

SYNOPSIS OF MUSTAFA IMPEX (2016 PLD 808)

1. The issue before the Honorable Supreme Court was that whether the notifications issued by the Secretary Revenue Division / Additional Secretary Revenue Division, with the approval of Advisor to the Prime Minister, have been validly issued and can be called or considered as "issued by the Federal Government" as relevant sections conferred those powers upon the Federal Government. Therefore primarily the issue before the Supreme Court was as to what is the meaning of the term "Federal Government" as per Constitution?

2. The Honorable Supreme Court analyzed Chapter-3 of Part-III of the Constitution, which deals with the definition and functions of the "Federal Government". In the process the Apex Court also examined the concept of "executive powers" and the Rules of Business.

Para 17

3. The Honorable SC traced the constitutional history from the Government of India Act 1833 through to the Government of India Act 1935 and also the Constitutional development from 1956, 1962 and 1973 Constitution as it stood originally and important amendments/changes in various provisions of the 1973 Constitution especially in Chapter 3 of Part III.

Para-19-41

4. Special reference was made to section 7 of Chapter II of the Government of India Act, 1935. As per section 7 of the Government of India Act, 1935, the executive authority of the federation shall be exercised on behalf of His Majesty by the Governor-General, either directly or through officers sub-ordinate to him. It was

Para-25

spec...cally given in the said section that federal legislature is not prevented from conferring functions upon sub-ordinate authorities.

5. Functions of the "Governor General" were defined to be as his powers and duties in exercise of executive authority of the federation and to any other powers and duties conferred or imposed on him as Governor General by or under Government of India Act 1935. However, the powers exercisable by the Governor General by the reason that they have been assigned to him by His Majesty under Part-I of the Government of India Act, 1935, were excluded from the definition of "functions" as defined above (meaning thereby that if the law giver directly vests certain powers into a subordinate authority of Federal Government then exercise of such powers will not be "Function".

Para-25

6. Discussion on the term "Federal Government" starts from para-27 wherein reference has been made to section 3(8ab) of the General Clauses Act.

Para-27-28

7. The Honorable Supreme Court in para-30 opined that the heading "the Federal Executive" in Chapter-2 of Part-II of the 1935 Act is contextually synonymous to the term "Federal Government" as used in 1973 Constitution. Articles 90 and 99 of the 1973 Constitution have been drafted on the foundations of section 7 to 10 of the Government of India Act 1935.

Para-30-31

8. For defining the term "Federal Government" special reference was made to Article 90 of the 1973 Constitution. Article 99 was also referred and discussed in detail. Article 99 as it stood originally had provisions relating to the federal government to delegate any of its functions to officers/authorities sub-ordinate to it but after the 18th Amendment, Article 99 has been substantially changed and it does not provide any power to the federal government to delegate any of its

Para-35

Para-37 to 4:

functions to sub-ordinate authority. As per Article 98 now Majlis-e-Shoora Parliament may by law confers functions upon officers sub-ordinate to the Federal Government.

9. It has also been inferred by the Court that executive power of the Federal Government can be exercised through mandatory modalities of Rules of Business. Rules of Business are binding on the government and violation of the term thereof can be fatal to exercise of the executive power.

Para-40

10. The Honorable Court made quick over view of the Rules of Business, special reference was made to;

Para-42-43

- (i) "Rule-2 Clause (iii) which defines "business" as all work done by the Federal Government.
- (ii) Rule-3 deals with "allocation of business" and Clause (3) provides that business of the government shall be distributed among various Divisions.
- (iii) Rule 5 deals with "transaction of business" that no important policy decision is to be taken except with the approval of the Prime Minister.
- (iv) Rule 15 makes it mandatory to obtain the approval of the Prime Minister in relation to important policy matters.
- (v) Rule 16, 16m 17, 18 & 20 have been discussed in detail.

Para-44-47

11. Discussion on the issue as to what is the meaning of the term "Federal Government", arguments of both the sides and that of the amicus curiae have been given in para-48 to 54.

Para-48-54

12. In para-55 to 57 Constitutional law of England has been discussed.

13. The Honorable Court has concurred with the concept of "business" (as defined in rule-2) that it includes both "executive" and "legislative work". However the Honorable Court has observed that there is vast gulf between considering, or taking policy decisions regarding legislative measures and the actual power to frame or enact legislation, whether primary or secondary. They also observed that the executive as such cannot make laws, which is the legislative function, distinct from the executive function meaning thereby the Honorable Court itself has opined that making law is legislative functions which is not covered by the term "business" as defined in rule-2 of the Rules of Business.

Para-58

14. The Supreme Court while making reference to Rule-27 of the Rules of Business has opined that "all statutory rules, including those of a fiscal nature, are subordinate legislation. The power to enact subordinate legislation has to be conferred by substantive law. The Rules of Business, which merely regulate procedural modalities, cannot conceivably do so. Further, legislative business"

Para-59

- (a) is restricted to proposal for legislation;
- (b) consultation with other divisions; and
- (c) to propose it before the House.

Para-60

And that from that stage onwards the powers of the executive comes to end and the legislature takes over. Meaning thereby that the Rules of Business do not cover any "legislative work" except the formation of statutory rules including those of fiscal nature which are "subordinate legislation" and the power to enact subordinate legislation has to be conferred by substantive law. The Honorable Court concluded that rules of business do not confer any legislative power.

15. Section 3 of the Sales Tax Act confers the power on the "federal government". The Supreme Court as per this judgment declared that federal government could not have conferred this power (of the federal government) falling in the executive functions on any other subordinate authority, or body, without violating the Constitution as constitutional power to delegate functions to officials or other authorities has been taken away. We have to take pause to understand para-62 of the judgment.

Para-62

15.1 As per my understanding, Article 99, as it existed originally, dealt with the conduct of the business of the Federal Government. Federal Government was empowered to regulate the allocation and transaction of business even by delegation of any of its function to the officers or authorities subordinate to it; meaning thereby that any "executive authority" of the federation which was required to be exercised by the "Federal Government" could have been delegated to subordinate authorities. The existing Article 99 while dealing with the conduct of the business of the Federal Government specifically states that all executive actions of the federal government shall be taken in the name of the President and the manner in which orders and instruments are executed and responsibility of the federal government to make rules for allocation and transaction of its business. The Honorable Supreme Court categorically expressed that allocation of business means that by whom, and how the matter is to be dealt with and allocation of business is merely a matter of inter-departmental procedure.

Para-63

15.2 Collective reading of para 58 to 63 shows that legislative power under delegated legislation falls outside the Executive Authority of the Federal Government and therefore is not governed by rules of business except from the

stage of proposal, formulation and drafting etc upto the stage of submission before the legislature.

15.3 In the mid of the para-63 within the context of section 3 of the Sales Tax Act the Court opined that certain powers have been conferred on the federal government and **the conferment of such powers on any other authority would have been clearly unconstitutional.** The preceding discussion especially in paras-37 to 40 makes it clear that this observation has been made with reference to conferment of powers by the Federal Government to its subordinate authorities and that has been declared unconstitutional. This is with reference to amendment in Article 99 as it existed originally viz-a-viz as it exists after the 18th amendment. In short the Honorable Supreme Court meant that once the legislature has conferred the powers u/s 3 of the STA to the Federal Government then Federal Government cannot confer such power to any other authority. Subsequent discussion in para 63 also supports the above inference.

15.4 Para-64 clearly states that it is the Federal Government, as constitutionally defined, **which is the repository of this executive power and no one else.** In the last sub para of para 66 the Supreme Court opined that designated functions can only be conferred on officers or authorities who are subordinate to the Federal Government. The Honorable Supreme Court again opined in the last few lines of the para-66 that the transfer of legislative powers would be a clear cut violation of the structure of the constitution and the concept of separation of powers. This is again with reference to article 99 after its amendment through 18th amendment i.e. once the power is conferred on the federal government it cannot be exercised by a subordinate authority or Division.

16. Article 97 with all due respect appears to have been misapplied. This article deals with the powers of the executive authority of the Federation viz-a-viz province and as long as any law which falls within the competence of the federal legislature, the federal legislature has unrestricted powers to make law.

17. Article 77 of the Constitution has been mentioned in cursory manner in the judgment, for ready reference Article 77 is reproduced as under:-

“No tax shall be levied for the purposes of federation except **by or under** the authority of Act of Majlis-e-Shoora (Parliament)”.

71.1 Article 77 of the 1973 Constitution is clearly different from the Article 265 of the Indian Constitution which is also reproduced as under:-

“No tax shall be levied or collected except by authority of law”.

Comparison of two parametric provisions of the two Constitutions shows that Article 77 of 1973 Constitution enables delegated legislation in express terms unlike the Indian Constitution.

17.2 Meaning thereby that tax can be levied by the express provisions of law enacted by the parliament itself or under delegated legislation by the authority (be it the Federal Government as it was as case in section 3 of the STA 1990 or subsection (5) of section 18 of the Customs Act, 1969) or by the FBR with the approval of the Federal Minister Incharge as per subsection (3) of section 18 of the Customs Act, 1969. This delegation of powers to Federal Government by the legislature as per section 3 of the STA, which was thoroughly debated in the Mustafa Impex case, was not declared unconstitutional. Similarly such powers have been delegated to the Federal Government as per Customs Act, 1969 since its promulgation.

18. The Honorable Supreme Court also discussed separation of powers among the legislature, judiciary and executive and have opined that parliamentary form of government essentially envisages a broad categorization of power but not the erection of rigid walls of separation. There are no impassable barriers between the different types of power. There is often an overlapping or blurring of boundaries. The executive also exercises some legislative powers while the judiciary is not entirely devoid of other forms of power including the power to make rules. A rigid division, or separation, is sometimes to be found in presidential forms of government. In this connection, reference is made to the Articles I, II and III of the Constitution of the United States.

Para 72

Two important decisions of the US Supreme Court Re-JW Hampton Jr and Co. Vs USA and Field Vs Clark are examples of such delegation which has been conferred by the US Supreme Court in spite of presence of strict separation of power.

19. Para 77 discussed the delegation of powers clearly shows that once the power is delegated to Federal Government then whether it can be delegated or not and supreme court has decided in favor of later, based on amendment in article 99 subsequent to the 18th amendment and the discussion does not encompass the power of legislature to delegate legislative functions to any authority.

22. The conclusion drawn and summarized as per para 84 of the Mustafa Impex case clearly support the above inference regarding delegation of legislative powers by the legislature itself to any authority and not directly to the federal government to be delegated to any other authority. In addition to other directions/discussions, the Rule 16(2) which apparently enables the Prime Minister to by pass the Cabinet is declared ultra vires. Moreover, any act, or statutory instruments purporting to

describe any entity or organization other than the Cabinet as the Federal Government is declared ultra vires and anullity.

23. Section 18(3) of the Customs Act and conferment of powers by the legislature upon FBR, to be exercised with the approval of Minister In charge, stands on a different footing and ratio of judgment of Mustafa Impex case is not applicable to this situation at hand.

LIMITATIONS ON IMPOSITION OF REGULATORY DUTY

1. The scheme of legislation provided in Section 18 of the Customs Act 1969 (IV of 1969) for levy of customs duties is very elaborate and systematic keeping in view the policy options in different circumstances of running the business of the state. The scheme entails the necessary checks and balances between the powers and functions of the legislature and executive. Section 18 of the Customs Act, 1969 deals with the imposition of different kind of duties on goods imported into or exported from Pakistan.

2. **Section 18 (1)** provides for levy of Customs duty on all the goods imported which are determined directly by the legislature as part of the annual money bill through Finance Act under the provisions of the Constitution read with Schedule IV comprising the Federal Legislative list.

3. **Section 18(3)** provides for imposition of Regulatory Duty by the Board after approval of the Federal Minister-in-Charge. In order to run the state business on day to day basis, it may not be possible to take immediate necessary measures to regulate the trade through the Parliament and Cabinet may be over burdened by these matters. This may be noted that the very nomenclature of the Regulatory

Duty shows that it is for the purpose of regulating the trade to immediately offset any adverse effects or injury to the national trade, industry or economy. Cognizant of this fact, the Parliament itself, through an Act of Parliament (The Customs Act, 1969 as amended through time to time by the Parliament itself through the annual Finance Acts), has authorized the Board with approval of the Federal Minister-in-Charge under Section 18(3) of the Customs Act, 1969 to impose the regulatory duty.

3.1 The Regulatory Duty can be imposed only on such goods which are specified in the First Schedule to the Customs Act. Meaning thereby the scope of Regulatory Duty is restricted only to those goods which are given in 1st Schedule and which are already subject to duty imposed by Legislature.

3.2 The quantum of Regulatory Duty is also restricted by certain parameters viz.

- a) It cannot go beyond the value of goods as determined as per section 25 of the Customs Act;
- b) There is another capping to the quantum of Regulatory Duty i.e. as per proviso to subsection (5) of section 18 of Customs Act. Sum-total of customs duty, Regulatory Duty and Additional Customs Duty cannot exceed the rates agreed by the Government under multilateral agreements.

4. This can be explained as under:-

If under the multilateral agreement maximum rate of duty which can be levied is say 30% and if value of goods as per section 25 of the Customs Act is Rs.100 and if the Customs Duty (as per sub-section (1) of section 18) is imposed @ 20% then Regulatory Duty (as per section 18(3), which otherwise can be Rs.100, cannot be levied by more than Rs.10 i.e. 10% of the Import value of goods. And if Additional Customs

duty (as per section 18(5) is also levied @ 5% i.e. Rs.5 then Regulatory Duty cannot be levied by more than 5% i.e. Rs.5.

Thus there is inherit system of checks on the powers of delegatee.

5. Section 18(5) empowers the Federal Government to levy additional customs duty on imported goods not exceeding 35% of the value of such goods.

6. In view of the foregoing, it is clear that the Parliament has kept all out power to levy customs duty under section 18(1) and empowered the "Board, with approval of the Federal Minister-in-charge" under section 18(3) to impose regulatory duty. However, after the Supreme Court's decision to interpret the Federal Government as Prime Minister along with the Cabinet, it was felt by the Parliament that it may not be possible in some circumstances of immediate nature for the Federal Government to take immediate action. Therefore, only in Section 18(3), the Board with approval of the Federal Minister-in-Charge may take immediate steps required. The very approval of the Federal Minister-in-Charge shows that the Cabinet oversight is still there in the new scheme. In rest of the sub-sections, the power still lies with the Federal Government. However, the Parliament has kept full power with itself to impose unlimited duties under section 18(1) and transferred only a limited power to the Board, Federal Minister and the Federal Government to regulate the day to day business, trade and economy of the country under special circumstances and also imposed condition/ restriction thereon.

7. Regulatory Duty is usually temporary in nature and imposed after thorough examination of impacts and causes. The present decision to levy Regulatory Duty was taken by ECC which is headed by the Prime Minister and its minutes were also approved by the Cabinet. Present Regulatory Duty was imposed to reduce the trade

deficit. Imports were increasing by 20% every month and exports were not correspondingly increasing and trade deficit figures increased. Therefore decision to impose Regulatory Duty was taken and since then growth in imports has been reduced from 20% to 15%. Thus the measure is bringing the desired results.

In past RD has been imposed either at import stage or export stage depending upon trade and economic situation. If domestic commodity prices of essential food items are increasing and goods are exported unchecked then RD is imposed at exports under similar circumstances RD was imposed on Potatoes or Sugar exports. Similarly RD at imports of steel products was imposed in past to protect domestic industries as some countries were protecting steel products at a price which was much lower than the domestically produced steel products. Thus the causes, reasons or factors for imposing RD may be different at different times.

8. Many other international Customs legislations have also provided similar powers to the Executive branch of the State to regulate their respective international trade. For instance, Section 18(2) of the Bangladesh Customs Act empowers their Government to impose Regulatory Duty not exceeding the highest rate of Customs duty. The Customs Act of Singapore provides under section 10(1) that there shall be charged, levied and paid to the Director-General such Customs Duties and Excise duties on any goods imported into the customs territory or manufactured in Singapore as may be prescribed by the Minister by order published in the Gazette. (Relevant portion copies attached for ready reference).

9. The above opinion is submitted for kind perusal of the Board.