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Judgment Sheet

**IN THE LAHORE HIGH COURT
MULTAN BENCH, MULTAN
JUDICIAL DEPARTMENT**

Case No. W. P. No. 6594 of 2017.

Sajjad Hussain etc.

Versus

Deputy Commissioner etc.

JUDGMENT

Date of hearing:	15.05.2017.
Petitioners by:	Malik Muhammad Zafar Iqbal, Advocate for the petitioners. M/s Ch. Abdul Ghani, Mahmood Ashraf Khan and Ch. Muhammad Siddique, Advocates for the petitioners in connected writ petitions. M/s Inam Ullah Khan, Malik Abdul Ghaffar Sial, Mian Tahir Iqbal, Mahar Shah Muhammad Sahu, Mahr Allah Bakhsh Hiraj, Haji Tariq Aziz Khokhar and Tariq Mahmood Dogar, Advocates for the petitioners in connected contempt petitions.
Respondents by:	Barrister Khalid Waheed and Mirza Muhammad Saleem Baig, Additional Advocates General, Punjab. Malik Muhammad Bashir Lakhesir, Assistant Advocate General, Punjab. Shaukat Ali, Secretary Food, Asif Bilal Lodhi, Director Food, Government of the Punjab and Zahoor Ahmad, Assistant Commissioner, Kot Addu. Gohar Mushtaq Bhutta, Director Anti-Corruption Establishment, Multan.

Shahid Jamil Khan, J. This judgment shall also decide Writ Petition Nos. 6414, 6761, 6932, 7008 of 2017, Crl. Org. Nos. 400, 401, 402, 409, 428, 392, 399, 444-W of 2017 and Crl. Org. No. 683 & 684-W of 2016, as issue involved in these petitions relates to exercise

of discretion for distributing “*BARDANA*” under Wheat Procurement Policy, 2017 dated 07.03.2017 (“**the Policy**”).

2. Numbers of writ petitions were filed alleging misuse of discretionary powers under the Policy while distributing *BARDANA* to the growers, which were disposed of with directions, after converting the petitions into representations, for attending petitioners’ grievance in accordance with law. The petitioners have filed the contempt petitions, alleging defiance of Court’s orders in addition to alleging maladministration in distribution of *BARDANA* to some fictitious persons having no agricultural land in relevant areas. Similar grievance was voiced through pending writ petitions, therefore, cases are consolidated.

3. It is argued by petitioners’ side that a mafia, in collusion with officials of respondents, is active at the Distribution Centers. Small farmers are made to stand in lines to submit their applications, yet *BARDANA* is being distributed to the favourites upon political influence or to fictitious persons by manipulating records. In Crl. Org. No. 400-W of 2017, learned counsel, through an application has placed on record certain documents to substantiate his allegation of mal-administration and distribution of *BARDANA* to fictitious persons. He has pointed out some persons to whom *BARDANA* is consistently being issued every year, and, as per his assertion, those persons do not cultivate any agricultural land in the relevant area of Distribution Center. Number of other illegalities have been pointed out in this and connected petitions.

4. Asif Bilal Lodhi, Director Food Punjab (“**Director**”) appeared in Court on 11.05.2017. By referring to different clauses of the Policy it was apprised that *BARDANA* was being distributed to meet the wheat purchase target of 4.0 MMT; to implement the Policy district and tehsil wise allocation was made by establishing Distribution Centers. Applications of the growers are being received and entertained on “*first come first served*” basis. When asked whether

distribution of *BARDANA* on first come first served basis was rationalized to ensure equitable distribution among the growers, he could only explain that whoever comes first in a day was given priority.

It transpired from the Policy in light of his submission that while distributing *BARDANA*, preference was to be given to small farmers and maximum of 200 bags could be given to one farmer. However, he could not deny that some similarly placed farmers were not being given a single bag. He was put under notice, why the clause of distribution on "*first come first served*" may not be declared against Article 25 of the Constitution of Islamic Republic of Pakistan, 1973 ("**Constitution**"). Certain queries were raised, to answer the same case was adjourned.

5. Barrister Khalid Waheed, learned Additional Advocate General Punjab along with Shaukat Ali, Secretary Food, Punjab appeared to defend the Policy and respond to the queries raised in order dated 11.05.2017. Learned AAG apprised that Government is not under any statutory obligation to purchase wheat from growers, however, wheat is purchased for number of reasons; First is that Government wants to have wheat reserves to meet with unforeseen circumstances or calamity and the other reason is to support the growers by purchasing it on more than the market price; like the rate of wheat in open market is Rs.1200/- per 40 k.g. and Government is purchasing it at Rs.1300/- per 40 k.g. Assisting on the Policy, he has apprised that two types of bags, known as *BARDANA* are being supplied by the Government; one is Polypropylene bag having capacity of 50 k.g. and other Jute bag having capacity of 100 k.g. He submitted that the bags are chemically treated and were manufactured as per given specifications to preserve the wheat for a longer time. He explained that such bags could not be allowed to be manufactured and supplied by private sector in open market due to an apprehension that pirated copies of the bags will be made which may cause damage to wheat reserves. Explaining

the query on discrimination, he submitted that the limit of 200 bags of 100 k.g. maximum, is imposed for produce from 20 Acres and a grower who has been issued 200 bags can again get another lot of bags when *BARDANA* is distributed amongst other growers in the next row.

Learned AAG and the Secretary Food Punjab could not deny that there are number of farmers/growers, including petitioners, to whom not a single bag has been distributed, whereas other farmers having similar land cultivated are provided with 200 bags. It could also not be denied that the Policy “*first come first served*” is capable of being misused. However, it is argued that 70% *BARDANA* has been distributed and that any adverse order at this stage would prejudice the process of purchasing crop to create the reserves and shall cause financial loss to the growers as the crops are lying in open fields.

6. Heard, record perused.

7. This Court is of considered view that discretion to distribute *BARDANA* on “*first come first served*” basis is not only susceptible to misuse but is being exercised in nontransparent and discrete manner by officials of the respondents at Distribution Centers throughout Punjab. It is an undeniable fact that every grower is not given *BARDANA* to purchase wheat crop in proportion to the crop cultivated by him, rather most of farmers/growers have not been given a single bag.

Supreme Court of Pakistan, in *M/s Mustafa Impex v. The Government of Pakistan* (PLD 2016 SC 808) has reemphasized the importance of “*structured exercise of discretionary powers*” by referring to ample case law on the subject, i.e., *Amanullah Khan and others v. The Federal Government of Pakistan* (PLD 1990 SC 1092), *Government of NWFP v. Majee Flour Mills (Private) Limited* (1997 SCMR 1804) and *Muhammad Amin Muhammad Bashir v. Government of Pakistan* (2015 SCMR 630). The doctrine of

‘structured discretionary power’ envisages the exercise of power in fair, transparent and indiscrete manner.

Equality Clause contained in Article 25 of the Constitution has consistently been regarded as inalienable fundamental right. At times legislative instruments were put to the test of *ultra vires* for having discriminatory characteristics. Guidelines to ensure and implement equality were elaborately given in I.A. Sharwani and others v. Government of Pakistan (1991 SCMR 1041). The enunciated principals were endorsed in number of subsequent judgments including Govt. of Balochistan through Adl. Chief Secretary v. Azizullah Memon (PLD 1993 SC 341), relevant part of which is reproduced:-

“5.

The, equal protection clause was also considered in Zain Noorani v. Secretary of the National Assembly of Pakistan PLD 1957 Kar. 1. In Malik Muhammad Usman v. The State and another PLD 1965 Lah. 229 sections 8 and 11 of the Frontier Crimes Regulation providing for reference of proceedings to a Jirga were held to offend against Fundamental Right No. 15 of 1962 Constitution for the reason that the Commissioner and the Deputy Commissioner were given uncontrolled discretion to select particular cases and even particular accused in the same case for the discriminatory procedure which was not governed by any settled principle. The observations made in Jibendra Kishore and Waris Meah were reiterated in East and West Steamship v. Pakistan (PLD 1958 SC 41) that "where a statute is not ex facie discriminatory but is capable of being administered in a discriminatory manner, the party challenging its constitutionality has to show that it has actually been administered in a discriminatory manner". Thus, where the statutory functionary acts mala fide or in a partial, unjust, oppressive or discriminatory manner, his action can be challenged for violation of equality clause of the Constitution. In *F.B. Ali's case* PLD 1975 SC 506 the challenge to amendments in Pakistan Army Act and Ordinance IV of 1967 was made inter alia as violative of equality clause of 1962 Constitution. This Court repelled it on the basis of principles laid down in Waris Meah's case and observed that in this case if the Foreign Exchange Regulation Act had set up a Tribunal of exclusive jurisdiction, with a procedure different from the Code of Criminal Procedure, the challenge would not have succeeded as the offenders under the Foreign Exchange Regulation could validly and reasonably be considered a different class from the offenders under the ordinary law. Fauji Foundation's case PLD 1983 SC 457 ruled that legislation in regard to an individual can be made provided it is not discriminatory. In *IA. Sherwani's case* 1991 SCMR 1041 after

considering the judgments in F.B. Ali's case PLD 1975 SC 506, Abdul Wali Khan's case PLD 1976 SC 57, Aziz Begum's case PLD 1990 SC 899, Shirin Munir and others v. Government of Punjab PLD 1990 SC 295 and several judgments of the Supreme Court of India, the following principles were deduced

- "(i) that equal protection of law does not envisage that every citizen is to be treated alike in all circumstances, but **it contemplates that persons similarly situated or similarly placed are to be treated alike;**
- (ii) that reasonable classification is permissible but it must be founded on reasonable distinction or reasonable basis;
- (iii) that different laws can validly be enacted for different sexes, persons in different age group, persons having different financial standings, and persons accused of heinous crimes;
- (iv) that no standard of universal application to test reasonableness of a classification can be laid down as what may be reasonable classification in a particular set of circumstances, may be unreasonable in the other set of circumstances;
- (v) that a law applying to one person or one class of persons may be constitutionally valid if there is sufficient basis or reason for it, but a classification which is arbitrary and is not founded on any rational basis is no classification as to warrant its exclusion from the mischief of Article 25;
- (vi) that **equal protection of law means that all persons equally placed be treated alike both in privileges conferred and liabilities imposed;**
- (vii) that in order to make a classification reasonable, it should be based
 - (a) on an intelligible differentia which distinguishes persons or things that are grouped together from those who have been left out;
 - (b) that **the differentia must have rational nexus to the object sought to be achieved by such classification.**"

[emphasis supplied]

The discretion given through the Policy is not structured, therefore, is not being exercised in transparent manner. Equality clause is being offended; because the price, higher than market price, to purchase wheat crop is a privilege offered, yet a number of equally placed farmers/growers are not given a single bag. The Apex Court in M/s Al-Raham Travels and Tours (Pvt.) Ltd. and other v. Ministry of

Religious Affairs, Hajj, Zakat and Ushr through Secretary and other
(2011 SCMR 1621) held,

“A policy can be judicially reviewed only if it is found; in conflict with any provision of law, in violation of any fundamental right, arbitrary or was made/employed to give benefit to a person or group of persons with mala fide intent.”

Notwithstanding the facts that the Policy is not only capable of being applied discriminately and discretionary powers are being used in nontransparent manner; this Court is constrained not to strike down the Policy, in presence of the facts that crop is lying under the sky in open field and delay in its collection shall cause loss of crop, which is national asset, but grower shall also suffer as they shall be left on the mercy of investors, who shall be at liberty to determine forced sale price under compelling circumstances.

8. At this stage, Secretary Food has undertaken and ensured that remaining quantity of *BARDANA* shall be distributed in fair and transparent manner; therefore, these petitions are transmitted to the Secretary Food. He is directed to ensure that bags are distributed equally amongst the similarly placed growers; small farmers, having minimum cultivated holding, shall be given preference. He shall secure interest of those growers also who could not approach this Court.

Learned AAG has undertaken on behalf of the Government of Punjab that future Policies for purchase of wheat crop from the farmers shall be framed, keeping in view the law laid down by Apex Court, by ensuring equal opportunity to similarly situated farmer, after structuring the discretion for this purpose to ensure transparency and fairness.

9. For initiation of inquiry into the allegation of malpractices and distribution of *BARDANA* to fictitious persons, attendance of Director Anti-Corruption Establishment Multan was directed. The

Director, present in Court, has ensured to initiate inquiry if petitioners approach him.

It is pointed out by learned counsel for the petitioners that growers cannot afford to approach the Directorate of Anti-Corruption, therefore, officials of the Directorates of Anti-Corruption may be directed to inquire the matter at Tehsil Head Quarters of Food Department.

Learned AAG is directed to ensure initiation of inquiry into the allegations by respective Directorates of Anti-Corruption at Tehsil Head Quarters of Food Department. The petitioners or other complainants shall be called at Tehsil Head Quarters for this purpose and culprits shall be proceeded against in accordance with law. Respective Directorates shall also prepare detailed report of the inquiry, pointing out defects and loopholes in execution of the Policy. The Report shall be transmitted to the Secretary Food Punjab and Deputy Registrar (Judicial) of this Court in 60 days.

10. The Secretary Food shall submit report of the compliance of this order to Deputy Registrar (Judl.) of this Court within thirty days.

This and connected petitions stand ***disposed of*** accordingly.

(Shahid Jamil Khan)
Judge

APPROVED FOR REPORTING.

Judge

A.W.