, 2015 SCMR 630 to submit that such requirements have to be met by statutory bodies as well. He argued that no time period has been given in the said Resolution and the Impugned Letters and Order seek information for the years 2016 till 2019 despite the fact that admittedly information regarding previous years has already been sought by the Commission previously. He relied upon *Evacuee Trust Property Board vs. Mst. Sakina Bibi*, 2007 SCMR 262; *Almas Ahmed Fiaz vs. Secretary, Government of the Punjab Housing and Physical Planning Development, Lahore and another*, 2006 SCMR 783; *Haji Abdullah Khan and others vs. Nisar Muhammad Khan and others*, PLD 1965 SC 690 to argue that points of law can be raised at any stage before the Court and as such even though

none of the Petitioners have challenged the *vires* of the Companies Regulations, 2020 this Court is empowered to consider the *vires* of Regulations 4 and 6(3) of the said Regulations to determine that the same is beyond the scope of the parent law. In this regard the learned counsel for the Petitioners in W.P. No. 841 and 842 of 2020 relied upon *Marbury vs. Madison*, 5 U.S. 137 (1803) to argue that it is the inherent powers of the Constitutional Court to look into the illegality of law even in the absence of any prayer challenging such law.

20. The learned counsel for the Commission submitted that it is trite law that presumption of validity is attached to every provision of law and also that the Petitioners have been submitting the costs statements in compliance of the Companies Regulations, 2020 without challenging the same before any forum at any point of time and are merely challenging the authority of SECP and *vires* of the said Regulations during oral arguments in the instant case. He relied upon *Lahore Development Authority vs. Ms. Imrana Tiwana and others*, 2015 SCMR 1739; *Federation of Pakistan vs. Aitzaz Ahsan and another*, PLD 1989 SC 61.

21. I have heard the learned counsel for the parties and have also perused the record and the applicable law with their able assistance.

Scheme of Law and Background:

22. The freedom of trade, business or profession is a fundamental right guaranteed by the Constitution however, such right is subject to regulation as per Article 18(b) of the Constitution. The instant case involves the determination of the limits of the Petitioners' Constitutionally guaranteed freedom to conduct trade and business and the extent to which such freedom can be regulated by the Commission in the interest of free competition as permitted by the Constitution.

23. It is a given fact that every business is motivated to increase profits and to minimize losses. The free market system as envisaged by Adam

Smith is based on the understanding that markets thrive when they operate freely given the widely accepted principle of human conduct that every person acts in self-interest. Thus a market where all players are allowed to pursue their self-interest freely with minimal government intervention is considered beneficial not only for economic prosperity but also for innovation as businesses compete to gain market dominance through improvisation not just in terms of quality of goods and services but also by price reduction. Although anti-competition laws are viewed as unnecessary under the doctrine of laissez-faire due to the belief that the economy regulates itself in the long term through demand and supply forces, however, some level of government intervention is considered necessary to curtail monopolization and cartelization almost by all capitalist countries. The aim is to foster a competitive environment that benefits consumers and to prevent anti-competitive practices that control a market, dictate prices and limit consumer choice. This is the reason for the promulgation of the Competition Act as enshrined in its preamble which is reproduced herein below:

*“WHEREAS it is expedient to make provisions to ensure free competition in all spheres of commercial and economic activity to enhance economic efficiency and to protect consumers from anti-competitive behavior and to provide for the establishment of the Competition Commission of Pakistan to maintain and enhance competition; and for matters connected therewith or incidental thereto.”*

24. To this end, Sections, 3, 4, 10, and 11 the Competition Act prohibit the abuse of dominant position; entering into anti-competitive agreements; indulging in deceptive marketing practices; and entering into mergers without seeking approval of the Commission. The functions and powers of the Commission are given in Section 28(1) which in a nutshell include (a) initiation of proceedings and making of orders in cases of contravention of the provisions of the Competition Act; (b) conducting studies; (c) enquiries; (d) giving advice to undertakings; (e) engaging in competition advocacy; and (f) generally taking all other actions as may be necessary for carrying out the purposes of the Competition Act. The mechanics of the

powers and functions under Section 28(1)(a) of initiating proceedings and passing orders are detailed in Sections 30 to 33; while the powers to conduct studies and enquiries under Section 28(1)(b) and (c) are governed by Section 37; and the means for exercising the power to engage in competition advocacy under Section 28(1)(e) are provided for under Section 29. Section 28(2) expressly empowers the Commission to delegate all or any of its functions and powers to any of its Members or officers, as it deems fit subject to such conditions as it may think fit to impose.

25. In addition, Section 34 provides for the power of search and entry while Section 35 provides the power of forcible entry. Section 36 deals with the power to call for information relating to the undertakings and is reproduced herein below:

***“36. Power to call for information relating to undertaking. Notwithstanding anything contained in any other law for the time being in force, the Commission may, by general or special order, call upon an undertaking to furnish periodically or as and when required any information concerning the activities of the undertaking, including information relating to its organization, accounts, business, trade practices, management and connection with any other undertaking, which the Commission may consider necessary or useful for the purposes of this Act.”*** [Emphasis added].

26. The Impugned Letters and the Impugned Order have been issued/passed by the Respondents No. 2 to 4 purportedly in exercise of the Commission’s powers under Section 36 of the Competition Act as delegated pursuant to Section 28(2) vide the Resolution dated 5-11-2019. The contents of the Resolution, the Impugned Letter, and the Impugned Order are reproduced herein below:

Resolution dated 5-11-2019:

**“TO CONDUCT ENQUIRY IN THE FERTILIZER INDUSTRY TO ASCERTAIN THE STATE OF COMPETITION IN THE SECTOR**

***It was RESOLVED THAT committee comprising the following officers is constituted to review the fertilizer industry in terms of Section 28(1)(c) read with Section 37 of the Act and to ascertain the state of competition in the sector while taking into account various aspects inter alia the cost of production of different fertilizer products.***

- i. Mr. Shahzad Hussain, Director General (Finance & Admin)
- ii. Mr. Muhammad Qasim Khan, Joint Director (C&TA)
- iii. Ms. Aqsa Suleman, Assistant Director (C&TA)

*It was further RESOLVED THAT pursuant to Section 28(2) of the Act the **powers of the Commission under Section 33 and Section 36 of the Act are delegated to the above mentioned Committee for the purpose of aforesaid enquiry.***” [Emphasis added].

**Impugned Letters dated 11-12-2019:**

“The Chief Executive Officer  
Engro fertilizer Limited  
7' and 8' Floor, Harbor Front Building  
Marine Drive, Block 4,  
Clifton, Karachi.

Subject: PROVISION OF INFORMATION

Dear Sir,

It has come to the knowledge of the Commission that the price of fertilizer has followed an increasing trend in the last year. In this regard, you are requested to provide the following information:

1. The details and reasons of each instance of price increase/decrease of fertilizer from July 2018 till date.
2. Please provide the cost information as per Performa attached as Annex A.
3. Provide the audited financial statements of your company for the years 2016-17, 2017-18 and 2018-19.

You are requested to provide the abovementioned information by 24<sup>th</sup> December, 2019. Your cooperation in this regard will be appreciated

Sincerely,  
Qasim Khan  
Joint Director.”

**Impugned Order dated 24-2-2020:**

“The Chief Executive Officer  
Engro fertilizer Limited  
7' and 8' Floor, Harbor Front Building  
Marine Drive, Block 4,  
Clifton, Karachi

SUBJECT: CALLING FOR INFORMATION UNDER SECTION 36 OF THE COMPETITION ACT, 2010.

1. Whereas the Competition Commission of Pakistan (hereinafter the 'Commission') is in the process of collecting information under section 28(1) of the Competition Act, 2010, (hereinafter the 'Act') to conduct enquiry into the affairs of undertakings for the purposes of the Act.
2. Whereas, in order to gather information regarding the matter, the Commission wrote a letter to Chief Executive Officer- Engro Fertilizer Limited on December 11, 2019 seeking information related to the matter.
3. Whereas, the Commission received response dated December 24, 2019 averring that the information sought is beyond the scope of Sections 36 and 37 of the Competition Act, 2010.
4. Whereas the Commission is established under the Competition Act, 2010 and is empowered thereunder to enforce any provision thereto. In this regard Section 36 of the Act empowers the Commission to call for information relating to undertakings, which the Commission may consider useful for the purposes of the Act.
5. Whereas pursuant to Section 28(2) of the Act, the powers of the Commission under Section 33 and Section 36 of the Act have been delegated to the committee comprising:  
I. Mr. Shahzad Hussain, Director General (Finance & Admin)  
II. Mr. Muhammad Qasim Khan, Joint Director (C& TA) ill. Ms. Aqsa Suleman, Assistant Director (C& TA)
6. Foregoing in view, you are required under Section 36 of the Act, to submit the information asked through letter dated December 11, 2019. The information should reach the Commission on or before March 04, 2020, without fail.
7. In case you fail to provide the required information within the stipulated time period, you may be liable, in terms of Section 38 of the Act to pay a penalty of up to PKR 1 Million for noncompliance and shall be further liable to a penalty up to PKR 1 Million for every day, from the date of expiry of the deadline.
8. In addition, if you fail to provide the required information within the stipulated time period, you may also be liable, in terms of Section 38(5), to face proceedings before a court of competent



*jurisdiction for non-compliance which is a criminal offense* punishable with imprisonment for a term which may extend to one year or with a fine which may extend to Twenty five (25) million rupees.

Shahzad Hussain  
Director General

Qasim Khan  
Joint Director

Aqsa Suleman  
Assistant Director” [Emphasis added].

Maintainability:

27. Let me first address the Commission’s objection regarding the maintainability of the instant petitions in view of the purported alternate remedies available to the Petitioners under the Competition Act. Indeed Section 41 of the Competition Act provides an appeal to an Appellate Bench of the Commission in respect of an order made by any Member or authorized officer of the Commission whereas Section 42 of the Competition Act provides that any person aggrieved by an order *inter alia* of the Commission comprising two or more Members may prefer an appeal to the Competition Appellate Tribunal.

28. The Impugned Letters however have been issued by the Respondent No. 2 alone whereas the Impugned Order has been passed by the Respondents No. 2 to 4, none of whom are Members of the Commission. The Commission has relied upon the Resolution dated 5-11-2019 whereby the powers under Sections 33 and 36 have been delegated to a committee of three members comprising the Respondents No. 2 to 4. However, the Respondent No. 2 was not authorized under the said Resolution to exercise the powers of the Commission under Section 33 and 36 unilaterally. Thus the Impugned Letters do not constitute orders passed by a Member or an authorized officer of the Commission that can be challenged in appeal under Section 41 of the Competition Act. Similarly, the Impugned Order passed by officers of the Commission cannot be regarded as an order of the Commission comprising two or more Members so as to fall within the scope of the appeal provided for under Section 42 notwithstanding the delegation of powers vide the Resolution dated 5-11-2019. Thus, the Impugned Order was not appealable under Section 42 of the Competition Act.

29. Moreover, the Resolution dated 5-11-2019 was not provided to the Petitioners. Although the Impugned Order passed by Respondents No. 2 to 4 does state that the powers of the Commission *inter alia* under Section 36 have been delegated to a committee pursuant to Section 28(2) of the Competition Act no copy of the said resolution was enclosed therewith. The Commission has pointed out that there is no requirement under Section 28(2) of the Competition Act to issue public notification of the delegation of any functions or powers of the Commission. On the other hand, the Impugned Notification i.e. SRO 1128(I)/2019 dated 19-6-2019 was issued pursuant to Section 28(2) where under the powers under Sections 36 and 37 were delegated to the Director General (Cartels and Trade Abuses), Director General (OFT), Director General (Exemptions), Director General (Mergers and Acquisitions), Director General (Legal), and Director General (Competition Policy and Research). Therefore, a specific objection has been raised by the Petitioner in W.P. No. 755 of 2022 that the Impugned Order passed by the Respondents Nos. 2 to 4 who are the Joint Director (Cartels and Trade Abuses), Director General (Finance and Admin), and Assistant Director (Cartels and Trade Abuses) respectively is in contravention of, *inter alia*, the Impugned Notification as it does not delegate the power to call for information through special or general order under Section 36 to them and the said Petitioner has *inter alia* prayed for a declaration that the Impugned Letter and the Impugned Order are *ultra vires* the Competition Act and the Impugned Notification and also that the Impugned Notification is itself *ultra vires* the Competition Act. It was only upon filing of the instant Petitions that the Resolution dated 5-11-2019 was produced by the Commission along with its comments in W.P. No. 765 of 2020.

30. Even otherwise, the Petitioners have challenged the Impugned Letters and Impugned Order as having been issued beyond the scope of Section 36 of the Competition Act and without satisfying its pre-conditions, which requires interpretation of various provisions of the

Competition Act so as to ascertain the scope of the powers and functions of the Commission. It is settled law that where an order is assailed on account of having been passed without jurisdiction the Constitutional jurisdiction of the High Court cannot be curtailed on the ground of alternate remedies<sup>1</sup> and that petitions seeking interpretation of substantive law requiring no factual determination may not be non-suited on account of maintainability<sup>2</sup>.

31. For all the foregoing reasons, I find the instant petitions maintainable.

Whether the Impugned Letters have been issued without authority?

32. It has already been observed herein above that the Respondent No. 2 is neither a Member nor had any authority been delegated to him under Section 28(2) of the Competition Act vide the Resolution dated 5-11-2019 or otherwise to exercise the powers under Section 36 of the Competition Act unilaterally.

33. Moreover, Section 36 of the Competition Act empowers the Commission to call for information by special or general order. Under Article 24A of the General Clauses Act it is necessary for any authority, office or person making any order or issuing any direction in exercise of any powers conferred by any enactment to give reasons for making the order or issuing the direction whereas the Impugned Letters are devoid of any reasoning (this aspect is discussed in more detail later in the judgment).

34. Therefore, the issuance of the Impugned Letters by the Respondent No. 2 was not only in excess of his authority and therefore palpably without jurisdiction making the Impugned Letters void *ab initio* but even otherwise cannot be treated as a special or general order under Section 36 of the Competition Act for failure to give reasons.

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<sup>1</sup> *Muhammad Safeer and others vs. Muhammad Azam*, PLD 2024 SC 838; *Jameel Qadir and another vs. Government of Balochistan, Local Government, Rural Development and Agrovilles Department, Quetta and others*, 2023 SCMR 1919; *Hydri Ship Breaking Industries Limited vs. Sindh Government and others*, 2007 MLD 770 .

<sup>2</sup> *Indus Motor Company Limited vs. Federation of Pakistan and 2 others*, 2021 PTD 460; *Messrs Pakistan Telecommunication Authority vs. Federation of Pakistan and others*, 2020 PTD 1683.

Whether the power of the Commission to call for information under Section 36 can be exercised independently of the powers and functions listed under Section 28(1) of the Competition Act?

35. The powers under Sections 34, 35, and 36 have not been specifically listed in Section 28(1) and as such it was argued that they are ancillary to the powers and functions given thereunder and that the power to call for information under Section 36 can only be invoked in aid or in assistance of any on-going proceedings or enquiries or studies but not independently thereof. The Petitioners submitted that they have not received notice of any enquiry without which call for information vide the Impugned Letters and the Impugned Order is against the scheme of law.

36. In both, *National Feeds Limited and Dalda Foods Limited (Supra)* the call for information under Section 36 was made along with a decision to initiate an enquiry under Section 37. Nevertheless, Section 36 does not contain any language which can be relied upon to reach the conclusion that it can be utilized by the Commission only as part or during the subsistence of any proceedings or enquiry or studies. On the contrary, it expressly states that the stipulated information may be called for *periodically or as and when required*. The use of the word 'periodically' signifies that an undertaking may be called upon to furnish the stipulated information from time to time or at regularly occurring intervals in light of which the interpretation sought by the Petitioners is not sustainable and would require reading into the statute which is not permissible.

37. Having said that in the instant case the power under Section 36 was delegated to the Respondents No. 2 to 4 (who being officers of the Commission do not have any inherent power to invoke Section 36) specifically for the purpose of an enquiry as may be seen from the reproduction of the Resolution dated 5-11-2019 herein above.

Whether or not an enquiry was validly initiated by the Commission? If not, to what effect viz-a-viz the Impugned Order?

38. In such circumstances it becomes necessary to see whether the enquiry was validly initiated. It bears emphasis that although the subject of the Resolution dated 5-11-2019 refers to an 'enquiry', by way of the first paragraph it has been resolved that the committee is constituted to *review* the fertilizer industry. Yet while describing the purpose of the constitution of the committee the Resolution specifically refers to Section 28(1)(c) read with Section 37 of the Competition Act which deal with enquiries. The last paragraph specifically resolves pursuant to Section 28(2) to delegate the powers of the Commission under Section 33 and 36 to such committee for the purpose of an enquiry.

39. It is also unclear, as rightly pointed out by the learned counsel for the Petitioner in W.P. No. 765 of 2020, whether the resolution to conduct an enquiry is implied in the resolution to constitute a committee in terms of Section 28(1)(c) read with Section 37 of the Competition Act or whether the enquiry had already been resolved to be conducted prior to the Resolution dated 5-11-2019. No prior resolution has been produced before this court yet no reason has been given in the Resolution dated 5-11-2019 for conducting an enquiry.

40. This Court has already settled in *National Feeds Limited (Supra)* against which Civil Petitions No. 2119 to 2123/2016 were dismissed by the Supreme Court of Pakistan vide Order dated 22-11-2017 that no enquiry under Section 37(1) or (2) can be initiated on the basis of vague and indefinite allegations nor on the basis of insufficient information or in the absence of *prima facie* evidence. It may be recalled that the notices impugned in *National Feeds Limited (Supra)* were issued by the Commission on the complaint made by consumer raising concerns that despite decrease in price of poultry feeds input the price of poultry feeds had been increasing consistently. This Court held that such allegations were vague and devoid of sufficient facts and *prima facie* evidence that is

required for initiation of an enquiry relating to the purposes of the Act and that at best the notices could be treated as forming a basis for initiating a 'study' under Section 37(3). I find that the Resolution dated 5-11-2019 relied upon by the Commission in the instant case does not even come up to the standard of the impugned notices in *National Feeds Limited (Supra)* as no reason, whatsoever, has been given for the enquiry.

41. The Supreme Court in *Dalda Foods Limited (Supra)* explained that the *suo moto* power of the Commission under Section 37(1) can be exercised to initiate an enquiry in any matter necessary for the purposes of the Competition Act *provided* that the Commission has deliberated on the matter and has produced its reasoning in writing. In the instant case, the decision to conduct an enquiry, if any, was in exercise of the *suo moto* powers of the Commission under Section 37(1) which thus required deliberation and for reasons to be produced, in writing.

42. In *Dalda Foods Limited (Supra)* the Commission brought on record before the Supreme Court material including multiple complaints regarding price hike and a working paper by the Commission on the basis of referral by the National Price Monitoring Committee that led to the decision to conduct an enquiry to determine contravention of Sections 3 and 4 of the Competition Act, which according to the additional note to the judgment was found sufficient to constitute *prima facie* evidence of a contravention of the provisions of Chapter II of the Competition Act. Therefore, the Supreme Court set aside this Court's judgment whereby the letter of the Commission informing the petitioner in such case about the initiation of an enquiry under Section 37 and the special order passed under Section 36 were set aside and while doing so the Supreme Court held that an order for an enquiry is not an adverse order and that it is essential for the Commission to carry out its functions under the Competition Act.

43. Unlike *Dalda Foods Limited (Supra)*, the Commission in the instant case has brought on record only the Resolution dated 5-11-2019. But the

Resolution does not reflect any deliberation and is eerily silent as to what led the Commission to exercise its *suo moto* powers to constitute a committee to, in its own words, *ascertain the state of competition in the sector while taking into account various aspects inter alia the cost of production of different fertilizer products?* There is no mention in the Resolution dated 5-11-2019 of a concern about an increase in price that may constitute an abuse of dominant position or that may be the result of a prohibited agreement or suspicion of any other contravention of the Competition Act. In fact, upon reading the Resolution one gets the distinct impression that the Commission, at random, decided to *study* the state of affairs of the fertilizer industry with regard to competition as opposed to conducting an enquiry. Therefore, it cannot be concluded that any enquiry was initiated with due deliberation or that the Commission had sufficient *prima facie* evidence of any contravention of the Competition Act that formed the basis of initiating an enquiry.

44. A call for information under Section 36 which stems from an enquiry that was initiated without satisfying the requirements of Section 37 cannot be sustained as valid on the age-old principle that the superstructure built upon the wrong foundation must fall<sup>3</sup>.

45. It is perhaps due to these shortcomings that the learned counsel for the Commission readily conceded on behalf of the Commission that the Resolution dated 5-11-2019 does not initiate an enquiry notwithstanding the reference thereto. The Commission has stated in its comments that by way of the Resolution dated 5-11-2019 the Commission resolved to constitute a committee to *review* the fertilizer sector and has clarified that it has been presumed by the Petitioners that the Commission initiated an enquiry but that presumption cannot replace proof. But the Petitioners cannot be faulted for reaching such conclusion when the Impugned Order itself confirms that the Commission is in the process of collecting information

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<sup>3</sup> *Ghulam Hussain Baloch and another vs. Chairman, National Accountability Bureau, Islamabad and 2 others*, PLD 2007 Sindh 469.

under Section 28(1) to conduct enquiry into the affairs of the undertaking and the Impugned Letters which the Petitioners are directed to comply with were issued to gather information regarding the matter.

46. Be that as it may, the Commission has categorically denied that the Commission resolved to initiate an enquiry and instead claims that it had resolved to merely review the fertilizer sector. However, there is no power of review which has been conferred upon the Commission under the provisions of the Competition Act! The Commission failed to explain the legal sanctity of a review or its scope and parameters under the law. If no enquiry was to be undertaken and no powers vests in the Commission to conduct a review then how is the Impugned Order sustainable which was passed by the Respondents No. 2 to 4 in exercise of the power under Section 36 delegated to them pursuant to Section 28(2) vide the Resolution dated 5-11-2019 for the purpose of an enquiry!

47. The learned counsel for the Commissioner vociferously argued that the power under Section 36 can be exercised and delegated independently given that the requirement under Section 36 that the information sought must be necessary and useful for the purposes of the Act is fully met as the increase in price could be as a result of an agreement fixing the purchase or selling price of the Petitioners' goods in violation of Section 4 and also a contravention of Section 3.

48. I have already concluded that the plain language of Section 36 does not allow for it to be interpreted in a way to make its invocation conditional upon a pending enquiry or proceedings or study. Having said that the contents of the Resolution dated 5-11-2019 do not support the contention of the Commission that the power to call for information under Section 36 was delegated to the Respondents No. 2, 3, and 4 to be exercised independently of any enquiry as has been discussed in sufficient detail herein above. The Commission cannot wriggle out of the language of the Resolution dated 5-11-2019. The Respondents No. 2 to 4 were not delegated the power under



Section 36 pursuant to Section 28(2) to be exercised by the Respondents No. 2 to 4 independent of an enquiry rather the plain language of the Resolution dated 5-11-2019 unambiguously states that the such powers were delegated for the purpose of an enquiry which is also confirmed by the Impugned Order.

49. It is therefore clear that the Impugned Order was passed by the Respondents No. 2 to 4 in excess of the authority delegated to them under the Resolution dated 5-11-2019 which empowered them to exercise the powers under Section 36 for the purpose of an enquiry and not otherwise given that the Commission has confirmed before this Court is that there was no enquiry initiated. The Impugned Order is liable to be set aside on this ground alone.

Whether the information called for by way of the Impugned Order is considered necessary and useful for the purposes of the Competition Act by the Commission?

50. Even otherwise, the contents of the Impugned Order do not satisfy the conditions of Section 36 of the Competition Act. Justice Mansoor Ali Shah, in his additional note in *Dalda Foods Limited (Supra)* has held that the provisions of the Competition Act that authorize the Commission, in the public interest of ensuring free competition, to interfere in the exercise of the fundamental right to conduct any lawful trade or business must be strictly construed.

51. There is no cavil to the proposition that the Commission bears the responsibility to take action against contravention of the provisions of the Competition Act for which purpose it is not only empowered but is duty bound to gather and collect information. However, it is important to appreciate the difference between calling for information in the performance of duty in pursuance of the Competition Act and conducting a fishing or roving enquiry. Such distinction is apparent from the phraseology of Section 36 of the Competition Act whereby the Commission is only empowered to call for information concerning the activities of the

undertaking which is considered necessary or useful for the purposes of the Competition Act. In other words, the information that may be called for must be that which is considered essential for the purposes of the Competition Act or is otherwise expedient in relation thereto. The nexus of the information called for or causal link with the purposes of the Competition Act must be disclosed in the general or special order passed under Section 36 to avoid a fishing expedition.

52. Notwithstanding that the Impugned Letters and the Impugned Order have been issued/passed by the Respondents No. 2 to 4 without valid authority let us for the sake of argument consider the contents thereof in light of Section 36 of the Competition Act.

53. The Impugned Order (reproduced in paragraph 22 above) simply confirms that the Commission is in the process of collecting information under Section 28(1) to conduct enquiry into the affairs of the undertaking for the purpose of the Competition Act and that the Impugned Letters seeking information were sent in order to gather information regarding the matter. It goes on to assert that the Commission is empowered under Section 36 to call for information considered useful for the purposes of the Competition Act which power has been delegated to the three-member committee passing the Impugned Order pursuant to Section 28(2) in view of which the Petitioners were directed to submit the information as required vide the Impugned Letters failing which the Petitioners would be liable for penalties and to face proceedings. But the Impugned Order utterly fails to shed light on how the information called for by way of the Impugned Letters is necessary or otherwise useful for the purposes of the Competition Act.

54. The Impugned Letters (reproduced in paragraph 22 above) merely refer to an increase in the price of fertilizer that came to the knowledge of the Commission in the preceding year. The Impugned Letters do not contain so much as a hint that the Commission suspects that the price

increase constitutes a contravention of the Competition Act and if so how and of which provision.

55. It is an admitted position that the Petitioners in the instant Petitions collectively constitute 93% of the relevant market. As such the Petitioners may be presumed to be in a dominant position as per the definition of 'dominant position' given under Section 2(e) of the Competition Act. Under Section 3(1) no person shall abuse dominant position. Section 3(2) provides that abuse of dominant position shall be deemed to have been brought about, maintained or continued if it consists of practices which prevent, restrict, reduce or distort competition in the relevant market. By virtue of Section 3(3)(a), the expression "practices" referred to in Section 3(2) includes unreasonable increase in price. Similarly, Section 4 prohibits undertakings from entering into any agreement fixing the purchase or selling price with regard to the sale and distribution of any goods which has the object or effect of preventing, restricting or reducing competition within the relevant market unless exempted under Section 5.

56. Therefore, a price increase especially if it is across the industry may definitely draw the Commission's attention given its purpose under the Competition Act but a price increase by itself is not enough to assume a contravention entitling the Commission to intrude into the affairs of an undertaking. In order for an increase in price to be deemed an abuse of dominant position that constitutes a contravention of Section 3 such increase must firstly be unreasonable and secondly it must result in prevention, restriction, reduction or distortion of competition in the relevant market. Yet the Impugned Letters and the Impugned Order do not describe the price increase as unreasonable or give any indication as to whether it would prevent, restrict, reduce or distort competition in the relevant market.

57. Similarly, in order to constitute a contravention of Section 4, there must be an agreement or a decision in respect of the production, supply, distribution, acquisition or control of goods or the provision of services

with the object or effect of preventing, restricting or reducing competition in the relevant market including an agreement fixing the purchase or selling price of any goods or services unless such agreement is exempted. However, the Impugned Letters and the Impugned Order do not allege any price parallelism that may indicate a suspected violation of Section 4 of the Competition Act which was argued in Court.

58. This is not to say that the Commission is required to submit a thesis qualifying and justifying that the increase in price is unreasonable or results in distortion of competition but a vague reference to increasing price trends, to my mind, certainly does not meet the threshold. Such a vague reference was already held insufficient for purposes of Section 37 by *National Feeds Limited (Supra)*. Therefore there is no conceivable reason why it should be held sufficient for purposes of Section 36.

59. Even in *Dalda Foods Limited (Supra)* where the Supreme Court held the enquiry to have been validly initiated, with regard to whether the Commission is obligated to communicate its reasons to the concerned undertaking and to justify its decision to initiate an enquiry with supporting material the Supreme Court held that the Commission is required, at minimum, to provide the gist of its reasons as recorded in its internal deliberations which led to the decision of initiating such enquiry for the purpose of transparency and good governance. In my opinion the same principle is applicable upon an order under Section 36 of the Competition Act in light of Article 24A of the General Clauses Act otherwise there will be no way to ascertain whether or why the Commission considers the information called for as necessary or useful for the purposes of the Competition Act<sup>4</sup>.

60. I am fortified in my view by the judgment reported as *Assistant Director Intelligence and Investigation, Karachi vs. M/s B.R. Herman and others*, PLD 1992 SC 485 wherein a notice under Section 26 of the

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<sup>4</sup> *Dewan Sugar Mills Limited and others vs. Federation of Pakistan and others*, 2024 PTD 681.

Customs Act, 1969 was issued requiring, in writing, certain information for the purpose of determining the legality or illegality of import, export, value and source of funds, and questions incidental thereto in respect of which the Supreme Court held as follows:

*“4. Faced with this situation, Mr. A.H. Mirza contended that the notice is bad and illegal as it does not show any allegations against Respondent No.1 in respect of which any inquiry is to be made and information is required. Mr. Shahudul Haque contended that section 26 empowers the authorities to ask for such information and thus the notice has been issued competently. The object of section 26 of the Customs Act is to empower the authority to ask for information or require the production of documents or inspect the same in order to determine the legality or illegality of importation or exportation of goods which have been imported or exported, the value of such goods, the nature, amount and source of the funds or the assets with which goods were acquired and the customs duty chargeable therein or for deciding anything incidental thereto. **The authority can only for specific purposes of determining the legality or illegality call for such information as required by section 26.** The authorised 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.**” [Emphasis added].*

61. Similarly, with regard to the power of the National Accountability Bureau to call for information the Sindh High Court in *Ghulam Hussain Baloch and another vs. Chairman, National Accountability Bureau, Islamabad and 2 others*, PLD 2007 Sindh 469 held as follows:

*“For the purpose of present case, the provisions of section 19(a), (b) & (c) are relevant, therefore, discussion would be in respect of said provisions. A bare reading of the said provisions reveals that if an*

inquiry or investigation is ordered in respect of offence punishable under the Ordinance by the Chairman NAB then during the course of said inquiry or investigation of such offence the Chairman NAB or any officer duly authorized by him is authorized to call for information from any person for the purpose of satisfying himself whether there has been any contravention of provisions of the Ordinance or any rule or order made thereunder. In this clause, "any person" would mean all persons including witnesses and accused from whom the information is required. **The question arises as to what sort of information the person is required to furnish to the competent authority. The information would be in respect of offence alleged or any matter which can suggest that the provisions of the Ordinance, rule or order made thereunder have been contravened. For that purpose competent authority is required to ask any person from whom such information is required to provide information which has nexus with the above provisions. If a person does not know the point or allegation or offence or fact on which information is to be provide or the person against whom such information is required then how such person would be in a position to help the competent authority,** therefore, while calling the information from any person, the person must be informed the fact, point, allegation, offence, name of accused, specified matter, if any, concerning the matters of the provisions in the B notice so that the person can furnish such information. If such specified information is of such a nature which, if furnished through any mode will serve the purpose, then such person should not normally be called to appear in person." [Emphasis added].

62. The Sindh High Court's view was endorsed by the Supreme Court in *Dr. Arsalan Iftikhar vs. Malik Riaz Hussain and others*, PLD 2012 SC 903 as follows:

"13. The clear and unambiguous pronouncements given in the case titled *Ghulam Hussain Baloch and another v. Chairman, National Accountability Bureau Islamabad and 2 others* (PLD 2007 Karachi 469) were violated by NAB in its two letters. In the cited precedent NAB has been given express guidelines as to its responsibilities while summoning or requiring the attendance of persons/witnesses in an inquiry. As per ratio of the case, before summoning a person to attend, **NAB was duty bound to identify and particularize the information sought from any witness etc. and to state the nexus between such information and the subject of the inquiry being conducted by NAB.** It was observed by the Court that "while calling [for] the information from any person, the person must be informed of the fact, point, allegation, offence, name of accused, specified matter, if any, concerning the matters ... in the notice so that the person can furnish such information". None of this was done by NAB. The Sindh High Court also laid down the principle that if the specified information can be otherwise furnished, then the person "should not normally be called to appear in person". The case of *Ghulam Hussain Baloch supra* gave further clarity to NAB by declaring that "normally a person should not be asked to appear ... for the simple reason that when the document or thing is received by the investigating officer [it] will serve the purpose and if for any reason attendance of such person is [still] required then he can be called by assigning valid and cogent reasons which will appear in the case diary".

*None of these guidelines, reiterated in a number of subsequent cases [e.g. Muhammad Yunus Arain v. Chairman, NAB and another (2008 MLD 1431), Niaz A. Baloch v. Chairman, NAB and 4 others (2008 MLD 1451) and Raja Muhammad Zarat Khan and another v. Federation of Pakistan through Secretary, Ministry of Cabinet Division and 2 others (PLD 2007 Karachi 597)] was followed by NAB. Instead an imperious and pernicious "thana" mentality is apparent from the letter, which NAB persisted with obdurately, as discussed below. **This raises serious questions, prima facie, as to the fairness, competence and professionalism of the members of the JIT.**” [Emphasis added].*

63. This is all the more important considering that the Impugned Order threatens of penal consequences in the event of failure to comply with the direction under Section 36. The learned counsel for the Commission argued that Section 36 does not trigger any penal consequences. This does not appear to be correct. The call for information under Section 36 is made by the Commission by way of a general or special order whilst Section 38(1)(b) specifically empowers the Commission to impose penalty upon an undertaking for failure to comply with an order of the Commission made under the Competition Act and Section 38(5) makes such failure a criminal offence. Therefore, failure to comply with a general or special order passed pursuant to Section 36 can attract the penal provisions of the Competition Act making it all the more necessary for the Commission to specify in an order under Section 36 of the Competition Act as to the reason why the information called for is considered necessary and useful for the purposes of the Competition Act.

64. Thus before invoking an intrusive provision of law such as Section 36 of the Competition Act which allows the Commission access to information about the businesses practices of an undertaking potentially interfering with a Constitutionally guaranteed right it is imperative that the Commission endeavors to satisfy itself whether the price increase that has come to its knowledge *prima facie* indicates any infraction of the law under the facts and circumstances of the case before the Commission. In case the Commission forms a tentative view that it does it must communicate to the undertakings by way of the general or special order under Section 36 the

nexus between the information called for and the purposes of the Competition Act it will serve.

65. On the contrary, in the instant case, the Commission has admitted in its parawise comments that the increase in retail prices by 29% from January, 2018 to January, 2019 might be attributable to the withdrawal of subsidy and hike in gas tariffs, which in itself shows that the price increase by the Petitioners is not wholly unreasonable. The Commission argued that those two factors do not fully explain the price increase hence the call for information but failed to point out where such explanation has been given vide the Impugned Order or the Impugned Letters. Nor has any material or working been placed before me to conclude that the increase in prices by the Petitioners during the relevant period was beyond that which was necessary to compensate for the removal of subsidy and increase in gas prices and that the excessive price increase indicates a potential violation of Chapter II of the Competition Act.

66. Despite the alternate reason available with the Commission for the price increase, the explanation given by the Commission to nevertheless call for the information is that an unreasonable price hike may affect farmers which therefore requires gathering of information from all concerned fertilizer manufacturing undertakings. In fact, Mr. Shahzad Hussain, Registrar of the Commission revealed that one reason for the Commission's concern is the profit margin given that the fertilizer industry is a heavily subsidized industry. I cannot bring myself to agree with such explanations. It appears that the Commission has misunderstood its purpose and function. The Commission is neither responsible to control prices nor to monitor the profits of subsidized industries. The Commission cannot jump the gun at every price increase and put undertakings on the stand. Clearly the Commission was shooting in the dark, hoping to find a contravention which lends credence to the Petitioners objections that the Impugned Letter and Impugned Order constitute fishing and roving exercise.



67. It is reiterated that an increase in prices is only of consequence to the Commission for its mandate under the Competition Act if it constitutes a contravention of the provisions of Chapter II of the Competition Act. Where, as in the instant case, the price increase can admittedly be explained by other factors and no *prima facie* evidence exists that the increase in price was beyond such factors or that any portion of the price increase which could not be explained by such factors indicated a contravention of the provisions of Chapter II of the Competition Act invocation of Section 36 of the Competition Act by the Commission was not warranted even if the Impugned Letters and the Impugned Order were passed with valid authority, which they were not.

Whether the Commission is empowered under Section 36 of the Competition Act to call for information that may be required to be submitted to the SECP under the Companies Regulations, 2020?

68. Merely because the Petitioners may be liable to share particular information with the SECP under certain regulations does not *ipso facto* entitle the Commission to call for such information by exercising the power under Section 36 of the Competition Act. The Commission is only empowered to call for such information under Section 36 that is necessary or useful for the purposes of the Competition Act notwithstanding that the SECP may be empowered to call for it otherwise.

69. Even under Section 50 of the Competition Act the Commission is not entitled to seek the information collected by the SECP pursuant to the Companies Regulations, 2020 unless it is relevant to the performance of its functions and for carrying out the purpose of the Competition Act.

Conclusion:

70. To sum up, I find that the Impugned Letters were issued by the Respondent No. 2 without jurisdiction whereas the Impugned Order was passed by the Respondents No. 2 to 4 in excess of the authority delegated to them pursuant to the Resolution dated 5-11-2019 and as such the

Impugned Letters and the Impugned Order are declared void *ab initio* and even otherwise are liable to be set aside as unlawful being in contravention of Section 36 of the Competition Act as they call for information without stating the reason why such information is considered necessary or useful for the purposes of the Competition Act.

71. In view of the foregoing, the instant petitions are **allowed** in the above terms.

(SAMAN RAFAT IMTIAZ)  
JUDGE

*Announced in open Court on 31<sup>st</sup> day of July, 2025.*

JUDGE

*Approved for reporting.*

Tanveer Ahmed/\*