

**JUDGMENT SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT**

Writ Petition No.208662 of 2018

**Ahmad Mehmood
Versus
The Government of Punjab through its Chief Secretary &
others**

J U D G M E N T

Date of hearing: 05.12.2018.
Petitioner by: Mr. Hassan Iqbal Warraich, Advocate.
Respondents by: M/s Muhammad Ejaz, A.A.G., Abdus Salam, Senior Law Officer and Umar Shahid, Advocate / Legal Advisor for respondent-TEVTA.

MUHAMMAD SAJID MEHMOOD SETHI, J.- This consolidated judgment shall dispose of instant writ petition alongwith following connected writ petition as common questions of law and facts are involved in these cases:-

W.P. No.208666 of 2018 titled *Ahmad Mehmood v. The Government of Punjab through its Chief Secretary & others*

2. Through instant petition, petitioner has challenged the vires of Rule 61(2) and (3) of the Punjab Procurement Rules, 2014 (“**the Rules of 2014**”) as substituted vide Notification No.S.O(Cabinet-I)2-9/2015 dated 06.01.2016, being ultra vires the Constitution of the Islamic Republic of Pakistan, 1973 (“**the Constitution**”), with the following prayer:-

“In the light of above submissions, it is most respectfully prayed that this writ petition may kindly be accepted and the rule 61(2)(3) of the Punjab Procurement Regulatory Authority Rules, 2014 may very graciously be declared as *ultra vires* to the Constitution of the Islamic Republic of Pakistan.

It is also prayed that during the pendency of instant writ petition, the operation of rule 61(2)(3) of the Punjab Procurement

Regulatory Authority Rules, 2014 may kindly be suspended in the interest of justice and fair play.”

In the connected petition, petitioner has sought direction from this Court for the respondents No.4 to 7 to issue work order to petitioner being the lowest / successful bidder, with the following prayer:-

“In the light of above submissions, it is most respectfully prayed that this writ petition may kindly be accepted and the petitioner may kindly be declared as successful bidder and the respondents No.4 to 7 may graciously be directed to issue work order to the petitioner being lowest bidder.

It is also prayed that during the pendency of instant writ petition, the respondents may kindly be directed not to issue work order to the respondents No.3 & 4 in the interest of justice and fair play.”

3. Learned counsel for petitioner submits that Rule 61 of the Rules of 2014 was amended on 06.01.2016 by adding certain substitutions encouraging public sector manufacturer units and discouraging competition to other private sector bidders, purportedly under Section 26 of the Punjab Procurement Regulatory Authority Act, 2009 (“**the Act of 2009**”), which is *ultra vires* the Constitution and against the spirit of the Act of 2009. He adds that respondents No.1 & 2 have allowed respondent No.3 to participate in bidding process, whereas it does not qualify the test of manufacturer, because it is a service providing public sector institution as per Section 5 of the Punjab Technical Education and Vocational Training Authority, 2010. Submits that impugned amendments are against economic competition and also in violation of the Competition Act, 2010 as well as other allied economic laws. He further submits that impugned amendments are not made in any other Province or Federal Government, except in the Punjab, which is clear discrimination under Article 25 of the Constitution. In the end, he submits that the impugned amendments in Rule 61(2)(3) of the Rules 2014 also offend the Articles 4, 5, 9 & 23 of the Constitution, thus, the same are not

sustainable in the eye of law. He has relied upon Brig. (Retd.) F.B. Ali and another v. The State (PLD 1975 Supreme Court 506), I.A. Sharwani and others v. Government of Pakistan through Secretary, Finance Division, Islamabad and others (1991 SCMR 1041), Government of Balochistan through Additional Chief Secretary v. Azizullah Memon and 16 others (PLD 1993 Supreme Court 341), Mehram Ali and others v. Federation of Pakistan and others (PLD 1998 Supreme Court 1445), Nizamuddin and another v. Civil Aviation Authority and 2 others (1999 SCMR 467), Federation of Pakistan and others v. Shaukat Ali Mian and others (PLD 1999 Supreme Court 1026), Province of Punjab through Chief Secretary and another v. Samuel Bhatti and others (2009 SCMR 1034), Mst. Attiyya Bibi Khan and others v. Federation of Pakistan through Secretary of Education (Ministry of Education), Civil Secretariat, Islamabad and others (2001 SCMR 1161), Asim Qureshi, Chief Editor, Haftroza Roshan, Gujranwala v. Farooq Ahmad Khan Leghari, President, Islamic Republic of Pakistan and another (PLD 1999 Lahore 76), Saleem Raza and 31 others v. The State (PLD 2007 Karachi 139) and Kasturi Lal Lakshmi Reddy v. State of J&K (AIR 1980 SC 1992).

4. Conversely, learned Law Officers, duly assisted by learned counsel for respondent-TEVTA, defend the impugned amendments and submits that reasonable classification is permissible, hence, competent authority has brought amendments in the rules keeping in view the mandate of law as well as the Constitution. He submits that Woodworking Service Centre Rawalpindi (“Centre”) was transferred from Pakistan Small Industries Corporation to TEVTA in the year 2001 which has been upgraded with state of the art machinery, and apart from training and allied services, Centre utilizes its available mini production lines and participates in open tendering process under PPRA to meet its operational expenses. In the end, he submits that instant as well as connected petition is liable to be dismissed in circumstances.

5. Arguments heard. Available record perused.

6. A combined reading of the provisions of the Punjab Procurement Regulatory Authority Act, 2009 read with the Punjab Procurement Rules, 2014 as they existed prior to amendment through notification dated 06-01-2016 shows that their purpose and object is to ensure transparency and fair competition in the process of public procurement. Primary function of the Punjab Procurement Regulatory Authority established under the Act of 2009 is to take measures and exercise powers as may be necessary for improving governance, management, transparency, accountability and quality of public procurement. The role of the Regulatory Authority is that of a gamekeeper, it is to watch the lawful interests of the procuring agency as well as the interested bidders or contractors interested and ensure a level playing field for fair competition to flourish as the confidence of the market is grounded in fair competition.

7. The impugned sub-rules (2) and (3) of Rule 61 of the Rules of 2014, by virtue of which private sector is stated to be deprived of participation in the bidding process, are reproduced hereunder:-

“61. Exemption.- (1) ...

(2) A procuring agency may directly procure goods from a public sector manufacturing unit on fixed price or negotiated price where value of procurement does not exceed one million rupees.

(3) Where value of goods exceeds one million rupees or in a competitive bidding, the public sector manufacturing unit participating in the bid may, within three working days of opening of the bids, match the lowest evaluated bid.

(4) ...”

The amendment dated 06-01-2016 by virtue of which sub-rules (2) and (3) have been substituted was made on the strength of Section 26 of the Act of 2009, which is reproduced hereinbelow:-

“26. Rules. – The Government may, by notification, make rules for carrying out the purposes of this Act.”

8. Undoubtedly rules and regulations are subordinate and delegated legislation deriving authority and legal cover from the provisions of parent statute. Power to make subordinate legislation / rules / regulations is derived from enabling statute and the delegatee is not authorized to make a provision beyond the policy of the statute. It cannot override the statute either by exceeding the authority or by making provisions inconsistent with the statute. General power to make rules or regulations for carrying out or giving effect to the statute is strictly ancillary in nature and cannot enable the authority on whom the power is conferred to extend the scope of general operation of the statute. Rule making authority cannot widen the purpose of statute or to add new and different means to carrying them out or to depart from or vary its terms. Reliance is placed upon *Sunbiz Private Limited (7 News TV Pakistan) through Abbas Ali Khan v. Federation of Pakistan through Secretary Ministry of Information and 3 others* (2018 YLR 1785).

9. A rule-making body cannot frame rules / regulations in conflict with or gating from the substantive provisions of the law or statute under which the rules / regulations are framed. A rule / regulation, which the rule-making authority has power to make, is liable to be declared invalid on the following grounds:-

- (1) Powers entrusted for one purpose are deliberately used with the design of achieving another, itself unauthorized or actually forbidden.
- (2) It shows on its face a misconstruction of the enabling law or a failure to comply with the conditions prescribed under the parent statute for the exercise of the powers.
- (3) It is not capable of being related to any of the purposes mentioned in the parent statute.

10. Needless to say that when the legislature confers power on authority to frame rules / regulations it is expected that such powers will be used with good intention, in a responsible spirit and in the true interest of the public and in furtherance of the object for

the attainment of which such powers were conferred. It cannot be said that an unlimited right of delegation is inherent in the legislative power itself. This is not warranted by the provisions of the Constitution. Legitimacy of delegation depends entirely upon its being used as an ancillary measure which the legislature considers to be necessary for the purpose of exercising its legislative powers effectively and completely. The legislature must retain in its own hands the essential legislative functions which consist in declaring the legislative policy and laying down the standard which is to be enacted into a rule of law, and what can be delegated is the task of subordinate legislation which by its very nature is ancillary to the statute which delegates the power to make it. Rules / regulations continue to be rules subordinate to the parent statute, and though for certain purposes, including the purpose of construction, they are to be treated as if contained in the statute, their true nature as subordinate legislation is not lost. Rule of interpretation is that if subordinate legislation is directly repugnant to the general purpose of the statute which authorizes it, or indeed is repugnant to any well-established principle of statute, it is either *ultra vires* altogether, or must, if possible, be so interpreted as not to create an anomaly. If reconciliation was found to be impossible between the provision of statute and the rules / regulations made thereunder and the latter is found to be in excess of the statutory power authorizing them, the subordinate provision, the rules / regulations so made, must give way and such rules / regulations shall be held to be *ultra vires* the parent statute.

11. The parent statute does not bestow any power upon the respondent-authorities to discriminate between the public and private sectors from participating in the bidding process. Article 18 of the Constitution safeguards fundamental rights of the petitioner with regard to freedom of trade, business and profession. For facility of reference, Article 18 is reproduced hereunder:-

“18. Freedom of trade, business or profession. Subject to such qualifications, if any, as may be prescribed by law, every citizen shall have the right to enter upon any lawful profession or occupation, and to conduct any lawful trade or business:

Provided that nothing in this Article shall prevent—

- (a) the regulation of any trade or profession by a licensing system; or
- (b) the regulation of trade, commerce or industry in the interest of free competition therein; or
- (c) the carrying on, by the Federal Government or a Provincial Government, or by a corporation controlled by any such Government, of any trade, business, industry or service, to the exclusion, complete or partial, of other persons.”

12. Likewise, Article 25 of the Constitution provides equal protection of law to the citizens, thus, no restriction can be imposed upon a citizen relating to the freedom of trade, business or profession and if the same is imposed, it will be subject to Article 18 *ibid*, which does not confer on any individual or association, the monopoly right to carry on trade or business without competition from other eligible persons rather it prohibits the same. If all the actions of the State are also subject to Article 18 of the Constitution and if any action of the State intends to eliminate competition into a trade, the same shall also be hit by the said Article, as it does not permit the State to confer any privilege on a private person or any private or public corporation to have a monopoly in any trade, business, industry or service. Article 25, while ensuring equality of all citizens, covers the entire field of State action, it would extend not only when a citizen is discriminated against in the matter of exercise of his rights, but also in matter of granting privileges *viz a viz* giving jobs by the State granting permits or licenses, inviting tenders for Government contracts or issuing quotas. Article 25 of the Constitution is as follows:-

“25. Equality of citizens. (1) All citizens are equal before law and are entitled to equal protection of law.

(2) There shall be no discrimination on the basis of sex.

(3) Nothing in this Article shall prevent the State from making any special provision for the protection of women and children.”

13. A rule of procedure also cannot be excluded from Article 25 of the Constitution as every citizen is entitled to availability of same procedural avenues as are provided to others including the State institutions, in like circumstances. Any discrimination in the procedure while dealing with the citizen shall offend Article 25 of the Constitution, whereas, the aforesaid amendment is highly discriminatory in nature while jeopardizing the rights of the petitioner. Article 25 not only protects the petitioner against discriminatory procedural laws, but equally applies against the discriminatory substantive laws. As a whole, the principle on which the doctrine of equality is founded, is that persons in similar circumstances must be governed by the same laws and assumption that circumstances are similar for the whole society holds good only in case of laws which operate equally on all persons in the realm and such laws are founded by experience to be wholly inadequate to cover all activity of the society. It has always been the practice to supplement the body of general laws with special laws i.e. the laws which apply to persons engaged in particular activities and since the effect of these special laws is to ‘classify persons’ and things into different groups, the process by which such legislation is governed is called ‘classification’. The process does not offend against the equal protection principle if the special law operates equally on all members of same class or group.

14. Due process under Article 4, freedom to carry out a lawful trade or business under Article 18 by maintaining fair competition and the right against discrimination under Article 25 of the Constitution collectively provide the requisite constitutional underpinning to maintain level playing field, in all public sectors, at all times. Reliance is placed on Barrister Sardar Muhammad v.

Federation Of Pakistan and others (PLD 2013 Lahore 343). The rule is well settled that a State may classify persons for purpose of legislation and pass laws applicable only to persons and objects within designated class according to the public object, it has in view. What is prohibited is class legislation against some and favouring others, which has happened in the instant case where the State is favouring the public manufacturers on the cost of elimination of private sector manufacturers, therefore, the said amendment to that extent is liable to be declared *ultra vires* the Constitution.

15. Equal protection of the laws does not mean that every citizen, no matter what his condition, must be treated in the same manner. The phrase 'equal protection of the law' means that no person or class of persons shall be denied the same protection of law which is enjoyed by other persons or other class of persons in like circumstances in respect of their life, liberty, property or pursuits or happiness. This only means that persons, similarly situated or in similar circumstances, will be treated in the same manner. A 'valid classification test' of any enactment would be that the enactment must not be arbitrary in nature. It must be founded on intelligible differentia which distinguished persons or things that are grouped together from others not falling in that group but such differentia must have a rational relation to the object sought to be achieved by the enactment in question. The object of classification should be lawful and it should be made in good faith. But in the instant case, the classification provided between public manufacturer and private manufacturer in the sub rules (2) and (3) of Rule 61 would not pass the classification test mentioned above, therefore, the said amendment in the Rule is liable to be declared as *ultra vires*. To determine the constitutionality of a law, when challenged as discriminatory and offending against the guarantee in Article 25 of the Constitution, it

is the first duty of the Court to examine the purpose and policy of the statute and then to find out whether the classification made by the law has reasonable relation to the object which the legislature seeks to achieve. The purpose and object of the Act has to be ascertained from an examination of its title, preamble and provisions. Whereas after going through the title, preamble and provisions of the Act of 2009, it can be concluded that the primary purpose to establish Procurement Regulatory Authority was to regulate procurement process of goods, services and works in the public sector after a competitive bidding process. But the said amendment in the sub rules 61(2) and (3) of the Rules of 2014 is against the Act of 2009 as well as the very intent of Articles 4, 18 and 25 of the Constitution as undue advantage has been given to the public sector manufacturers on the private sector manufacturers, therefore, same are not sustainable in the eye of law. However, the transactions already concluded pursuant to the impugned sub rules 61(2) and (3) are saved and protected on the doctrine of past and closed transactions.

16. Learned Law Officer, however, argued that impugned amendment in Rule 61 of the Rules of 2014 cannot be questioned in constitutional jurisdiction of this Court as it has been made in exercise of powers conferred under the parent statute. This argument, if accepted, would negate the object of the Act and the principles enunciated in the case-law referred to above. Section 26 of the Act does not state that the Government may "in its absolute and unfettered discretion" make rules. This Court has the duty to ensure that governmental institutions abide by the constitutional constraints on their power. The argument of the respondents is misconceived. Learned counsel for petitioner has argued that respondent No.3 is not a manufacturer, because it is a service providing public sector institution, and, therefore, respondents No.1 & 2 have illegally allowed respondent No.3 to participate in

bidding process. Suffice it to say that no convincing evidence / material has been brought on record which even otherwise involves disputed questions of facts, and this Court cannot resolve this factual controversy while exercising constitutional jurisdiction.

18. In view of the above discussion, the impugned sub rules 61(2) and (3) of the Rules of 2014 are declared to be ultra vires the provisions of the Act of 2009 read with Articles 4, 18 and 25 of the Constitution of Islamic Republic of Pakistan, 1973, and the same are struck down. Resultantly instant petition is **allowed** in the above terms, and connected W.P. No.208666 of 2018 is **disposed of** in view of the observations contained in paragraph No. 15.

(Muhammad Sajid Mehmood Sethi)
Judge

Announced in open Court on 06.02.2019.

Judge

A.H.S.

Approved for reporting