

**BEFORE THE COMPETITION APPELLATE TRIBUNAL,
ISLAMABAD**

FAUJI FERTILIZER COMPANY LIMITED.

.... APPELLANT

VERSUS

COMPETITION COMMISSION OF PAKISTAN

...RESPONDENT

Appeal No.11/2016.

Present: Justice (R) Mian Fasih Ul Mulk, Chairperson.
Ahmed Owais Pirzada, Member Technical.
Justice (R) Miftah Ud Din, Member Technical.

For the Appellant: Barrister Raja Jibran,
Mr. Salman Javed Siddiqui,
Mr. Sheraz Ahmed and Mohsin
Iftikhar Advocates.
Barrister Jawad Qureshi.

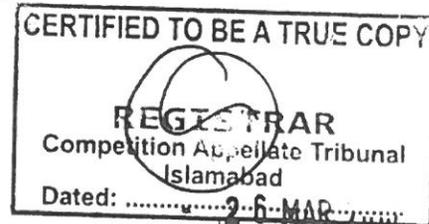
For the Respondent: Mr. Nouman Amin Farooqi,
Advocate.

Date of hearing: 09.03.2016, 30.03.2016, 20.04.2016,
25.05.2016, 29.06.2016, 21.09.2016,
30.11.2016, 11.01.2017, 01.02.2017,
07.03.2017, 29.03.2017, 16.05.2017
07-06-2017, 05-09-2017, 13-09-2017,
27-09-2017, 04-10-2017, 10-10-2017,
17-10-2017, 01-11-2017, 08-11-2017,
09-01-2018, 14-02-2018, 27-02-2018

JUDGMENT

Justice Miftah-Ud-Din, Member

This appeal No.11/16, has been filed by Fauji Fertilizers Company Ltd. against the Judgment and order dated 29-03-2013 of the learned Competition Commission of Pakistan, whereby the appellant has been punished under section 3(3)(a) to pay a fine of Rs.5.5 Billion.



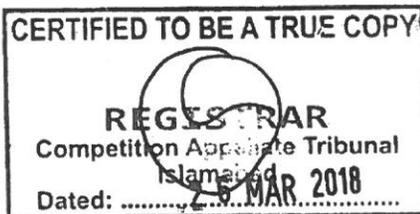
2. The brief facts of the case are that in January, 2011, the learned Competition Commission of Pakistan took notice of increase in prices of 50 KG Urea Fertilizers Bags through several newspapers Pakistan times etc. A show-cause notice was issued to the appellant and other fertilizer manufacturers, M/s DH Fertilizers Ltd, M/s Agritech Ltd, M/s Fatima Fertilizer Company, M/s Pak Arab Fertilizer Ltd and M/s Engro Fertilizer Ltd. The appellant and other fertilizer manufacturers in response to the show-cause notice submitted their written replies, wherein they pleaded that increase in prices is due to gas curtailment and failure of Government of Pakistan (GOP) to ensure timely import of urea. They also raised other legal and factual pleas in their written reply including jurisdiction of Competition Commission of Pakistan in present matter. The learned Competition Commission of Pakistan framed the following issues from the pleading of the parties;

- a. Whether the Intervener's application could be allowed in the proceedings under section 30 of the Act in this matter?
- b. What is the relevant market?
- c. In relation to alleged 'unreasonable price increase' whether each of the undertaking can be termed 'dominant'?
- d. Whether the undertakings found dominant (if any), abused their dominant position through unreasonable increase in prices in violation of section 3(3)(a) of the Act?
- e. Whether the undertakings concerned exercised 'collective dominance' in relation to the alleged violation?

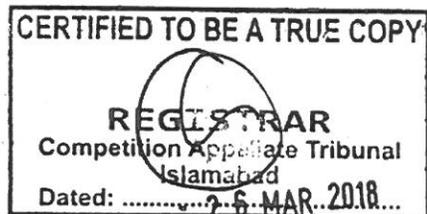


3. After collecting documents and evidence of the parties on the above issues and hearing the learned counsel for the parties, the learned Competition Commission of Pakistan through the impugned Judgment found the appellant and Engro Fertilizer Ltd. to have violated the provisions of section 3(3)(a) of the Act and ordered appellant Fauji Fertilizer Company Ltd. to pay a fine of Rs.5.5 Billion and Engro Fertilizer Ltd. to pay a fine of Rs.3.14 Billion and exonerated the remaining fertilizer producers in the present case. Aggrieved from the aforesaid order of the learned Competition Commission of Pakistan, appellant Fauji Fertilizer Company Ltd. has preferred appeal No.11/2016, while Engro Fertilizer Ltd. has filed separate appeal No.10/2016.

4. Learned counsel for appellant contended that baseless, illegal, arbitrary and legally flawed findings of Enquiry report regarding relevant market was wrongly upheld by the learned Competition Commission of Pakistan without taking into account the relevant legal and material facts available on the record. He further submitted that learned Competition Commission of Pakistan has wrongly relied upon the guidelines of office of fair trading [OFT, UK], titled "Public Bodies and Competition Law", which mainly deal with the issue of, when a public body should be considered as an undertaking with respect to Anti-competitive behavior. The scope of guideline was to provide public bodies with an outline of facts and circumstances in which their activities will be subject to UK and EU, Competition Law prohibitions. Further explained that the question in controversy involved in the present case was not that Government of Pakistan was an undertaking and therefore, subject to prohibitions under Competition Laws, but the question was whether Government



of Pakistan imported Urea should be included in relevant market along with locally manufactured urea or not. He contended that Government of Pakistan is the most potent competitive Force in the market of urea and Government of Pakistan's import of urea have impacts on the market of Urea, hence, must be included as a product in relevant market for proper determination of penal liability under section 3 of Competition Act. Learned counsel for the appellant contended that the learned Competition Commission of Pakistan has based the entire findings on the inquiry report and has taken one sided aspect of the case, by ignoring the legal and factual pleas taken by the appellants in their written replies. Further submitted that Competition Commission of Pakistan has got no jurisdiction to enter the area of price regulation or price fixation without any internal capacity to deal with such matters. Further contended that gas curtailment was not equally distributed between urea producers, efficiency and other factors affecting each company were different, therefore similar action against the Urea producers was not justified. Further submitted that under fertilizer policy of 2001, the appellant had undertaken to provide urea to farmers at affordable prices i.e lower than international prices which the appellant had provided therefore, the Competition Commission of Pakistan was not justified to punish the appellant. Further, contended that appellant has not entered into any cartelization, collusion or formal understanding about prices of urea. Further submitted that gas curtailment, failure of Government of Pakistan to exercise power under clause 5.1 of fertilizer policy 2001 to make timely import of urea, and control prices under price control prevention of profiteering and Hording Act, 1977, contributed towards increase in prices, hence the



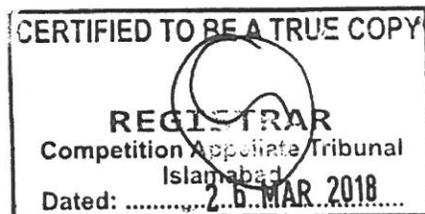
appellant alone could not be held responsible for the same. Further submitted that Competition Commission of Pakistan has not properly determined the dominant position and its abuse which consist of practices, to prevent restrict, reduce or distort competition in the relevant market and that such practices has an anti-competitive effect on the relevant market. Further contended that under section 2(e) of the Competition Act, the appellant's lacks ability to behave to an appreciable extent, independently of competitors, customers, consumers and suppliers because they solely depends upon gas supply of Government of Pakistan. Further submitted that Government has the ability to influence the market of urea any time, because Government of Pakistan unlike manufacturers is not afraid to make losses and in fact sells the imported urea at a huge costs to national ex-chequer. Learned counsel for appellant contended that appellant Fauji Fertilizer Company Ltd. along-with other manufacturers followed the market price, but the appellant was awarded penalty and other manufacturer were exonerated, hence, the Competition Commission of Pakistan has acted with apparent discrimination. Further contended that learned Competition Commission of Pakistan conducted assessment survey about fertilizer sector, wherein Government of Pakistan influence in import of fertilizer sector is acknowledged, beside the fact that exploitative pricing and excessive profiteering as a result of anti-competitive practices could not be established, but the learned Competition Commission of Pakistan ignored its own survey report in the present case without any reasonable and plausible explanation for the same at the time of determination of relevant market.



5. The learned counsel for Competition Commission of Pakistan defended the findings of Competition Commission to exclude the government imported Urea from the relevant market and contended that government is importing Urea to discharge essential State functions as a social activity and not economic or commercial activity to earn profits, hence Government of Pakistan imports cannot be considered as part of relevant market. He further submitted that Competition Commission of Pakistan has rightly relied upon the guidelines of [OFT,UK] in this connection. He lastly submitted that the learned Competition Commission of Pakistan on sound and justified grounds has rightly excluded the government imported Urea from the definition of relevant market.

6. After hearing, the learned counsel for the parties and perusal of material available on record, we have come to the conclusion that the learned Competition Commission of Pakistan while evaluating the material available on record has made pick and choose to explain and develop one sided claim set up in inquiry report against the appellant. Perusal of the issues framed by the learned Competition Commission of Pakistan clearly indicate that the same has been framed on the basis of inquiry report, therefore, framing of defective and one sided issues has resulted in one sided appraisal of evidence favourable to the Competition Commission of Pakistan and ignoring the defence pleas set up by the appellant in his written reply.

7. In the light of written reply/comments of the appellant, learned Competition Commission of Pakistan should have framed at least the following issues.



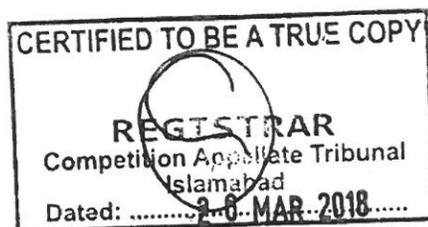
1. Whether Government of Pakistan import of urea is interchangeable, substitutable by the consumer by reason of the product characteristics, prices and intended uses with the locally manufactured urea hence, form part of the relevant market in the present case?
2. Whether the Competition Commission of Pakistan has got jurisdiction to enter the area of price regulation or price fixation without any internal capacity to deal with such issues?
3. Whether gas curtailment was not equally distributed between the urea manufacturers, efficiency and other factors affecting each Urea producer were different and that Fauji Fertilizer Company Ltd. is price follower and therefore, could not be subjected to similar punishment by the Competition Commission of Pakistan.
4. Whether the gas curtailment, as well as failure of Government of Pakistan to exercise power under clause 5.1 of fertilizer policy 2001 for making timely import of urea as well as to control prices under price control prevention of profiteering and Hording Act 1977, contributed towards increase in prices, hence, appellant alone cannot be held responsible for the same.
5. Whether the Competition Commission of Pakistan conducted assessment survey about fertilizer sector in Pakistan, wherein influence of Government of Pakistan's imported urea was acknowledged in prices mechanism and all fertilizer producers were exonerated from prices



exploitation and anti-competitive practices, hence, no deviation can be made from the same in the present case.

6. What is the yard stick for reasonable and unreasonable prices in prevailing facts and circumstances.
7. Whether prices increase are excessive as compared to costs in relevant year by making comparison with the profit margin of the previous year.
8. Which of the undertakings have dominant position to behave to an appreciable extent independently of competitors, customers, consumers and suppliers.
9. which of dominant undertaking abused the dominant position by unreasonable increase in prices to the extent to prevent, restrict, reduce or distort competition in the market.
10. Whether the Urea manufacturers cannot act independently of their gas supplier i.e, Government of Pakistan.

8. No doubt the appellant has not raised the matter of defective issues before the learned CCP, but the appellant in para "M" of memo of appeal has agitated the matter of framing of issues. This Tribunal in exercise of appellate jurisdiction cannot ignore the legal flaws and defects of substantial nature committed by the learned CCP. It is the primary duty of the learned trial Court to frame proper issues on all material propositions of law and facts alleged by one party and either denied or not admitted by the other parties. The object of framing proper issues is to ascertain the real

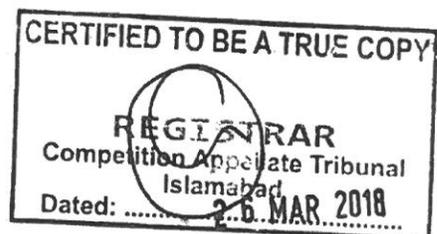


dispute between the parties to narrow down the area of conflict, and determine where the parties differ. Before collecting evidence on the issues framed, the Court is also required to ascertain as on which party the burden of proof would lie to produce evidence in support of such issues. Perusal of the issues framed by the learned Competition Commission of Pakistan indicates that the same has not only been framed in a slip shod manner, but are also not specific elaborate and explanatory. The issues framed by the learned Competition Commission of Pakistan were based on inquiry report which is a tentative assessment of facts based on preliminary investigation, while the legal and factual pleas raised by the appellant are not reflected in the issues.

9. As the Competition Commission of Pakistan has decided the present matter after framing of issues, therefore, it was incumbent upon the Competition Commission of Pakistan to frame proper issues from the pleading of the parties by giving equal treatment and opportunities to the parties in accordance with the guideline given in order 14 and 18(2) of the Civil Procedure Code. To elucidate the matter further the provisions of order 14 and 18 (2) CPC are hereby produced as under;

ORDER 14 CPC

1. **Framing of issues.**(1) Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other.
2. Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence.



3. Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issues.
4. Issues are of two kinds: (a) issues of fact, (b) issues of law.
5. At the first hearing of the suit the Court shall, after reading the plaint and the written statements, if any, and after such examination of the parties as many appear necessary, ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend.

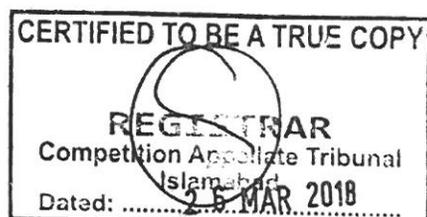
ORDER 18(2) CPC

Statement and production of evidence.(1)

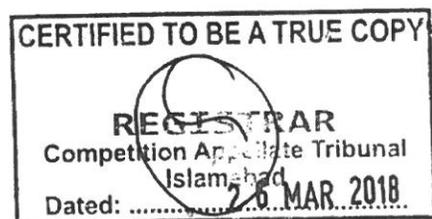
On the day fixed for the hearing of the suit or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove.

2. The other party shall then state his case and produce his evidence (if any) and may then address the Court generally on the whole case.
3. The party beginning may then reply generally on the whole case.

10. The above-mentioned provisions of CPC are mandatory in nature, therefore, it was basic and fundamental



duty of learned Competition Commission of Pakistan to frame issues in the light of controversies raised in the pleadings of the parties. The issues of law and facts are to be illustrated specifically and clearly to enable the parties to understand the point at issue and know before recording evidence that on which issues they are required to produce evidence to discharge the burden of proof under the provision *ibid*. It is clear from the aforesaid provisions of CPC that under the law, the parties are required to prove issues and not the pleadings. Neither the defence pleas taken by appellant in written reply has been reflected in the issues framed, nor opportunity of producing evidence on such issues has been provided to appellant, which has definitely caused great miscarriage of justice to appellant. Where the real matter in controversy is not part of issues framed, non pointation of the same by the parties cannot result in its abandonment. It is equally duty of the court to frame correct issues in the light of the pleadings to determine the real controversy. Action or inaction on the part of court should not prejudice a party to litigation so as to cause miscarriage of justice. The learned Competition Commission of Pakistan has failed to comply with the mandatory provision of law regarding framing of issues, which resulted in one sided, erroneous and against facts appraisal of evidence regarding the main questions in controversy i.e, a relevant product market, effect of Government of Pakistan import of Urea on the relevant market, dominant position and abuse of dominant position as well as jurisdiction of Competition Commission of Pakistan as price regulator. Even the learned Competition Commission of Pakistan has failed to take into account its own assessment survey report regarding fertilizer sector in Pakistan without any plausible explanation. This improper, defective, non



specific, non explanatory and one sided issues framed on the basis of inquiry report only, without reflection of any defence plea set up by appellant in the issues, has caused a great miscarriage of justice. In these circumstances, we are declined to up hold this incomplete legally flawed and defective adjudication of case in hand by the learned Competition Commission of Pakistan. In order to frame issues, on all points in controversies raised in the pleading of the parties in the light of aforementioned observations of this Tribunal and give fresh findings thereon, remand of the case is inevitable in the interest of justice.

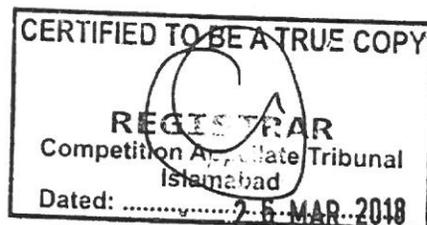
11. As a corollary to the above discussion, the instant appeal is therefore, accepted, the impugned Judgment and order of learned Competition Commission of Pakistan dated 29-03-2013 is set aside to the extent of appellant Fauji Fertilizer Company Ltd. only and the case is remanded to learned Competition Commission of Pakistan with the direction to decide the same afresh after framing of proper issues in the light of pleadings and observations of this Tribunal referred to above. Parties are directed to appear before the learned Competition Commission of Pakistan on 04-04-2018.

**Announced in open court on:
14-03-2018**


Justice Mian Fasih Ul Mulk,
Chairman


Justice Miftah-Ud-Din
Member Technical


Ahmed Owais Pirzada
Member Technical

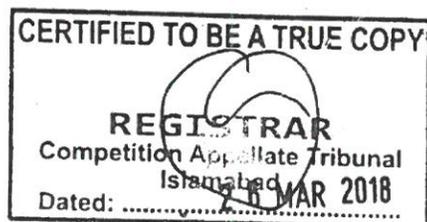


Judgement framed by my learned brothers is placed before me. I have gone through it. However, before I give my comments on the above noted Judgment, it may be stated that the order impugned by way of petitioner's appeal has also been challenged side by side by another appeal No-10/2016 (Enro Fertilizer Pvt Ltd), which is still pending for decision by this Tribunal. The appellant in the appeal has also challenged the constitution of this Tribunal before the Hon'ble court has passed restraining order, restraining this Tribunal from passing final order. Both these appeals before us are against the same order and involve identical questions of facts and law; more so involving imposition of huge amount of penalties. During the hearing, on a query, whether in such type of circumstances, where the same Judgment was involved by way of two appeals, one appeal out of the two, in presence of the restraining order, could be decided, nothing could be brought to our notice for guidance by the learned counsel for the parties, such as case laws of the superior courts laying down any principle to proceed further in such kind of situation. Now, if the appeal of the petitioner is dismissed or the impugned order involved in this appeal is set aside, nothing important is left to be further decided by this Tribunal in the pending appeal, filed by Engro Fertilizer (Pvt) Ltd, challenging the same impugned order. It is evident that this Tribunal has been restrained from passing final order in respect of appeal No-10/2016. The decision in this case shall automatically adversely or/and favorably affect the other appeal, challenging the same order.

In the circumstances sated above, in my humble view, we cannot separately take up this appeal by passing any order against the order dated 29th March, 2013 of Competition Commission of Pakistan impugned in both the appeals. I, therefore, restrain myself to offer my comments in affirmative or negative on merits of the case.

Announced in open court on:

14-03-2018




Ahmed Owais Pirzada
Member.