IN THE HIGH COURT OF SINDH AT KARACHI

Present: **Mohammad Ali Mazhar** and **Agha Faisal**, **JJ**.

CP D 398 of 2019	:	Pfizer Pakistan Private Limited vs. Federation of Pakistan & Others
CP D 399 of 2019	:	Sanofi Aventis Pakistan Limited vs. Federation of Pakistan & Others
CP D 400 of 2019	:	OBS Pakistan (Pvt.) Limited vs. Federation of Pakistan & Others
CP D 401 of 2019	:	Barrett Hodgson Pakistan (Pvt.) Limited vs. Federation & Others
CP D 917 of 2019	:	Indus Pharma Private Limited vs. Federation of Pakistan & Others
CP D 939 of 2019	:	Tabros Pharma (Pvt.) Limited vs. Federation of Pakistan & Others
CP D 695 of 2019	:	Martin Dow Limited vs. Federation of Pakistan & Others
CP D 940 of 2019	:	Epla Laboratories (Pvt.) Limited vs. Federation of Pakistan & Others
CP D 1185 of 2019	:	Martin Dow Marker Private Limited vs. Federation of Pakistan & Others
CP D 1354 of 2019	:	Hakimsons (Impex) Private Limited vs. Federation of Pakistan & Others
CP D 1355 of 2019	:	The Searle Company Limited vs. Federation of Pakistan & Others
Dates of Hearing	:	12.02.2019, 21.02.2019 & 27.02.2019 (In CPs D 398, 399, 400, 401, 917 and 939 of 2019) 11.03.2019 & 27.03.2019 (In CPs D 695, 940, 1185, 1354 and 1355 of 2019)
For the Petitioners	:	Mr. Raashid Anwar, Advocate Mr. Abdul Sattar Pirzada, Bar at Law Ms. Umaima Anwer Mansoor Khan
For the Respondents	:	Mr. Ishrat Zahid Alvi, Advocate Assistant Attorney General Mr. Amanullah Deputy Director – Pricing Drugs Regulatory Authority Pakistan
Date of Announcement	:	16.04.2019

JUDGMENT

Agha Faisal, **J**: The present petitions have impugned the notice dated 11.01.2019 ("**Impugned Notice**") issued by the Drug Regulatory Authority of Pakistan, Ministry of National Health Services, Regulations and Coordination ("**DRAP**"). The Impugned Notification sought to enforce the reduced quantum of maximum retail prices of drugs fixed vide SRO 1610(I)/2018 dated 31.12.2018 ("**Impugned SRO**"). In five petitions herein there is a supplementary constituent, being that the petitioners have also filed appeals before the statutorily prescribed appellate board and have made an alternate prayer seeking to restrain the respondents from taking any adverse action there against pending decision in their appeals. The petitions were heard and reserved successively, however, since the controversy is common to all the subject petitions, and the same instruments have been assailed inter se, therefore, the said petitions shall be determined conjunctively vide this common judgment.

2. The factual background is that the Drug Pricing Policy 2015 ("**2015 Policy**") was notified by the respondents on 05.05.2015 and it *inter alia* provided for a mechanism for reduction in the maximum retail prices falling within the category of originator brands. It was, *inter alia*, provided that, unless it was possible to determine the price upon consideration of the price for the same drug being marketed in India and Bangladesh, the retail price in all developing countries, which regulate drug price, shall be taken into account.

Notices were issued in 2015, and thereafter, wherein reduction of maximum retail price of drugs was sought in consonance with the 2015 Policy. This determination of price in respect of originator brands, hardship cases and other instances was challenged by the petitioners, and others, in numerous suits filed before the Courts. The honorable Supreme Court took notice of this litigation impacting an issue of public importance and initiated *suo motu* proceedings in such regard. Under the guidance of the honorable Supreme Court a roadmap was agreed between the drug manufacturers and the regulatory body and pursuant thereto the *suo motu* proceedings were concluded vide order dated

03.08.2018, observing *inter alia* that the parties had consensually agreed to a roadmap and thereafter there was no reason to interfere with the same on any ground whatsoever. The aforesaid order categorically observed that in case any of the parties felt aggrieved on account of the violation of the directions therein contained, the said party may move an appropriate application in such regard. Several review petitions were preferred in respect of the aforesaid order and the same were decided vide order dated 14.11.2018 wherein the honorable Supreme Court clarified certain matters and also observed that companies aggrieved by the actions of DRAP pursuant hereto shall have the right of appeal available thereto under the governing law. The consensual roadmap referred to by the honorable Supreme Court culminated in the notification of the Drugs Pricing Policy 2018 ("**2018 Policy**"). The difference in the 2018 Policy vis-à-vis 2015 Policy, relevant to pricing of originator brands, is that the reduction in the maximum retail price, where the said brand was not marketed in India and Bangladesh, was to be predicated upon a basket of countries, defined in the 2018 Policy as being Indonesia, Philippines, Lebanon, Sri Lanka and Malaysia and not developed countries as was prescribed in 2015 Policy.

The petitioners' grievance arose when the respondents notified the Impugned SRO and reduced the maximum retail price of drugs listed therein arguably on the basis of 2015 Policy and not upon the 2018 Policy. It was contended that the Impugned SRO and the Impugned Notification were in violation of the orders of the honorable Supreme Court, hence, may be declared to be void and of no legal effect.

3. The petitions under scrutiny herein fall under two classifications; the first category comprises of CPs D 398, 399, 400, 401, 917 and 939 of 2019 ("**First Category**") wherein the Impugned Notice and the Impugned SRO have been assailed and sought to be struck down; the second category comprises of CPs D 695, 940, 1185, 1354 and 1355 of 2019 ("**Second Category**") wherein the petitioners have also preferred appeals before the statutorily prescribed appellate forum and as an alternate remedy seek interim relief pending adjudication of their appeals upon the premise that the appellate authority has no ostensible power to consider pleas for interim relief. Since the arguments in both

sets of petitions is identical in so far as the impugned instruments were concerned, however, additional grounds were pleaded in the Second Category, therefore, it is considered appropriate to advert to the two sets of arguments in chronological order.

4. Mr. Raashid Anwer, Advocate, appearing in CP D 398 of 2019, set forth the case of the petitioners in the First Category of petitions and submitted that the Impugned SRO and the Impugned Notification were prima facie in derogation of the orders of the honorable Supreme Court. Learned counsel adverted to the chronology of events and submitted that the honorable Supreme Court had called for the files of all the matters pending in Courts and after precipitating an understanding between the parties delivered appropriate orders, however, the respondents were seeking to unilaterally enforce the position which gave rise to the litigation in the first place. It was contended that the actions of the respondents had nullified the entire consensual exercise culminating in the 2018 Policy as they have opted to disregard the very same policy in the price determination under scrutiny. Learned counsel also elaborated upon the very mechanism of drug pricing and submitted that originator brands enjoy certain protection in order for the developers to recover the cost of research and development, however, post expiration of the period earmarked for the said purpose the prices are universally reduced in the interests of the public at large. Learned counsel demonstrated that per the 2015 Policy a manufacturer was supposed to submit that the proposed price was not more than the price for similar drugs in developing countries which regulate drug prices. Learned counsel submitted that over a 187 countries qualify in the said category and collation of the data from the entire globe was an inefficient way for price determination to begin with, hence, after mutual consultation the 2018 Policy substituted the requirement of all developing countries to a basket of five countries considered to be similarly placed as Pakistan. Learned counsel submitted that after notification of the 2018 Policy, there was absolutely no justification for the respondents to determine prices on the basis of a policy admittedly no longer in force.

5. Barrister Abdul Sattar Pirzada, representing the petitioners in CP D 399, 400, 401, 939 & 917 of 2019, presented his arguments to

supplement the submissions already made by Mr. Raashid Anwar. Learned counsel argued that the earlier litigation, which the honorable Supreme Court sought to conclude, was a result of the implementation of the 2015 Policy and the Impugned Notification / Impugned SRO has endeavored to set the entire exercise conducted under the auspices of the honorable Supreme Court to naught. Learned counsel adverted to the Impugned SRO and demonstrated that the only reason given for the arbitrary pricing conducted by the respondents was that the petitioners failed to give a statement that the prices in all developing countries are not lower than that in Pakistan. Per learned counsel, the said requirement was unjustifiable in any event, however, after the 2018 Policy it was rendered redundant in any event. Learned counsel demonstrated from the record that the prices from the basket of countries designated in the 2018 Policy were available with the respondents, however, they chose to ignore the precepts of 2018 Policy and instead decided to place unwarranted reliance upon the 2015 Policy. Learned counsel delved upon successive orders of the honorable Supreme Court and articulated that the submissions of the petitioners were in line with the prescriptions of the honorable Supreme Court. In conclusion, it was argued that it was just and proper for the petitioners to be heard by the respondents under the 2018 Policy and for the price determination to be conducted thereunder and in the meanwhile the respondents ought not to insist for the unmerited reduction in drug prices.

6. Barrister Pirzada, also appeared for the petitioners in CP D 695, 1354 and 1355 of 2019, being petitions in the Second Category, and reiterated the arguments advanced in respect of the petitions listed supra in so far the challenge to the Impugned Notice and the Impugned SRO were concerned. In addition thereto, learned counsel submitted that without prejudice to the contentions with regard to the legality of the Impugned Notification / Impugned SRO the petitioners had already challenged the impugned instruments in appeal, however, no adjudication in respect thereof has taken place as of date. Per learned counsel the statutory framework, inter alia, the Drugs Act, 1976, the Drug Regulatory Authority of Pakistan Act, 2012 and the Rules and Regulations made thereunder contain no provision for the entertaining of interim applications, hence, the petitioners are precluded from seeking

interim relief pending the adjudication of their appeals. Learned counsel also adverted to the often invoked practice, in tax matters, whereby the Courts have restrained the enforcement of an impugned demand pending adjudication before at least one independent appellate forum. In conclusion it was argued that it was just and proper for this Court to restrain the respondents from taking any adverse action against the petitioners pending adjudication of their appeals filed before the appellate board.

7. Ms. Umaima Anwer Mansoor Khan, Advocate argued on behalf of the petitioner in CP D 1185 of 2019 and submitted that the petitioner was dealt with by the respondents otherwise than in accordance with the orders of the honorable Supreme Court. Learned counsel submitted that the appellate board has no authority to strike down a notification of the Federal Government and they may only at best be able to undo the underlying recommendations that precipitated the issuance of the notification. In such regard it was argued that it was imperative that orders preserving the corpus of litigation be rendered in the interim period so as to safeguard the interest of the petitioners. Learned counsel also challenged the constitution of the appellate board and submitted that no legal person was contained therein who would be able to comprehend the niceties of the law and pass appropriate orders, therefore, it was prayed that the Constitutional jurisdiction of this Court. It was also submitted that the appellate board is a barely functional body that has only met once in this calendar year and even on the said date no case of appeal was taken up. It was further argued that the delay in adjudication could not be permitted to have an adverse effect upon the legitimate interests of the petitioners, therefore, it was imperative that this Court exercise this Constitutional jurisdiction and safeguard the rights of the petitioners.

8. The case for the respondents was opened by Mr. Ishrat Zahid Alvi, Advocate. The learned Assistant Attorney General assailed the maintainability of the petitions and submitted that the primary ground invoked by the petitioners was the enforcement of the orders of the honorable Supreme Court, however, it is not the enforcement that was being sought herein but the interpretation of the said orders, which is the sole domain of the honorable Supreme Court itself. Learned counsel

submitted that there was no impediment to the petitioners to approach the honorable Supreme Court once again, if it were apprehended that their orders were not being complied with, however, the petitioners have chosen to file the present petitions which are not maintainable. Learned Assistant Attorney General argued that there is a redressal mechanism provided under the relevant governing statutes to address the grievance of the petitioners and the same have also been adverted to by the honorable Supreme Court in the orders cited before us and in view of an alternate remedy being available the present petitions were arguably misconceived. Learned Assistant Attorney also submitted that the issue of pricing is a factual issue and invocation of the writ jurisdiction of this Court, in order to arrive at a determination in such regard, was not merited.

9. Mr. Amanullah, Deputy Director (Pricing) DRAP, appeared in person and submitted that the petitioners are attempting to misconstrue the orders of the honorable Supreme Court, hence, disentitled to the relief. The Deputy Director argued that there is a divergent interpretation of the orders of the honorable Supreme Court, to the understanding of the respondents, and stated that if the said interpretation was unacceptable to the petitioners then there was statutory remedy available to them to challenge the same. The Deputy Director submitted that the suits, that were pending in respect of the challenges to the 2015 Policy, were withdrawn by the respective plaintiffs, including the petitioners, after issuance of the Impugned SRO and the Impugned Notification and if the grievance of the petitioners had not been resolved then there would have been no occasion to withdraw the aforesaid suits.

It was further added that the office of the chief executive DRAP was to be filled soon and since the holder of the said office is also the chairman of the appellate board, therefore, meetings of the appellate board have been delayed. The Deputy Director admitted that the appellate board has met only once in this calendar year and that no appeal pertaining to pricing had been taken up thus far. He submitted that to his knowledge there was no provision of interim relief under the Drugs Act, 1976, the Drug Regulatory Authority of Pakistan Act, 2012 and the Rules and Regulations made thereunder. However, it was for

the appellate board to determine their jurisdiction and the said officer was not competent to make a definitive statement on their behalf. In conclusion the Deputy Director submitted that the present petitions were not maintainable and were even otherwise misconceived, hence, may be dismissed forthwith.

10. We have appreciated the arguments placed before us and have also carefully considered the record to which our scrutiny was solicited. The pivotal issue for this Court to determine is whether recourse thereto was appropriate under the present facts and circumstances.

11. At the very outset, it is pertinent to record that the honorable Supreme Court had initiated the cited *suo motu* action with a view to address the multiplicity of litigation pending in different courts with regard to drug prices. The orders of the honorable Supreme Court placed before us provide for guidance in the event that parties remain aggrieved post conclusion of the said proceedings, hence, it is imperative for the illuminated dispute resolution mechanism to be given primacy. The order of the honorable Supreme Court, dated 03.08.2018 in Human Rights Case 2858 of 2006, culminated the *suo motu* proceedings and it was observed therein as follows:

> "5. It is pertinent to mention here that under the law an appellate forum has been provided. Anybody aggrieved of the decision of DRAP in the above matters may challenge the same before the appellate forum. With consensus of all, we direct that instead of approaching the Courts of ordinary jurisdiction i.e. civil courts or High Courts in original jurisdiction or even before agitating the matters in the constitutional jurisdiction of the High Courts, the aggrieved parties shall avail all remedies available to them under the statute."

(Underline added for emphasis.)

In addition thereto the honorable Supreme Court was pleased to conclude the aforesaid *suo motu* proceedings, vide the order dated 03.08.2018, with the following directions.

> "8. This matter is disposed of in the above terms. However, in case any of the parties feels aggrieved on account of violation or non-compliance with the above directions, it may move an appropriate application for resurrection of the same."

It is thus noted that the honorable Supreme Court had emphasized the predominance of the statutorily prescribed appellate mechanism and had discouraged recourse to the High Courts, and the Courts of ordinary jurisdiction. Notwithstanding the forgoing, the honorable Supreme Court itself observed that in case any of the parties felt aggrieved on account of violation or noncompliance of the its directions, contained in the aforesaid order, then it could move an appropriate application for resurrection of the same. Thus, it is apparent from the aforesaid pronouncement that that the dispute resolution mechanism going forward was duly articulated and the avenue of the statutory appeal was required to be followed, and in addition thereto the option for agitating any noncompliance before the honorable Supreme Court was also recognized.

12. We have had the occasion to consider the order of the honorable Supreme Court dated 14.11.2018, wherein numerous review applications, seeking clarificatory orders pursuant to the earlier order referred to supra, were determined. This order amplified the prescriptions of the earlier order and reinforced the direction regarding the statutory right of appeal being the designated mode of grievance redressal. It is thus the deliberated view of this Court that in the presence of a dispute resolution mechanism having been illuminated by the honorable Supreme Court, in this very matter and in proceedings to which all the present parties were involved, no case has been made out for the intervention of this Court in the exercise of its Constitutional jurisdiction.

13. Adverting to the matter of relief pending decision of the appeals, as sought in the alternative in the Second Category of petitions, it is observed that notwithstanding the argument that the Drugs Act, 1976, the Drug Regulatory Authority of Pakistan Act, 2012 and the Rules and Regulations framed thereunder contain no provision for interim relief, it cannot be presumed that the said law contains any bar in respect of

interim relief. It is trite law that the forum empowered to grant final relief is also empowered to grant interim relief. The honorable Supreme Court had meticulously illustrated this principle in *Sindh Employees Social Security Institution & Another vs. Adamjee Cotton Mills Limited* reported as *PLD 1975 Supreme Court 32* ("***SESSI***"), wherein it was explicated as follows:

> "Bearing these principles in mind, the question would naturally be to find out the scope or the ambit of the appellate jurisdiction of the Social Security Court under section 59 of the Ordinance. The section reads:
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> "Any person aggrieved by the decision of the Institution under section 57 or on a review under section 58, may appeal to the appropriate Social Security Court."
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> The above is a general provision, which is not qualified by any limitation. It was observed in the Colonial Sugar Refining Co. v. Irving 1905 AC 369, that a right of appeal where it exists, is a matter of substance and not mere procedure. It is not disputed that the Social Security Court, on an appeal brought before it under the above section can set aside the order appealed against in its entirety or may grant even partial relief depending upon the facts of a particular case. The question therefore, would really be, whether there is any limitation on the power or jurisdiction of the Social Security Court to grant partial redress. This partial redress may be as respects the quantum of liability or may be in point of time, when the liability under order made be the Institution may have to be discharged. In other words, whether who the Social Security Court can reverse the order appealed against, in it entirety and thus grant complete redress to the appellant before it, which ordinarily would happen at the final stage in the appeal, the Court will have no power to suspend the operation of the order during the pendency of the appeal, even if the circumstances of the case would eminently justify it?
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> To accept any such proposition, would indeed be to whittle down the substance of the Courts' appellate jurisdiction, which would be scarcely just or reasonable. Strictly speaking, the matter does not fall to be governed by Order XXXIX, rule 1, C. P. C. In our opinion, the power to grant interim relief by suspending wholly or partially, the operation of the order appealed against is reasonably incidental or ancillary to the main appellate jurisdiction. It would be wrong to regard the exercise of this incidental or ancillary power as enlargement of the appellate jurisdiction of the Court. Mr. Sarwana's argument, that in the absence of any provision in the Ordinance, corresponding to Order XXI, rule 26, or Order XXXIX rules 1 and 2, C. P. C. the Social Security Court will have no power to suspend the recovery of the amount of contribution either wholly or partly also overlooks the true nature of the 1965 Ordinance which is essentially a

> substantive law and is not designed to lay down the procedure in detail to be followed by the Institution or the Social Security Court. If the argument of the appellants' learned counsel was to stretched to its logical conclusion then it would lead to a number of absurdities. For instance, there is no provision corresponding to Order XVII, rule 1, C. P. C. or section 344, Cr. P. C. to enable the Social Security Court to adjourn the case to a future date. It would indeed, be absurd to suggest that in the absence of any such provision, the Social Security Court will have no power to adjourn a case. This is sufficient to demonstrate the futility of the argument.
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> However, that may be, this Court's recent judgment in Commissioner of Khairpur Division v. Ali Sher Sarki P L D 1971 S C 243, is directly in point. That case arose out of an appeal against the order of a Tribunal constituted under West Pakistan Control of Goondas Ordinance, 1959, to the Commissioner under section 18 ibid. The question that arose for decision was, whether the Commissioner, in the absence of an express provision in that behalf, could suspend the operation of the impugned order during the pendency of the appeal before him. The Commissioner had declined to suspend the order in that case on the ground that section 18 of the Ordinance, apart from empowering the Commissioner to entertain and decide the appeal, did not expressly empower him to suspend the operation of the impugned order during the pendency of the appeal. The matter was then agitated in the High Court in certiorari and ultimately brought to this Court in appeal, and it was held that the power of the Divisional Commissioner to grant interim relief during the pendency of the main appeal before him was "ancillary" to the main appellate jurisdiction expressly conferred under section 18. This judgment in our opinion concludes the matter.
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> It is however, important to point out that the power to grant interim relief, in this case is "ancillary or incidental" to the main appellate jurisdiction expressly conferred by the statute. This should not be confused with what is sometimes, claimed as the "inherent" jurisdiction of a Court, a claim which is no longer tenable in view of clause (2) o Article 175 of the Constitution. What is "inherent" is an inseparable incident of a thing or an institution in which it inheres. In the instant case, on the other hand, the power to grant interim relief is exercisable by the Social Security Court, not because of the inherent character or the attribute of the Court itself, but only to enable it to exercise its appellate jurisdiction expressly conferred upon it more effectively and in accordance with what indisputably are requirements of justice and reason."

The aforesaid principle was bulwarked by subsequent judgments of the honorable Supreme Court, including in the case of *Imran Raza Zaidi vs. Government of Punjab & Others* reported as *1996 SCMR 645*, wherein it was maintained that the forum having the power to grant the final relief would also have all such powers as may be reasonably

incidental or ancillary to its main jurisdiction and that the said principle encompassed the grant of interim relief during the tenancy of the proceedings.

A Full Bench of this High Court, in the case of *Pak Saudi Fertilizers Limited vs. Federation of Pakistan & Others* reported as *2002 PTD 679*, applied the ratio of *SESSI* in the taxation jurisdiction and observed that if a statute does not contain the provision of interim relief it does not mean that the authority, while exercising appellate jurisdiction, is powerless and does not have the power to grant interim relief. Sabihudin Ahmed, CJ (as he then was) had articulated the aforesaid principle in a Division Bench judgment of this Court in *Kunwar Khalid Younus vs. Federation of Pakistan & Others* reported as *PLD 2002 Karachi 209* and observed that power to grant interim relief was a necessary concomitant out of the power to grant final relief.

The general law with respect to interim relief has been encapsulated supra, therefore, it is only appropriate that the learned appellate board empowered to hear the appeals, expeditiously take up and determine the case for interim relief at the very first instance.

14. In view of the discussion and reasoning delineated supra, the petitions under review are determined in seriatim as follows:

a. The First Category of petitions, being CPs D 398, 399, 400, 401, 917 and 939 of 2019, are disposed of with directions to the petitioners to file appeals before the appellate board, within a period of one week, wherein the petitioners shall remain entitled to rely upon such material, record and / or evidence as may be relevant, inclusive of without limitation the material pleaded / relied upon in their respective petitions under consideration herein.

b. The Second Category of petitions, being CPs D 695, 940, 1185, 1354 and 1355 of 2019, are disposed of with directions to the petitioners to proceed with their appeals before the appellate board and seek the consideration of their applications for interim relief before the same forum.

c. The appellate board shall hear the appeals, already preferred in respect of the Second Category and to be preferred in respect of the First Category, within fifteen days from the date of announcement of this judgment after providing due notice to the appellants (petitioners herein).

d. The applications for interim relief, express or upon oral motion, shall be heard upon the first date of hearing and determined in accordance with the law, guided by the principles enunciated by the Superior Courts as delineated supra.

e. The respondents shall ensure that the appellate board shall hear appeals as often as may be efficient, in order to provide an effective forum for dispute resolution as envisaged by the honorable Supreme Court in the aforementioned *suo motu* proceedings, and shall also ensure punctilious adjudication of the said appeals, after providing ample opportunity to the petitioners to be heard.

f. Any person aggrieved by any such determination, in whole or in part, may be entitled to seek such relief before such forum and in such proceedings as may be appropriate.

15. These petitions, along with all pending applications, are disposed of in terms herein contained. The office is directed to communicate a copy hereof to the respondents forthwith.

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