JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT,
ISLAMABAD

W.P. NO. 4937 OF 2018

M/S AL-UBAID ASSOCIATES

VS

THE FEDERATION OF PAKISTAN, THROUGH SECRETARY, MINISTRY OF LAW, ISLAMABAD AND OTHERS.

Petitioner by	**:**	**Mr. Muhammad Afzal Awan, Advocate**
Respondents by	**:**	**Mr. Abu Muhammad Azfar, Advocate for the Respondent No. 3.** **Mr. Saif Ullah Khan, Advocate for the Respondent No. 4.** **Raja Zamir ud Din Ahmed and Ms. Asia Batool, AAGs.**
Date of hearing	**:**	**6.2.2025**

MUHAMMAD AZAM KHAN, J.

1. The Petitioner [M/s Al-Ubaid Associates] has filed the instant Writ Petition under Article 199 of Constitution of the Islamic Republic of Pakistan, (hereinafter referred to as the **"Constitution"**) being aggrieved by Notice of Final Determination bearing No.37/2015/NTC/GC dated 08.02.2017 **("Impugned Notice")** issued by the Secretary, National Tariff Commission.

2. The brief facts of the case as per the memo of Petition are that the Petitioner imported a consignment of Galvanized Steel Sheets in Coils of Chinese Origin **("Subject Goods")** which arrived into Pakistan on 01.12.2018. The Petitioner wants to pay lawful duty taxes to the Respondent No.2 [Secretary, Ministry of Finance] and get his goods customs cleared but the Petitioner is unable to do so unless the Impugned Notice is declared having no legal effect, set aside or suspended. The Respondent No.3 [National Tariff Commission] has issued the Impugned Notice of Final Determination and Imposition of Anti-Dumping Duties on the Subject Goods under Section 39 of the Anti-Dumping Duties Act, 2015, (hereinafter referred to as the **"Act, 2015"**) which is founded on illegal Provisional Determination dated 03.11.2016 under the Mandate of

Section 37 of the Act, 2015. The said provisional determination was made in absence of jurisdiction after expiry of 419 days from the notice of initiation of investigation dated 11.08.2015. The notice of initiation of investigation was issued on the basis of application dated 29.06.2015 filed by the Respondent No.4 [M/s International Steel Limited] under the Anti-Dumping Duties Ordinance, 2015 (herein after referred to as **"Ordinance"**). The initiation of investigation was made on 11.08.2015 much before the enactment of the Act the only prevailing law at the crucial time, conferring jurisdiction upon the Respondent No.3 but it was violated under apparent designs.

3. The learned counsel appearing on behalf of the Petitioner contended that the Respondent No. 3 has been working for compliance of the mandate of Act whereas no application under Section 20 of the Act, 2015 was received to the Respondent No.3; that in absence of mandatory application, the impugned proceedings and determination were framed by the Respondent No. 3; that in absence of said application, whole proceedings are nothing but flawed with the facts and law of the case and void *ab-initio*; that so called complaint/application dated 29.06.2015, referred into notice of initiation of investigation, was made prior to promulgation of the Act; that the proceedings of initiation or investigation on the basis of said application were unlawful, unwarranted by facts of the case and the applicable law as well as null and void; that on 29.06.2015, there was no Anti-Dumping Duties law in the field; that the earlier Ordinance promulgated as on 26.02.2015 was repealed as on 26.04.2015, it has already repealed the very basic law the "Ordinance-2000"; that further to the unwarranted initiation of the investigation in absence of lawful application, the Respondent No. 3 acted under apparent non-*bonafide* for undue encroachment beyond the scope of jurisdiction barred under Section 37 of the Act, 2015; that the Respondent No. 3 on the basis of unwarranted initiation of investigation in absence of lawful application made the preliminary determination arbitrarily in absence of jurisdiction and built a superstructure thereupon and issued the Impugned Notice which is nothing except void *ab-initio*, *ultra vires* of statute, violative of norms of natural justice "*audi alteram partem*" and nullity in the eyes of law and no alternate remedy is provided; and that the proceedings since investigation till final determination were baseless and unlawful having no legal

effect. The learned counsel requested for acceptance of instant Writ petition and prayed for the following relief:-

i. Declaration that the Impugned Notice is *void ab-initio*, nullity in the eyes of law and of no legal effect, as the same is *ultra vires* of statute Anti-Dumping Duties Act, 2015 without jurisdiction under Sections 23, 37 and 39 in absence of application made under Section 20 of the Act, 2015.

ii. Direction to the Respondents No. 2 & 3 restraining them from recovery of the Anti-Dumping Duty, from the petitioner against his imports, in whatsoever manner, under the impugned Notice of Final Determination and imposition, from the Petitioner.

iii. That during pendency of this case, ad-interim order may be passed for suspension of the impugned Notice of Final Determination, subject to furnishing of post-dated cheque as security with an undertaking as per earlier orders of this Hon'ble Court in identical controversy/matters.

4. The learned counsel representing the Respondents contended that the present Petition is not maintainable under Article 199(1) of the Constitution, given the factual dispute raised therein. They further argued that the Petitioner has an alternative remedy available under Section 70 of the Act, 2015 which allows 'any interested party' to appeal to the Anti-Dumping Appellate Tribunal against the initiation, preliminary determination, or final determination of an investigation. It was asserted that the Petitioner should not be allowed to bypass this statutory remedy and instead invoke the constitutional jurisdiction of this Court. Additionally, the Respondents stated that the Petitioner's assertion that the proceedings of the Commission were *coram non judice*, illegal, and a nullity due to a perceived vacuum between 25.6.2015 and 30.7.2015, caused by the lapse of the Ordinance, is erroneous. In conclusion, they argued that the Petitioner's request for this Court to interpret the Constitution in a manner extending beyond its scope of adjudication would amount to a misinterpretation, and that restricting the legislative authority under Article 89 of the Constitution in this way would result in an unlawful usurpation of legislative power under the guise of judicial interpretation.

5. The learned Assistant Attorney Generals adopted the arguments of the learned counsel for the Respondents Nos. 3 and 4 and prayed for dismissal of instant Petition.

6. I have heard the learned counsel for the parties and perused the record with their able assistance.

7. The main contention and the grounds upon which the Petitioner has filed the instant Writ Petition are:-

i. The provisional determination was made in absence of jurisdiction after expiry of 419 days from the notice of initiation of investigation dated 11.08.2015, upon application filed by Respondent No.4 [M/s International Steel Limited] under the Ordinance; that the initiation of investigation was made on 11.08.2015, much before the enactment of the Act.

ii. That no application under Section 20 of the Act, 2015 was received to the Respondent No. 3 but the same is filed under the Ordinance which was baseless and unlawful having no legal effect.

iii. That earlier to 29.06.2015 (filing of application) by Respondent No.4 the Ordinance had become repealed since 26.06.2015. The Act, 2015 was enacted on 08.09.2015 and notified in the gazette of Pakistan on 10.09.2015, and during that period, Respondent No. 3 has not received the said application of Respondent No.4. Hence, the proceedings of initiation of investigation on the basis of said application were unlawful, unwarranted by facts and law of the case as well as null and void.

8. From the arguments presented by the learned counsel, two key questions arise for consideration: First, whether the National Assembly had the authority under Article 89(2)(a)(ii) of the Constitution to pass a resolution extending the life of the Ordinance retrospectively. Second, whether the Ordinances laid before Parliament were to be treated as bills, which, upon being enacted as Acts of Parliament, would ensure the continuity of the said Ordinances and, as a result, protect the proceedings.

9. The Article 89 of the Constitution vests the power in the President to promulgate the ordinance. This legislative power can only be exercised if the conditions expressly mentioned in sub-Article (1) are in existence. The sub-Article (2)(a)(ii) relates to matters specified in clause (2) of Article 73 while sub-Article (2)(a)(ii) covers matters other than those referred to in paragraph (ii). An

ordinance promulgated under Article 89 of the Constitution has an initial life of 120 days from the date of its promulgation, and it is extendable for another period of 120 days. The second proviso to Article 89(2)(a)(ii) provides that further extension for a further period may be made only once. The sub-Article (3) of Article 89 contemplates that an ordinance laid before the National Assembly, either under sub-paragraph (i) or both the Houses under sub-paragraph (ii), shall be deemed to be a Bill introduced in the respective House as specified therein. Article 89(2)(a)(ii) envisages three distinct eventualities i.e. (i) the Ordinance would stand repealed on the expiration of 120 days from its promulgation if not extended, (ii) before the expiration of 120 days, either of the Houses, upon passing of a Resolution, may disapprove the Ordinance, and (iii) either House may by Resolution extend it for a further period of 120 days. A plain reading of Article 89 clearly shows the intention of the makers of the Constitution. The power vested in the President to promulgate an Ordinance is an exception to the rule that legislative power falls within the exclusive domain of the Parliament. The power vested in the President can only be exercised if the preconditions expressly mentioned in sub-Article (1) are in existence for exercising the legislative powers. The respective House can either disapprove the ordinance before the expiry of 120 days or extend its life for another 120 days. The President has been conferred with the legislative power and the same can only be exercised within the limits prescribed under sub-Article (i) of Article 89 of the Constitution. Reading sub-Article (2) in conjunction with sub-Article (3) clearly shows that both the Houses may provide continuity to an ordinance by enacting it as an Act of the Parliament, as it is deemed to be introduced as a Bill. As noted above, legislative power, except for the limited power vested in the President under Article 89(1) of the Constitution, vests in the legislature namely the Majlis-e-Shoora. It is settled law that the power of legislation includes the power to legislate retrospectively, unless otherwise provided by the Constitution e.g. reference may be made to Article 12 of the Constitution which is a clog on the power to legislate retrospectively.

10. By now it is settled law that like an Act of the Parliament an Ordinance can also be promulgated retrospectively. The august Supreme Court in the case

of *Pakistan Steel Mills Corporation Versus Muhammad Azeem Katper,* **2002 SCMR 1023** has observed and held as follows:

> "*It is settled proposition of law that legislation concerning procedural matters would operate retrospectively. However, legislation not concerning mere procedure but more than a matter of procedure and touching a right in existence at the time of its passing will not operate retrospectively unless Legislature either by express enactment or by necessary intendment given legislation retrospective effect, considering that the dispute having become past and closed transaction having created a right in one's favour could not be taken away by giving retrospective operation to the amended statutory provision."*

In the above said judgment the august Supreme Court reaffirmed the principles and law elucidated in the earlier judgments rendered in the cases of *Commissioner of Income Tax, Karachi Versus Eastern Federal Union Insurance Co.,* **PLD 1982 SC 247** and *Hassan and others Versus Fancy Foundation*, **PLD 1975 SC 1**. It is, therefore, settled law that the legislature, vested with the power to legislate, can also exercise the said powers retrospectively. The power vested in the Houses under Article 89(2)(a)(ii) is of a legislative nature. The power has been conferred by the makers of the Constitution to extend an Ordinance for another term of 120 days and, therefore, includes the power to extend it retrospectively. The Ordinance, therefore, even if extended by giving it retrospective effect, would remain enforced for a total period of 240 days from the date of its promulgation. The act of extending the Ordinance is essentially a legislative power and, therefore, it can be exercised at any time after the expiry of 120 days and before the 240th day from the date of promulgation. Moreover, this being a legislative power, can be exercised retrospectively.

11. The language of Article 89 of the Constitution, particularly sub-Articles (2) and (3), when read together, shows that the Majlis-e-Shoora can provide continuity to an ordinance by enacting it as an Act. It is the mandate of the Constitution that an Ordinance promulgated under Article 89 shall either be laid before the National Assembly or before both Houses, as the case may be, and the same is deemed to be a Bill.

12. The Resolution dated 30-7-2015, extending the Ordinance w.e.f. 25-6-2015 was passed pursuant to the powers vested under Article 89 of the Constitution. By giving retrospective effect the Ordinances were, therefore,

extended for another period of 120-days and, therefore, no vacuum existed between 25-6-2015 and 30-7-2015. The commission and all its acts or proceedings were, therefore, valid and lawfully covered under the Ordinances. Moreover, after the enactment of the Act and the NTC Act of 2015 the Ordinances were clearly provided with continuity by the Majlis-e-Shoora. The investigations initiated by the Commission pursuant to receiving application under Section 20 of the Ordinance on 29-6-2015, and the proceedings conducted by the Commission thereafter, are consequently declared to be valid and within the authority and jurisdiction of the latter. Moreover, the consequences of repeal provided under Article 264 of the Constitution after the expiry of the period of validity of an Ordinance prescribed under Article 89 shall be attracted as held by the august Supreme Court in the Judgment titled *Federation of Pakistan Versus M. Nawaz Khokhar and others,* **PLD 2000 SC 26**.

13. In the instant case, application was filed by Respondent No. 4 to Respondent No. 3 on 29.06.2015 during the period when relevant law was in field and there was no vacuum between 25.06.2015 and 30.07.2015.

14. It is settled law that Courts avoid an interpretation of a constitutional or statutory provision which would create a vacuum. Moreover, the law must be presumed valid and every effort must be made to uphold the same, unless it can be established beyond doubt that it has violated the letter rather than the spirit of the Constitution.

15. In the context of challenging the vires of a law, the august Supreme Court in the case of *Lahore Development Authority through D.G. and others Versus Ms. Imrana Tiwana and others,* **2015 SCMR 1739**, after examining the precedent law, has encapsulated and summarized the principles as follows:-

> **i.** There was a presumption in favour of constitutionality and a law must not be declared unconstitutional unless the statute was placed next to the Constitution and no way could be found in reconciling the two;
>
> **ii.** Where more than one interpretation was possible, one of which would make the law valid and the other void, the Court must prefer the interpretation which favoured validity;
>
> **iii.** A statute must never be declared unconstitutional unless its invalidity was beyond reasonable doubt. A reasonable doubt must be resolved in favour of the status being valid;

iv. Court should abstain from deciding a Constitutional question, if a case could be decided on other or narrower ground;

v. Court should not decide a larger constitutional question than was necessary for the determination of the case;

vi. Court should not declare a statute unconstitutional on the ground that it violated the spirit of the Constitution unless it also violated the letter of the Constitution;

vii. Court was not concerned with the wisdom or prudence of the legislation but only with its Constitutionality;

viii. Court should not strike down statutes on principles of republican or democratic government unless those principles were placed beyond legislative encroachment by the Constitution; and

ix. Malafides should not be attributed to the Legislature.

16. It was also argued that the provisions of the Act, 2015 are in violation of the fundamental right of the Petitioner as enshrined in Article 18 of the Constitution. In this behalf, it is observed that the fundamental right of freedom of trade and profession is not absolute and subject to reasonable restrictions. As noted above the measures provided in the Act, 2015 are remedial to protect the local industry and this is a result of the agreement reached by the World Trade Organization and General Agreement on Trade and Tariff to which Pakistan is also a signatory. The Parliament/Majlis-e-Shoora is competent to enact laws which are for enforcement of the international treaties.

17. The petitioner has also agitated that the provisional determination was made after expiry of 419 days from the notice of initiation of investigation, who has limited jurisdiction to pass the provisional determination "not earlier than 60 days and not later than 180 days, after initiation of investigation". In the relevant sections i.e. Sections 36 and 39 of the Act, 2015, no consequence is provided in case of failure on part of NTC (respondent No.3) to do the needful within the prescribed time. Even otherwise, it is mentioned in the referred sections by way of proviso that the needful shall be done normally within the time prescribed. It is an established preposition of law that where consequence is not provided regarding doing of something within the timeframe the same is directory and not mandatory, if no consequence is provided for failure to do the same within the time prescribed. Reliance is placed on "Ghulam Hassan V. Jamshaid Ali and others" (2001 SCMR 1001).

18. Section 70 of the Act, 2015 provides remedies against:-

i. The initiation of an investigation or a preliminary determination where it is alleged that it does not satisfy the requirements laid down in Sections 23 and 37 respectively;

ii. An affirmative or negative final determination by the Commission under section 39;

iii. Any final determination pursuant to a review;

iv. An order of the Commission for termination of investigation under section 41; or

v. A determination of the Commission under Section 52.

Therefore, the Petitioner has an alternative remedy available under Section 70 of the Act, 2015, and an appeal lies to the Anti-Dumping Appellate Tribunal against the initiation of investigation, preliminary determination, or final determination, as is the case in the present matter.

19. For what has been discussed above, the instant petition is without merits, and therefore, accordingly **dismissed**.

(MUHAMMAD AZAM KHAN)
JUDGE

Announced in the Open Court on _____ day of February, 2025.

JUDGE

//Kamran//*

Approved for Reporting
Blue Slip added.