

## ORDER SHEET IN THE HIGH COURT OF SINDH AT KARACHI

Suits No.2272, 2273, 2455 and 2474 of 2021

- (1) Pakistan Sugar Mills Association & others  
(2) Al-Abbas Sugar Mills Ltd. & others  
(3) Dewan Sugar Mills Ltd. & another and  
(4) Abdullah Shah Ghazi Sugar Mills Ltd.

Versus

Federation of Pakistan & others

Date	Order with signature of Judge
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1. For hearing of application u/o 39 Rule 1 & 2 CPC.
2. For hearing of application u/o 39 Rule 4 CPC.

**Date of hearing: 07.02.2022, 07.03.2022 and 16.04.2022**

M/s Makhdoom Ali Khan, Khawaja Aizaz Ahsan and Sami-ur-Rehman for plaintiffs in Suits No.2272 of 2021.

M/s Abdul Sattar Pirzada and Mamoon N. Chaudhry for plaintiffs in Suit No.2273, 2455 and 2474 of 2021.

Mr. Muhammad Ahmed, Assistant Attorney General for respondent No.1 in all suits.

M/s Faisal Siddiqui, Saad Fayaz and Shakoore Zulqarnain for defendants No.2 and 3 in all suits.

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**Muhammad Shafi Siddiqui, J.** - I have before me aforesaid four suits filed by different sugar mills and/or Sugar Mills Association wherein they have jointly and cumulatively challenged the chairperson's (defendant No.3's) right to cast second vote, claiming it to be illegal, unlawful, without jurisdiction, void ab-initio. Further challenge is the exercise of powers by defendant No.3 being chairperson under section 24(1), (5) & (6) read with section 28(1) of the Competition Act, 2010 while passing the impugned chairperson's casting vote decision in a quasi-judicial proceedings, being completely illegal and unlawful. Plaintiffs lastly sought declaration with reference to Section 24(5) of Competition Act,

2010 being ultra vires to the Constitution of Islamic Republic of Pakistan, 1973 and that the cumulative effect of the aforesaid observation would be that the entire impugned order be declared as illegal and unlawful. In the alternate plaintiffs sought 24(5) of ibid Act to be read down to save the statutory provision.

2. Along with the main suits, plaintiffs have also filed their respective injunction applications seeking interim injunction restraining defendants i.e. Federation of Pakistan and Competition Commission of Pakistan from implementing the aforesaid impugned order/decision till final decision of the suit on which ad-interim orders were passed by this Court followed by applications under order XXXIX Rule 4 CPC filed by the defendant No.2 for recalling the said interim orders.

3. During the proceedings Mr. Faisal Siddiqui, learned counsel appearing for defendant No.2 proposed for disposal of the suit and for continuance of interim order till disposal/decision of the appeals filed by the plaintiffs before the Competition Appellate Tribunal, with further statement that the aggrieved party, either plaintiffs or defendants, would be at liberty to avail the remedy/remedies available to them under the law. Said proposal was not accepted by all the counsel appearing for plaintiffs in the suits and thus I proposed to hear the injunction applications only as the defendants too have not agreed to the disposal of suits summarily after framing issues while at the stage of hearing of applications except as suggested by Mr. Siddiqui, above.

4. Dispute started when a letter was issued to Competition Commission of Pakistan by Special Advisor to Prime Minister on Accountability to conduct an inquiry against sugar cartel under the Competition Act, 2010. The report to that effect suggested that sugar cartel offended section 4(1), 4(2) and (4)(2)(c) of the Act, which was then followed by a show cause notice by defendant No.2 based on said

inquiry, which was responded. Matter came before Commission consisting originally of four-members. Commission's decisions tied the outcome and opinion of the Chairman/Chairperson was then again sought, who casted her vote (second vote), as being 5<sup>th</sup> member to set the naught at rest. She casted vote as chairman/chairperson despite her first opinion at the initial stage of four members' commission. The first opinion issued by two members of the commission held plaintiffs liable for penalties on a number of issues on 06.08.2021. Second opinion was issued by the other two members not holding plaintiffs liable for such penalties on 12.08.2021. The issues which were considered by the commission members with their opinions are as under:-

Issues	<u>First Opinion</u> Members No.1 and 4	<u>Second opinion</u> Members No.2 and 3
Issue No.I:- Whether PSMA and the undertaking have shared sensitive commercial stock information amongst themselves with the object or effect of distorting competition in the relevant market in violation of Section 4(1) read with Section 4(2)(a) of the Act?	Against Plaintiffs	Denovo Inquiry ordered
Issue No.II:- Whether the undertaking including PSMA, made a collective decision to determine export quantities, amounting to fixing or setting/controlling supply of white refined sugar in the relevant market in violation of Section 4(1) read with Section 4(2)(c) of the Act?	Against Plaintiffs	Finding of inquiry set aside
Issue No.III:- Whether such collective determination of export quantities led to an increase in or maintenance of a desired price level in the relevant market in	Against Plaintiffs	Finding of inquiry set aside

violation of Section 4(1) read with Section 4(2)(a) of the Act?		
Issue No.IV:- Whether PSMA made a decision/practice of creating zonal division in Punjab to coordinate sales, stock positions and production quota to monitor and control quantity to be sold in violation of Section 4(1) read with Section 4(2)(a) of the Act?	Against Plaintiffs	Denovo Inquiry ordered
Issue No.V:- Whether PSMA and its member undertakings who participated in the 2019 and 2010 USC tenders respectively took a collective decision/indulged in a collective bargaining practice to fix and divide the quantity of sale among themselves in violation of Section 4(1) read with Section 4(2)(c) of the Act?	Against Plaintiffs	Denovo Inquiry ordered
Issue No.VI:- Whether PSMA decided to cease crushing of sugarcane, thus, as a result of such decision, 15 undertakings in the Punjab zone ceased crushing activity violation of Section 4(1) read with Section 4(2)(a) of the Act?	Denovo inquiry ordered	Denovo Inquiry ordered

**Chairperson's opinion**

	13.08.2021	Impugned Casting Vote Order passed by Defendant No.3 holding:  To break the deadlock created by the First and Second Opinions, the Defendant No.3 exercised casting vote right in favour of the First opinion using the alleged powers under Section 24(1), 5, and (6) read with Section 28 of the Act.	
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5. On Issues, I, IV and V, the First Opinion goes against the Plaintiff while the Second Opinion leans for a *de novo* inquiry. On Issues II and III,

the First Opinion is against the Plaintiff while the Second Opinion sets aside the inquiry. Issue No.VI is the only issue on which all four members are unanimous i.e. they ordered *de novo* inquiry. The First Opinion imposes penalties of Rs.44 Billion upon the Plaintiffs, whereas second opinion does not. Proceeding commenced before the Commission after the inquiry was conducted.

6. On these facts, not being disputed, the gist of the plaintiffs' arguments are:

- The impugned order in its original outfit before “casting vote issue”, is violative of Section 14(1) of Competition Act, 2010 as the Commission at the time of passing order comprised of only four members and thus it was not constituted in terms of Section 14(1).
- Plaintiffs further challenged the constitutionality of Section 24(5) of Competition Act, 2010 being violative of Article 4, 10A and 25 of the Constitution.
- In the alternative Mr. Makhdoom Ali Khan, learned counsel appearing for plaintiffs, argued that primary way forward, for Court is to save the provision from being declared as unconstitutional by reading it down to reconcile it with provisions of *ibid* Act, Regulations and Constitution itself and only then it may be declared as *ultra vires*, if above recourse is not conducive since casting vote should not be used in quasi-judicial proceedings, adjudication or contravention under Competition Act, 2010, like the one here ended up as an impugned order.
- The provisions of Section 24(5) of Competition Act, 2010 that concerns with the exercise of casting vote applies to administrative proceedings of the Commission and not adjudication.

- The Competition Appellate Tribunal, as constituted under section 43 of Competition Act, 2010, cannot examine the vires of Section 24(5) of Competition Act, 2010 and/or its reading down mechanics.
- Thus, on the strength of one of the grounds that embarked upon unconstitutionality of Section 24(5), it is argued that this Court can exercise jurisdiction notwithstanding that the rest of the queries and questions, as raised, may have been impugned before the Competition Appellate Tribunal.

7. On the basis of above propositions, I am only obligated to decide the listed stay application and application under order XXXIX rule 4 CPC on the basis of arguments raised on the aforesaid points notwithstanding the pendency of appeal before the Competition Appellate Tribunal. Thus, I have to keep in mind the three standard principles for deciding injunction applications i.e. prima facie case, balance of inconvenience and irreparable loss.

8. The argument that could advance the case of plaintiffs for any kind of jurisdiction that may vest with this Court in presence of statutory forum, is the unconstitutionality of Section 24(5) of Competition Act, 2010 and the answer to this question will make or break as far as the jurisdiction is concerned but those could only be tentative and not conclusive since parties have agreed to the disposal of injunction application only. If the plaintiffs are able to establish that Section 24(5) contravenes or offends Article 4, 10-A and 25 of the Constitution, they may well be able to make out a prima facie case, where balance of inconvenience would lie in their favour and they would suffer irreparable loss on account of label of penalty imposed. In case they don't then they may face its consequential effect.

9. The emphasis of Mr. Makhdoom Ali Khan in challenging the vires of Section 24(5) of Competition Act, 2010 is on the count of Article 4, 10A and 25 of the Constitution and the main thrust was that a second/casting vote right has been given to the chairperson who has already casted a vote and has a “conceived mind” in view of original decision (four-member decision) made by her. As obvious from the facts that the two members of the Commission decided in favour of plaintiffs and two against plaintiffs and chairman/chairperson is one of them who gave decision against the plaintiffs.

10. Defendant No.2 being a Commission under the Competition Act, 2010 is claimed to be *coram non iudice* as not being constituted under section 14(1) of the Act, as it provides a minimum of five and maximum of seven members (odd member). In support of this contention plaintiffs’ counsel relied upon the case of Chittaranjan Cotton Mills Ltd.<sup>1</sup> and further relied upon the case of Muhammad Ashraf Tiwana<sup>2</sup> which stretched upon the failure of the commission to fulfill statutory obligation in the composition of SECP and to ensure its proper constitution in accordance with law.

11. Learned counsel has further indicated that on 07.02.2022 this Court enquired about Commission’s composition under Competition Act, 2010 and the availability of complete quorum to which time was sought by learned counsel for defendants. However, instead of responding and providing reasons to the non-availability of complete quorum, the defendants relied on section 14(7) to validate the incomplete composition of the commission and the action of defendant No.2. For such a situation, learned counsel for the plaintiffs relied upon a judgment of Lahore High Court in the case of Institute of Architects,

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<sup>1</sup> Chittaranjan Cotton Mills Ltd. v. Staff Union (PLD 1971 SC 197)

<sup>2</sup> Muhammad Ashraf Tiwana v. Pakistan and others (2013 SCMR 1159)

Pakistan<sup>3</sup>. This judgment was challenged before the Hon'ble Supreme Court but nothing materially altered as far as the view formed on the subject issue (composition of commission) by the learned Lahore High Court, is concerned.

12. With regard to the provisions of section 24(5), which empowers the Chairman, in the event of equality of votes to opt for a casting vote, learned counsel vehemently submitted that the same is not applicable to the quasi-judicial order in a quasi-judicial proceedings. He stressed upon 24(5)'s applicability by reading it down to administrative decision being taken by the Commission but not for quasi-judicial proceedings and order thereunder. Mr. Makhdoom Ali Khan, learned counsel submits that for all intent and purposes a statute must be saved and that could only be possible if the provision is read down in terms of the above understanding of law. He argued that Section 24(5) clearly offends Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973 as the sanctity of entire quasi-judicial proceedings has been diluted by the commission when fifth vote by one of the members of the original commission was allowed to be casted.

13. Mr. Abdul Sattar Pirzada Advocate has also assisted on the basis of same analogy and primarily adopted the arguments of senior counsel Mr. Makhdoom Ali Khan.

14. Mr. Faisal Siddiqui, learned counsel appearing for the Commission/respondents, vehemently opposed the arguments of the counsel for plaintiffs and submitted that the observations of the Hon'ble Supreme Court with reference to other statute having the *pari materia* provision of section 14(7) of the Competition Act, 2010, have been

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<sup>3</sup> Institute of Architects, Pakistan (Lahore Chapter) v. Province of Punjab (PLD 2016 Lahore 321)



adjudged to be lawful. Learned counsel in this regard has relied upon the cases of Sardar Sher Bahadur Khan<sup>4</sup> and Ibrahim & Sons<sup>5</sup>.

15. He submitted that the objections regarding improper constitution of an authority can be decided by forums created under the statute i.e. Appellate Tribunal in the instant case. Mr. Siddiqui, however, argued that the objection regarding the constitution of the Commission and casting 5<sup>th</sup> vote by one of the members of the Commission, was not taken before the Commission itself during the proceedings. Mr. Siddiqui has relied upon the Regulation 52(A)(6) of the Competition (General Enforcement) Regulations, 2007 which requires that no proceedings of the Commission shall be invalid by reason of any defect or irregularity unless the presiding authority, on any objection taken by any party, is of the opinion that substantial injustice has been caused by such defect or irregularity.

16. Regarding Section 24(5) of the Competition Act, 2010 it is contended that not a single article has been pointed out which is being offended by the aforesaid provisions of the Act, 2010. Besides, such questions have already been raised before the Competition Appellate Tribunal and could well be addressed before statutory forum provided under the law.

17. Learned Assistant Attorney General adopted Mr. Siddiqui's arguments.

#### **COURT'S ANALYSIS**

18. Chittaranjan's case (Supra) discussed a Labour Court's case which Court was constituted under East Pakistan Labour Disputes Act, 1965 and was challenged on the ground that two members of the Court have not been selected in accordance with the provisions of Section 9(4) of the

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<sup>4</sup> Sardar Sher Bahadur Khan v. Election Commission of Pakistan (PLD 2018 SC 97)

<sup>5</sup> Ibrahim & Sons v. Punjab Text Book Board (2006 SCMR 875)

aforesaid Act and the Hon'ble Supreme Court pronounced that "where the Court is not properly constituted at all the proceedings must be held to be *coram non judice* and, therefore, non-existent in the eye of law". It further says that there can also be no doubt that in such circumstances, "it could never be too late to admit and give effect to the plea that the order was a nullity"<sup>6</sup>.

19. If this case is not an ideal reference to apply to the proceedings in hand, as it was selection of two members of "Court" not being selected under section 9(4) of the *ibid* Act of 1965, then the case of Muhammad Ashraf Tiwana (*Supra*), which discussed the composition of SECP Commission under the Act, squarely applies to understand the question raised here. Para-40 of the said judgment is appropriate to understand the depth of the arguments of Mr. Makhdoom Ali Khan which is reproduced below:-

*"40. Before parting with this aspect of the case, it is necessary to comment on the statutory requirement as to the composition of SECP and the failure of the Government to fulfill its statutory obligation and to ensure proper constitution of SECP in accordance with law. In section 5 of the Act it has been mandated that "the Commission shall consist of such number of Commissioners, including the Chairman, appointed by the Federal Government as may be fixed by the federal Government but such number shall not be less than five and more than seven". The minimum number of Commissioners by law could not be stated with greater clarity. Even this Court had clarified in its judgment in C.P No.447 of 2001 and 448 of 2001 that the SECP was not properly constituted because the minimum number of Commissioners had not been appointed. Learned counsel for the petitioner placed on record a table, reproduced below, which shows that barring a period of four years the constitution of the Commission was incomplete during the previous 15 years, as the minimum of five Commissioners had not been appointed. The respondents have not denied the veracity of this table which reflects a patent illegality and a flippant attitude towards statutory requirements. In fact, in the Concise Statement filed on behalf of respondents Nos.2, 4, 5 and*

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<sup>6</sup> Chief Kwame Asante, *Tredahone v. Chief Kwame Tawia* (9DLR686(PC))

*6, it is admitted that "the number of Commissioners in [SECP] has been less than five since 2003." A half-hearted attempt was also made to justify this on the ground that "there is no requirement of minimum quorum in the Act or Regulations." When these submissions are juxtaposed with section 5 of the SECP Act, we cannot help but notice the disregard for the law on the part of the respondents in the crucial matter of the very composition of SECP:--*

20. In the case of Institute of Architects, Pakistan (Supra) the Bench maintained as under:-

*"30. Respondents relied on section 8 of Act-II to argue that the existence of any vacancy or any defect in the constitution of the Authority does not render the acts, proceedings, decisions, orders of the Authority invalid. Section 8 of Act-II presupposes that the Authority has been lawfully established and constituted. It is not a protection clause that covers for the failure of the Government to establish or constitute the Authority in the first place. Infact it is a functional clause which overcomes procedural and temporary defects of the constitution and saves the decisions or proceedings of the Authority against minor hiccups provided the Authority is otherwise substantially in existence and functional. In the present case, the Authority has not been established or validly constituted in the first place, so Section 8 has no application to this case. Reliance is placed on Enayat Ali and others v. Province of West Pakistan and others (PLD 1968 Kar. 552)."*

21. The question raised in Architect case went up to Hon'ble Supreme Court and the leave was declined in C.P Nos.423-L to 559-L of 2017.

22. Considering the above conclusions, submissions of Mr. Faisal Siddiqui is not forceful that at some point of time, which was very limited, there were five or six members of the Commission appointed, as this aspect was discussed in Tiwana case (Supra-2). The fact remains that most of the time minimum quorum was never in existence and mostly when it matters. The situation could have been convincingly argued by Mr. Siddiqui, provided he could have shown that "most" of the time quorum was available, as required under section 14(1) of the Act or that efforts were made in this regard. This point was further attempted

by Mr. Faisal Siddiqui that a larger Bench in the case of Sardar Sher Bahadur Khan (Supra) has already discussed in its Para 12, the present situation of less number of Members of Commission and also in the case of Ibrahim & Sons (Supra). Ibrahim & Sons is a leave refusing order and does not discuss the points raised in detail whereas Sardar Sher Bahadur does, so I would consider the said case in support of Mr. Siddiqui's arguments. The observation of the Bench in Sardar's case is as under:-

*“...From the perusal of the above provision, it is clear that ECP is comprised five members but at nowhere it has been provided that any decision of ECP shall be taken by all of its five members. Contrary to it, in Section 8(2) of the Order, 2002 any order passed by ECP by lesser members of its total strength has been protected by specifically proving that no action taken or thing done by ECP shall be invalid or called in question only on the ground of the existence of a vacancy therein or of the absence of any member from any meeting thereof...”*

23. The subject law under consideration in the case of Sardar Sher Bahadur was Election Act, 2017 which Act itself came in consideration before Hon'ble Supreme Court in the case of Aam Log Ittehad case<sup>7</sup> which law was looked into from another perspective, however, conclusion perhaps is very material for controversy in hand. The question crucial for the purposes of deciding current issue in hand was decided therein to the effect that Election Commission of Pakistan under 2017 Act does not enjoy quasi-judicial status. Learned Bench of the Hon'ble Supreme Court in Aam Log case (Supra) framed a central question (Para 8) therein which was raised before them and also decided in the judgment impugned before them i.e. the office of member of the commission being quasi-judicial in nature, as held in the impugned judgment before Hon'ble Supreme Court. The nature of the office of the member of the Commission was then discussed at length and answered

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<sup>7</sup> Aam Log Ittehad v. The Election Commission of Pakistan (PLD 2022 SC 39)

in para-18 of the judgment. Paragraphs 8 and 18 of the judgment are reproduced as under:-

*“8. We have heard the learned petitioner and learned counsel and considered the relevant provisions and the record. We begin by setting out the conclusions arrived at by the learned High Court, which are conveniently summarized in para 22 of the judgment:*

*“22. We would, therefore, sum up our findings on various constitutional and legal grounds agitated by the petitioners and the objections as to maintainability of instant petition raised by the respondents, in the following terms:*

*(i) Petitioners have the locus standi to file instant constitutional petition in the nature of quo-warranto under Article 199(i)(b)(ii) of the Constitution of Islamic Republic of Pakistan, 1973 for the reason that any person, who may not be an aggrieved party, can invoke the constitutional jurisdiction of a High Court for issuance of a writ of quowarranto so that a High Court may examine the validity of an appointment to a public office, on constitutional and legal grounds. In view of our detailed finding as recorded in Paras. 9 to 12 hereinabove, the objections raised by the respondents with regard to maintainability of instant petition on various grounds, including: (i) locus standi of petitioners to file instant petition; (ii) mala fide on the part of the petitioners; (iii) laches; and (iv) lack of territorial jurisdiction of this Court, are hereby declared to be without any substance, hence over-ruled.*

*(ii) Office of Election Commission of Pakistan is a "quasi-judicial office", therefore, bar of expiration of two years in terms of Article 207(2) of the Constitution of Islamic Republic of Pakistan, 1973, would not be attracted in the case of appointment of retired judges of Supreme Court and High Court(s). Therefore, a writ of quo-warranto cannot be issued against respondents Nos. 2 to 4 being the retired Judges of different High Courts on the grounds that their appointments have been made before expiration of two years from the date when they ceased to hold office as Judges of High Courts. Accordingly, writ against respondents Nos.2 to 4 is misconceived and not maintainable.*

*(iii) As regards issuance of writ of quo-warranto against respondent No.5, a retired bureaucrat, no substantial constitutional or legal ground has been agitated, nor any sufficient material or evidence has been produced in support of the allegations of corruption, therefore, we are not inclined to*

*conduct any inquiry or to make a probe into the allegations levelled against respondent No.5 while exercising constitutional jurisdiction under Article 199 (i) (b) (ii) of the Constitution in the instant case. Accordingly, writ against respondent No.5 is not maintainable."*

*We may note that the learned High Court has, in sub-para (ii), inadvertently referred to the "Office of Election Commission of Pakistan" being quasi-judicial. There is of course no such office (the Commission being a body), but the true meaning and intent is clear and we proceed accordingly. It will be seen that the preliminary objections taken before us were also raised before the learned High Court but were repelled. We are satisfied with the treatment of the same; therefore no further notice need be taken of them here. Furthermore, we are, with respect, also not inclined to take up the matter of the Respondent No. 5, both for the reasons that found favor with the learned High Court and that admittedly he stands retired. We turn therefore to the central question raised before us, and decided by the impugned judgment: is the office of a member of the Commission of a quasi-judicial nature?*

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*18. In view of the above discussion and analysis, we conclude that the question posed in para 8 must be answered in the negative. The contrary view taken by the learned High Court is, with respect, erroneous, and cannot be sustained."*

24. The Hon'ble Supreme Court then went on to conclude other issues which conclusively decided the appeal. The nature of the entity being Election Commission was not quasi-judicial in nature as against the case in hand and that becomes the ratio in Sardar's case. Mr. Siddiqui never disputed the "Commission constituted under Competition Act, 2010 for adjudication" to be other than quasi-judicial and/or that the office of the member of the Commission meant for adjudication is not quasi-judicial<sup>8</sup>. Nevertheless, the Chairperson herself observed the Competition Commission to be quasi-judicial and pending such issues before them, adjudications takes place. This has been opined by the

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<sup>8</sup> Mrs. K.L. Sahgal v. State of U.P. and others (AIR 1965 Allahabad 465)

Chairman/Chairperson while she rendered her first opinion as being member of the commission as under:-

*“Coming to the burden and standard of proof applicable in proceedings before the Commission, in light of the above, the Commission, being an administrative tribunal and discharging quasi-judicial functions as well as administrative functions, is not bound by the formal laws of evidence and procedure..... (Para-90 at 667).”*

25. The case of Sardar Sher Bahadur thus is distinguishable on this count as to the status of two bodies.

26. In Aam Log Ittehad the ratio discussed in reaching the conclusion that office of member of Election Commission of Pakistan does not enjoy quasi-judicial status is summarized in Paragraph 13 and the same is reproduced as under:-

*“13. The other provisions of the 2017 Act considered may now be taken up (though not in sequential order). Reference was made to section 126, which provides that for purposes of disposal of an appeal the Commission has the same powers as vest in a court under the Code of Civil Procedure (“C.P.C.”) for certain matters as listed therein. Now, section 126 and the conferment of the sort of powers there listed is a common legislative device that has been adopted in many statutes in respect of diverse offices, bodies, authorities and forums. To take but one example, section 176 of the Income Tax Ordinance, 2001 (“2001 Ordinance”) empowers the Commissioner of Inland Revenue to issue notices to persons to attend to tax (and/or other) authorities, and provide information and produce record etc. Subsection (4) of this section corresponds to section 126. It lists very much the same sort of matters in respect of which the Commissioner can exercise the powers of a court under the C.P.C. No one has ever suggested that the Commissioner, by virtue of section 176(4), is to be regarded as being an office or post of a quasi-judicial nature. Remaining with fiscal laws for the moment, we may also note that such laws routinely provide that for purposes of recovery of tax, the relevant authorities shall have the same powers as does a court under the C.P.C. “for the purposes of the recovery of any amount due under a decree”. See, e.g., section 138 of the 2001 Ordinance, section 202 of the Customs Act, 1969 and section 48 of the Sales Tax Act, 1990. Again, no one has*

*ever suggested that by reason of such a provision the tax authorities are to be regarded as quasi-judicial. Section 126 is just another example of a well known, and widely used, legislative device and nothing more should be read into it. Furthermore, the powers of the Commission are, as noted, limited to the disposal of an appeal. Section 125 is an example of such an appellate power. It is in relation to the count of the vote, which is clearly an administrative exercise.”*

27. The relevant provisions of different statutes discussed above were in fact in exercise of powers for recovery of “Due Tax” whereas proceedings and adjudication here is to adjudge plaintiffs’ actions being violative of Section 4(1), 4(2) and 4(3) of Competition Act, 2010. Once the proceedings and adjudication is over, the leftover is only administrative, as far as recovery is concerned. So provisions, which triggers adjudication mechanism and provisions which are formal and meant for information and recovery of “due tax” already adjudged, are distinguishable features of a statute which covers both nature of proceedings. A statute may have both administrative and adjudication limbs and that distinguishes the actions taken.

28. A 5 member Bench of this Court in the case of Dr. Zahid Javed<sup>9</sup> held as under:-

*“...A “quasi-judicial power” is one imposed on an officer or an authority involving the exercise of discretion, judicial in its nature, in connection with, and as incidental to, the administration of matters assigned or entrusted to such officer or authority. A “quasi-judicial act” is usually not one of a judicial tribunal, but of a public authority or officer, which is presumably the product or result of investigation, consideration, and human judgment, based on evidentiary facts of some sort in a matter within the discretionary power of such authority or officer. A quasi-judicial power is not necessarily judicial, but one in the discharge of which there is an element of judgment and discretion; more specifically, a power conferred or imposed on an officer or an authority involving the exercise of discretion, and*

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<sup>9</sup> Dr. Zahid Javed v. Dr. Tahir Riaz Chaudhry (PLD 2016 SC 637) at 656F



*as incidental to the administration of matters assigned or entrusted to such officer or authority.”*

29. Similar instances could be drawn through H.M Abdullah<sup>10</sup> and Askari Cement (Pvt.) Limited<sup>11</sup>. There is no cavil to the preposition that in all such proceedings which are quasi-judicial in nature, the fundamental rights of the party cannot be snatched and just because process was adopted, could not justify it as lawful and to be adhered to<sup>12/13</sup>.

30. Pari materia provisions to Section 24(5) of Competition Act, 2010 are available in various other statutes i.e. (i) Securities & Exchange Commission of Pakistan Act, 1997 - Section 12(7); (ii) Workers Welfare Fund Ordinance, 1971 - Section 11-B(4); (iii) State Bank of Pakistan Act, 1956 - Section 9(4) and (iv) Karachi Port Trust Act, 1886 - Section 17(2)(e), but it is not conceivable that such right of casting vote could be applied in a quasi-judicial proceedings.

31. Now discussing the case in hand, ever since the Competition Act, 2010 came into being this Commission was never properly constituted except for a few occasions and that too for a limited period, which will not override the effects of Institute of Architect and Tiwana (Supra). The Federal Government never cared to provide a complete quorum consistently and/or on regular basis for the existence of the commission in terms of requirement of Section 14(1) of Competition Act, 2010. Since the Federal Government never felt obligatory about fulfilling their obligations, it does not lie in their mouth to plead that Section 14(7) would come for their rescue. The absence of a member of a Commission under section 14(7) could only cater where federal government acted vigilantly and has provided a complete body and availability of its

<sup>10</sup> H.M Abdullah v. Income Tax Officer (1993 SCMR 1195)

<sup>11</sup> Collector of Customs v. Askari Cement (Pvt.) Limited (2020 SCMR 649)

<sup>12</sup> Murlidhar v. University of Karachi (PLD 1966 SC 841)

<sup>13</sup> Abdul Wahab v. Secretary Government of Balochistan (2009 SCMR 1354)

members, being validly constituted. Similarly, the existence of vacancy could only be pleaded provided the federal government, for most of the time was vigilant in performing their duty, and had always been prompt in filling the vacancies of Commission, as and when created, but that has not been demonstrated here as mostly vacancies remained unfilled and the worst part of it is that this has gone unnoticed by federal government as no efforts to fill the vacancies were shown. They only pleaded 14(7) of Competition Act, 2010 against this argument and not that government had been making efforts to fill those vacancies.

32. In the case of Al-Jihad Trust<sup>14</sup> the Hon'ble Supreme Court has considered it to be a fraud on the statute by the federation. Relevant part for convenience is reproduced as under:-

*“The real issue in the present case, therefore, is as to whether such a statutory delegation during a vacancy in the office of the delegator can be stretched to a period which is unduly protracted and indefinite and which creates an irresistible impression that those responsible for filling the vacancy in the office of the delegator are not interested in filling that vacancy and are contented with running the affairs of the concerned institution or department through the delegate himself. This surely is a serious matter and in case such an impression is well-founded then such an exercise may amount to committing a fraud with or upon the relevant statute.”*

33. The matter does end here. It is just the background necessary for considering the real issue which provides jurisdiction to this Court. In fact the material issue which has enabled me to consider the preposition raised is the vires of Section 24(5) of the Competition Act, 2010 but since previous conclusion has some overlapping effect to this issue, I discussed it earlier. Mr. Makhdoom Ali Khan has raised twofold arguments. Firstly he submitted that this impugned provision offends Article 4, 10-A and 25 of the Constitution of the Islamic Republic of Pakistan and should be struck down. Secondly he argued that it does not

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<sup>14</sup> Al-Jehad Trust v. Federation of Pakistan (PLD 2011 SC 811) at 819E

apply to a quasi-judicial order/decision and hence be read down to save the statute and proceedings conducted under section 4 of the Competition Act.

34. Mr. Makhdoom Ali Khan has not seriously emphasized how Article 25 of Constitution of Pakistan is being violated out of 24(5) of Competition Act, 2010 because if this law stand, it stands for every citizen (unless reasonably classified) or is bad for everyone, however, he stressed upon article 10A of the Constitution of Pakistan, most. Although the questions regarding vires of Section 24(5) of Competition Act, 2010 have been raised in the memo of appeal to challenge the impugned order before the Competition Appellate Tribunal however its unconstitutionality and for it being declared ultra vires to Constitution, the Constitutional Court could only be a remedial forum and way forward to answer the questions raised. There is nothing under the special law before a special tribunal, which itself is a creation of a statute, to adjudge the provisions of a statute being ultra vires to the Constitution or unconstitutional.

35. As I noticed, the power to issue casting vote find its existence in Section 24(5) of the Act. This section set out the Chairman to convene such meetings of the Commission at such time and place as he/she considers necessary for the efficient performance and functions of the Commission. Section 24(5) then provides that in the event of an equality of votes, the Chairman shall have a casting vote. It is this provision which was utilized by the Chairperson of CCP to pass impugned decision in adjudication proceedings which decision was originally tied between four members. She favoured her first opinion as she was a co-member and author of the opinion rendered by two members, when decision was tied.

36. Question is, could there be a preconceived mind on the Commission and that too for untying the knots of four members, one of them being herself, who matters most in course of adjudication proceedings? In an undisputed quasi-judicial proceedings and adjudication, to break a deadlock created by first four members of the commission in the shape of first and second opinions referred above, a **cloned mind** was utilized having been “utilized” earlier when deadlock was created. In my view, in a judicial or quasi-judicial proceedings, a Judge and/or presiding officer and/or member of Commission like one here with preconceived mind, cannot be obliged to sit as an umpire and/or Referee. That member and/or any member on the Commission has to be free from any preconceived or determined thoughts. Conclusiveness of dispute in the mind of a member before sitting on commission, is a loss to ensure fair trial and due process<sup>15</sup> and the situation could well be idealized close to *parti pris*. The judge or a member in a quasi-judicial proceeding, untying the naughts should not be the one already utilized. It negates the assurance of fair trial and due process guaranteed under Article 10-A of the Constitution of Islamic Republic of Pakistan, as held in Naveed Asghar case<sup>16</sup>.

37. If the statute requires a decision started from a query, investigation, report, proceedings and/or then adjudication by any odd number of judges, with its lower and upper cap, it should be seen that each member is of independent and impartial mind and should not be carrying any weight of preconceived conclusion.

38. With my above assessment and conclusion, I would now make an attempt to reconcile these provisions with the regulations framed earlier being applied by both Mr. Makhdoom Ali Khan and Mr. Faisal Siddiqui, but in their own ways.

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<sup>15</sup> Government of the Punjab v. Abdur Rehman (2022 SCMR 25) and Justice Qazi Faez Isa v. President of Pakistan (PLD 2022 SC 119)

<sup>16</sup> Naveed Asghar v. State (PLD 2021 SC 600) at 618

39. It is necessary to understand the scope and spirit of the two regulations, which were framed under Competition Ordinance 2007 and confusingly saved under section 62 of Competition Act, 2010 however adjudged consequently in LPG Association<sup>17</sup>. The saving is also covered by Section 24 of General Clauses Act and Dr. Syed Muhammad Ali Shah<sup>18</sup> and Nawaz Khokhar<sup>19</sup> cases. A comparative table of the two regulations is reproduced as under:-

Competition Commission of Pakistan (Conduct of Business) Regulations, 2007	Competition Commission (General Enforcement) Regulations, 2007
<p>1. ...</p> <p>2. ...</p> <p><b>3. Procedure and conduct of business of the Commission.-</b> (1) The Chairman may call meetings of the Commission for conduct of its business, at such time and places, as he deems fit.</p> <p>...</p> <p><u>(7) In the case of difference of opinion among the Members, the opinion of the majority of the Members present at the meeting shall prevail and orders of the Commission shall be expressed in terms of the views of the majority. Any Member dissenting from the majority view may record his reasons separately. If the Members are evenly divided in their opinion, the Chairman or, as the case may be, the Member chosen to preside at the meeting, shall have a second or casting vote.</u></p> <p><b>4. Functions and power of Chairman.-</b> (1) The Chairman-</p> <p>(a) shall be the chief executive officer of the <u>Commission and shall deal with the day to day administration of affairs of the Commission ;</u></p> <p>(b) shall take <u>all policy decisions of administrative nature</u> in consultation with the Members as</p>	<p>1. ...</p> <p><b>2. Definitions.—</b>(1) In these regulations, unless there is anything repugnant in the subject or context,-</p> <p>(a) “applicant” means a party to a prohibited agreement who have filed an application under regulation 4;</p> <p>(b) “application” means an application seeking exemption under these regulations;</p> <p>(c) “Chairman” means the Chairman of the Commission appointed under subsection (2) of section 14 and includes the Acting Chairman appointed under section 16 thereof;</p> <p>(d) “Commission” means the Competition Commission of Pakistan established under section 12;</p> <p>(e) “complainant” means an undertaking or a registered association of consumers filing a complaint or the Federal Government filing a reference under regulation 17;</p> <p>....</p> <p>(i) “inquiry officer” means an officer appointed by the Commission to enquire into any matter under these regulations;</p>

<sup>17</sup> LPG Association of Pakistan v. Federation of Pakistan (2021 CLD 214)

<sup>18</sup> Dr. Syed Muhammad Ali Shah v. Chairman Pakistan Cricket Board (2010 MLD 1241)

<sup>19</sup> Federation of Pakistan v. M. Nawaz Khokhar (PLD 2000 SC 26)

<p>may be necessary;</p> <p>...</p> <p><b>5. Duties and Responsibilities of Secretary:-</b> (1) There shall be a Secretary to the Commission who shall report directly to the Chairperson and Commission (where required) on all the matter concerning the Secretary Office. The duties and responsibilities of secretarial nature, including the following:-</p>	<p>...</p> <p>(l) “party” shall include complainant and an undertaking defined in clause (p) of section, 2 or the officer concerned of the department of the Commission conducting the relevant case, or any statutory authority, as the case may be, and shall include a respondent or respondents against whom any inquiry or proceeding is instituted or relief is sought to be made and shall also include any person permitted to join the proceedings or an intervener but does not include an informant;</p> <p>....</p> <p><b>7. Power to inquire.</b>— Where the Commission receives an application made under regulation 4 above, the Commission may proceed to decide the matter on the basis of the record made available or it may decide to commence an inquiry in accordance with these regulations.</p> <p><b>8. Burden of proof.</b>— The applicant desirous of obtaining an exemption under these regulations shall bear the burden of proving that the conditions relating thereto have been satisfied in terms sub-section (2) of section 9.</p> <p>...</p> <p><b>13. Decisions following an inquiry.</b>— Consequent upon the conclusion of an inquiry conducted under regulation 7, the Commission may proceed to grant or refuse an exemption.</p> <p>(2) Before making the decision to refuse the grant of exemption, the Commission shall-</p> <p>(a) give written notice to the undertaking likely to be affected by the proposed decision; and</p> <p>(b) give that undertaking an opportunity of being heard.</p> <p>....</p> <p><b>16. Inquiry.</b>— (1) Without prejudice to the generality of the powers conferred under section 37 and subject to sub-regulation (2) hereof, the Commission may</p>
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	<p>commence an inquiry:</p> <p>(a) suo moto; or</p> <p>(b) upon a reference made to it by the Federal Government under regulation 17; or</p> <p>(c) on receipt of a complaint from an undertaking or a registered association of consumers under regulation 17.</p> <p>(2) The Commission may commence an inquiry upon receipt of a complaint if the facts before it, appear to constitute a contravention of the following provisions:</p> <p>(a) prohibition in section 3;</p> <p>(b) prohibition in section 4;</p> <p>(c) prohibition in section 10;</p> <p>(d) prohibition in section 11; or</p> <p>(e) any act, omission or facts otherwise available appear to constitute contravention of the provisions of Chapter II of the Ordinance.</p> <p>....</p> <p><b>26. Hearing after submission of Inquiry Report.</b>– (1) ...</p> <p><b>26A. Taking of Evidence.</b>- (1) ...</p> <p><b>26B. Production of additional evidence before the Commission.</b>–(1) ....</p> <p>...</p> <p><b>40. Appeals.</b>– The person aggrieved by any order passed by any Member or authorized officer of the Commission pursuant to the provisions of the Ordinance, may file an appeal before the Appellate Bench of the Commission in accordance with the Competition Commission (Appeal) Rules, 2007.</p> <p>....</p> <p><b>52A. Conduct of Proceeding.</b>- (1) ...</p> <p>....</p> <p>(6). <u>No proceedings of the Commission shall be invalid by reason of any defect or irregularity unless the presiding authority, on any objection taken by any party, is of the opinion that substantial</u></p>
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	<u>injustice has been caused by such defect or irregularity or there are otherwise sufficient reasons for doing so, and the authority may, in such even, make such orders as deemed appropriate by it for the rectification of such defect or irregularity.</u>
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40. Mr. Makhdoom Ali Khan has argued that in fact 24(5) is applicable to internal meetings or administrative orders of the commission convened for the purposes other than quasi-judicial proceedings

41. Let us now see if casting vote provision could be diverted to those recognized as administrative order while applying reading down principle and/or if this principle of reading down is applied in all proceedings conducted by the commission then all quasi-judicial proceedings conducted by the commission could be excluded by reading in, except quasi-judicial proceeding, from the applicability of Section 24(5) as recognized in the cases of Haroon-ur-Rashid<sup>20</sup>, Total Parko Pakistan<sup>21</sup> and Hazrat Hussain<sup>22</sup>.

42. Regulation 3(7) of Competition Commission of Pakistan (Conduct of Business) Regulations in relation to internal meeting states as under:-

*“In case of difference of opinion among the members, the opinion of the majority of the members present at the meeting shall prevail and orders of the commission shall be expressed in terms of the views of the majority. Any member dissenting from the majority view may record his reason separately. If the members are evenly divided into opinion, the chairman or, as the case maybe, the member chosen to preside at the meeting, shall have a second or casting vote.”*

43. Regulation 4 provides for the functions and powers of the Chairman under the regulations. The Chairman deals with day to day administrative issues of the commission. This could be summarized to

<sup>20</sup> Haroon-ur-Rashid v. LDA (2016 SCMR 931) at 936A

<sup>21</sup> Total Parko Pakistan Limited v. Pakistan (PTCL 2021 CL 576) at 5920

<sup>22</sup> Pakistan v. Hazrat Hussain (2018 SCMR 939) at 956D



internal meetings regarding the administration and internal business issues in clarity where existing vote could be utilized and the application of Section 24(5) could be narrowed down by its applicability with the internal/administrative affairs.

44. In any proceedings which are quasi-judicial in nature, the Competition Commission (General Enforcement) Regulations, 2007 are material in nature in its applicability. Its regulation 26 provides for the procedure of hearing after submission of inquiry report and regulation 28 regularizes process for passing of decisions. Under the Competition Commission (General Enforcement) Regulations, 2007 there is apparently no power to cast second vote to break any deadlock and section 27(1) suggests that commission should consist of not less than 5 and more than 7 members. This configuration suggested members of Commission in odd and not in even numbers. This configuration of number of members is not provided in Competition Commission (Conduct of Business) Regulations, 2007 and in fact provides that in the event of member evenly divided, Chairperson's decision shall prevail. This is not available in General Enforcement Regulations 2007 as totally different diversion is provided under Regulation 52-A6. The proceedings were conducted under Section 4 read with Section 28 of the Competition Act 2010 which restrains the plaintiffs from entering into such agreement as passed by the commission which was then followed by the powers and functions of the commission in terms of Section 28 of the *ibid* Act. Section 33 empowers the commission in relation to proceedings and inquiry. It is these proceedings and the relevant provisions cited above that further strengthened my understanding that the subject proceedings are quasi-judicial in nature and none else and to be treated under the required Regulations i.e. Competition Commission (General Enforcement) Regulations, 2007.

45. I seek guidance from the above reported judgments of Haroon-ur-Rashid, Total Parco and Hazrat Hussain (Supra). The relevant part of judgment in Haroon-ur-Rashid is reproduced as under:-

*“It is settled position in law that while interpreting the law or any provision of any statute all efforts are made by the Court to save the statute by applying various tools of interpretation one of the rule of harmonious construction being rule of reading down and rule of severance. Rule of reading down, a statutory provision means that a statutory provision is generally read and or toned or narrowed down, applying restrictive meaning in its application.”*

46. Similarly, the case of Total Parco Pakistan Limited (Supra) the Bench held as under:-

*“The theory of reading down is a rule of interpretation which is resorted to by the Courts when they find a provision read literally seems to offend a fundamental right or falls outside the competence of the particular Legislature. It falls within the competence of a Court to do this so as to save the very statute. Besides, the addition and subtraction of a word in a statute is not justified, except where for the interpretation thereof the principle of reading in and reading down may be pressed into service in certain cases. Rule of reading down a statutory provision means that a statutory provision is generally read and or toned or narrowed down, applying restrictive meaning in its application..... The offending provision or part of it is read down to the extent it is necessary to given it legal effect, or will be served if it cannot be read down, and the remaining part and provision of the statute will remain intact.”*

47. It is also established that the statute must read with the situation in case there is clear conflict, as recognized in the case of Hazrat Hussain (Supra). Relevant part of the said judgment is reproduced as under:-

*“Finally, there is a reference in the judgment to the well-known principle of the presumption of constitutionality of a statute. The principle is indeed well-established. But an equally well-established principle is that, if there is a conflict between the provisions of a statute and that of the Constitution, then it is the statute which must yield*

*to the superior mandate of the basic law, which confers on Parliament the power to enact laws. The offspring must necessarily be subservient to the parent and the lesser power must surrender before the greater power. There is no greater power known to any civilized polity than that which flows directly from the constitution.”*

48. In the case of Mahindra Electric Mobility Limited<sup>23</sup> at Para 160, the vires of amendment made to Section 22(3) of the Competition Act, 2002 (India) was challenged, which is pari materia to Section 24(5) of our Competition Act, 2010. While hearing and expounding the question in detail, the Delhi High Court in Para 160 held as under:-

*“160. In the considered opinion of this Court, there can be no two opinions that a casting vote, which potentially can lead to an adjudicatory result or consequence, is anathema to and destroys the Rule of Law in the context of Indian Constitution”.*

49. Further in paragraph 161 the Delhi High Court has observed as under:-

*“161. The court further is of the opinion that the principle of equal weight for the decision of each participant of a quasi-judicial tribunal is undoubtedly destroyed by Section 22(3) and further that the provision is incapable of compartmentalization or “reading down”. This can be shown by an illustration whereby the decision taken by a majority of four members might be to question a complaint and record that there is no prima facie opinion. The potential mischief which the casting vote provision can result in is that the Chairperson may well take recourse to the second or casting vote and tip the balance the other way and direct that a prima facie case exists in order to investigate into the matter further. There can be several such illustrations where the potential repercussions can be felt in the ultimate adjudicatory result. Consequently, the provision of Section 22(3) is incapable of a clear or neat segregation and has to be declared void in entirety. As a consequence, the only provision which would survive then is the proviso which mandates a minimum quorum of three members (including the Chairman). The proviso then would stand on its own and act as a norm since per se it is harmonious and caters to situations and contingencies where the entire Commission of seven members may be unable to sit and composition larger than 3 may not be able to function for several reasons.”*

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<sup>23</sup> Manindra Electric Mobility Ltd. v. Competition Commission of India (2019 SCC Delhi 8032)

50. A judgment that was relied upon by Delhi High Court is also of much relevance to be cited and that is Shobhana Shankar Patil's case<sup>24</sup>, which highlighted similar issue resulting in entrustment upon him/her (authority), the extra or casting vote, would be entirely irrational. Indian Constitution does not have an article identical to article 10-A of Constitution of Islamic Republic of Pakistan, yet casting vote by a member already rendered his/her opinion was considered as anathema to its supreme law. We have Article 10-A and would be undermining its assurance and effectiveness in case an adjudicating member is obliged to render its opinion twice in a quasi-judicial function.

51. With this understanding of law, I have reached to a conclusion that there should not have been a situation of even number of member of commission in a quasi-judicial proceeding, however, in the current situation the event of an equality of votes reached and hence the Chairman/Chairperson and/or any other member already rendered opinion, cannot be saddled with additional responsibility to cast a vote to untie knot as it would destroy the balance of each independent judicial mind being applied to a triable question under adjudication. This provision of Section 24(5) of Competition Act, 2010 thus be read down to the administrative functions and operations of Commission only arising under Competition Commission (Conduct of Business) Regulations 2007 being distinguished by the other regulation i.e. Competition Commission (General Enforcement) Regulations, 2007. An option of carrying out such exercise of casting vote again is also not available in view of above understanding of law.

52. This is only an injunctive order and hence is of tentative findings. Excluding the casting vote decision of Chairperson, in view of above conclusion, it is a split decision by 2 x 2 and thus I am inclined to grant

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<sup>24</sup> Shobhana Shankar Patil v. Ramchandra Shirodkar (AIR 1996 Bombay 217)

injunction to the extent of casting vote decision of Chairman/Chairperson only subject to securing 50% of the respective penalties recommended by the Commission with the Nazir of this Court through a bank guarantee in two weeks' time. With this condition the injunction applications in the above terms are allowed, Chairman/Chairperson's casting vote decision/ opinion shall remain suspended till the final disposal of the suit subject to furnishing above bank guarantee whereas applications under order XXXIX Rule 4 stand dismissed.

Dated: 13-06-2022

**J U D G E**