

JUDGMENT SHEET
PESHAWAR HIGH COURT, PESHAWAR
JUDICIAL DEPARTMENT

Writ Petition No.1769-P/2017

JUDGMENT

Date of hearing...06-07-2017 (Announced on 17-08-2017)

Petitioner: (Frontier Mine Owners Association) by
Mr.Afnan Karim Kundi, Advocate.

Respondents: (Khyber Pakhtunkhwa through Chief
Secretary, Government of Khyber
Pakhtunkhwa and others) by M/s Waqar
Ahmad Khan, AAG and Bilal Ahmad Durrani,
Advocate alongwith Parvaiz Khan, Assistant
Director (Law).

YAHYA AFRIDI, C.J.- Petitioner, seeks the
constitutional jurisdiction of this Court, praying
that:-

*“In view of the submissions, prayer is
humbly made as under;-*

- 1. It is respectfully prayed that the
Khyber Pakhtunkhwa Minerals
Sector Governance Act, 2016 (“the
Act of 2016”) and the Khyber
Pakhtunkhwa Mineral Titles
(Large and Small Scale Mining)
Rules, 2017 Rules (“the 2017
Rules”) may be declared to have
been made without lawful
authority and of no legal effect
having been enacted/made in
violation of the Constitution and
the ratio of the Mustafa Impex
case (PLD 2016 SC 808) and may
thus be struck down in toto.*
- 2. In the alternative, the multiple
provisions of the Act of 2016 and
the 2017 Rules specifically
impugned in the grounds portion
of this petition (but not reproduced
for sake of brevity being so*

numerous) may kindly be struck down being ultra vires Articles 2A, 4, 5, 9, 10A, 14, 18, 24, 25, 115, 129, 227 and 264 of the Constitution and in violation of the case law laid down by the superior Courts. It is nonetheless mentioned and requested accordingly that due to the large number of such provisions, the entire Act of 2016 and the entire 2017 Rules deserve to be struck down as they are in any case impractical and unworkable to implement.

3. *Resultantly, it is prayed that, firstly, all notifications, orders, acts and things made or done pursuant to the Act of 2016 and the 2017 Rules may be declared of no legal effect and void ab initio; and, secondly, the Regulation of Mines and Oil-fields and Mineral Development (Government Control) Act, 1948 (“the Act of 1948”) and the Khyber Pakhtunkhwa Mining Concession Rules, 2005 (“the 2005 Rules”) may kindly be declared to hold the field.*
4. *It is further prayed that the establishment of Khyber Pakhtunkhwa Mineral Investment Facilitation Authority (MIFA) and the Mineral Titles Committee purportedly under the Act of 2016 may kindly be set aside together with all acts and things done by the said forums till date.*
5. *It is also prayed that the respondents be directed to engage and involve the petitioner association, being an essential stakeholder duly recognized by the 2005 Rules and 2014 Policy, on a regular basis in meaningful consultations regarding the regulatory regime for the mining sector in Khyber Pakhtunkhwa and its implementation vis-à-vis large and small-sale mining, including formulation of any policy, any legislative or executive measures etc., and to properly address their proposals, concerns and grievances*

in a transparent, non-discriminatory, fair and equitable manner in accordance with law.

6. *It is prayed, by way of seeking interim relief, that till the final disposal of this petition, MIFA and the Mineral Titles Committee may be restrained from functioning and the respondents may be restrained from taking any adverse action against the members of petitioner association pursuant to the Act of 2016, the 2017 Rules or any other legislative or executive measure in pursuance of the said Act and Rules including retrospective application thereof on the pending applications, appeals and proceedings of the members of petitioner association.*
7. *Any other/further better relief deemed just and equitable in the circumstances of the case may also kindly be granted to the petitioner association and its members.*

2. In essence, the grievance of the petitioner is that the Act of 2016 and the 2017 Rules made thereunder lack constitutionality for, *inter alia*, being without the requisite approval of the Provincial Cabinet of the Government of Khyber Pakhtunkhwa (“**Provincial Cabinet**”).

3. Brief and essential facts of the case, in chronological order, are that;-

25.07.2016	<i>Khyber Pakhtunkhwa Mines and Minerals Development and Regulation Ordinance, 2016 (“the Ordinance”) promulgated without approval of Provincial Cabinet.</i>
18.08.2016	<i>Judgment passed by the Hon`ble Supreme Court in the Mustafa Impex case (PLD 2016 SC 808)</i>
07.10.2016	<i>The Ordinance was introduced in the Provincial Assembly as a ordinary Bill.</i>

07.10.2016	<i>Extensive amendments introduced to the Bill by the Provincial Government starting from amending its long title and preamble upto the schedules, even changing its short title to Act of 2016.</i>
20.12.2016	<i>The new extensively amended Bill passed by the Provincial Assembly.</i>
30.12.2016	<i>The Governor gave assent and published in Gazette Notification issued by the Provincial Assembly Secretariat, Act of 2017.</i>
30.12.2016	<i>Establishment of Khyber Pakhtunkhwa Mineral Investment Facilitation Authority (MIFA) by the Provincial Government by means of Gazette Notification under section 3(1) of the Act of 2016.</i>
15.02.2017	<i>Khyber Pakhtunkhwa Mineral Titles (Large and Small Scale Mining) Governance Rules, 2017 made and notified by the Provincial Government in the official Gazette.</i>
25.04.2017	<i>Instant petition i.e. W.P.No.1769-P/2017 titled Frontier Mine Owners Association v. Khyber Pakhtunkhwa and others filed in this Hon`ble Court at Peshawar.</i>

4. Let us take the main ground of challenge made to the constitutionality of the Ordinance, Act of 2016 and the 2017 Rules framed thereunder; that the true test to gauge the constitutionality of an enactment has been laid down by the Apex Court in **Messrs Mustafa Impex's case (PLD 2016 SC 808)**, which have not been adhered to in promulgating the Ordinance, enacting the Act of 2016 and framing the 2017 Rules. The said decision of the august Court concludes by ruling that;

“We may now summarize our conclusions;

- (i) *The Rules of Business, 1973 are binding on the Government and a failure to follow them would lead to an order lacking any legal validity.*
- (ii) *The Federal Government is the collective entity described as the Cabinet constituting the Prime Minister and Federal Ministers.*
- (iii) *Neither a Secretary, nor a Minister and nor the Prime Minister are the Federal Government and the exercise, or purported exercise, of a statutory power exercisable by the Federal Government by any of them, especially, in relation to fiscal matters, is constitutionally invalid and a nullity in the eyes of the law. Similarly, budgetary expenditure, or discretionary governmental expenditure can only be authorized by the Federal Government i.e the Cabinet, and not the Prime Minister on his own.*
- (iv) *Any Act, or statutory instrument (e.g. the Telecommunication (Re-Organization) Act, 1996) purporting to describe any entity or organization other than the Cabinet as the Federal Government is ultra vires and a nullity.*
- (v) *The ordinance making power can only be exercised after a prior consideration by the Cabinet. An ordinance issued without the prior approval of the Cabinet is not valid. Similarly, no bill can be moved in Parliament on behalf of the Federal Government without having been approved in advance by the Cabinet. The Cabinet has to be given a reasonable opportunity to consider, deliberate on and take decisions in relation to all proposed legislation, including the Finance Bill or Ordinance or Act. Actions by the Prime Minister on his own, in this regard, are not valid and are declared ultra vires.*
- (vi) *Rule 16(2) which apparently enables the Prime Minister to bypass the Cabinet is ultra vires and is so declared.*

(vii) Fiscal notifications enhancing the levy of tax issued by the Secretary, Revenue Division, or the Minister, are ultra vires. (it is clarified, in passing, that this Court has in the past consistently held that a greater latitude is allowed in relation to beneficial notifications and that principle still applies).

In consequence of the above findings the impugned notifications are declared ultra vires and are struck down.”

5. The *ratio decidendi* of the above judgment relevant to the present case, *inter alia*, sets down that;

- i. A statutory instrument to be introduced by the Provincial Government has to be first approved by the Provincial Cabinet.***
- ii. The act of the worthy Chief Minister bye-passing the Provincial Cabinet by exercising powers under Rule 19(2) of Khyber Pakhtunkhwa Rules of Business, 1973 is illegal and a nullity in the eye of law.***

6. It is an admitted position that apart from the Ordinance promulgated on 25.07.2016; the amendments introduced therein, the *Bill* laid down before the Provincial Assembly; the amendments introduced in the *Bill*, and finally the ascent thereto by the Governor were acts having taken place after the pronouncement of *Mustafa Impex’s case* and that too without the approval of the Provincial Cabinet. This being the legal position, the Act of

2016 and the 2017 Rules are clearly without lawful authority and thus a nullity in the eyes of law.

7. Moving on to the contention of the worthy Additional Advocate General that the Ordinance promulgated by the Provincial Government prior to the decision of the apex Court in *Mustafa Impex's case* should be considered as valid piece of legislation and be declared the Act of 2016. In this regard, the contention of the worthy counsel for the petitioner was that the decision of the apex Court in *Mustafa Impex's case* would have retrospective effect and thus would adversely affect the constitutionality of the said legal instrument. When confronted to the above contention of the worthy counsel for the petitioner, the worthy Additional Advocate General responded by asserting that the legal pronouncement of a Court of law is ordinarily prospective unless the same expressly provides it to have a retrospective effect, which the apex Court did not expressly provide for in *Mustafa Impex's case*. Hence, the same be applied prospectively. In the peculiar circumstances of the present case, especially when the Ordinance promulgated in its original state had been amended prior to being considered as a *Bill* introduced in the

Provincial Assembly of Khyber Pakhtunkhwa, and more importantly that the Ordinance had out lived its constitutional life, it would not be legally appropriate to pass a finding on the contested assertions of the parties regarding the applicability of the decision of the apex Court to the Ordinance promulgated prior thereto.

8. Let us now examine the other contention of the worthy Additional Advocate General that the Ordinance was introduced as a *Bill* before the Provincial Assembly of Khyber Pakhtunkhwa in pursuance of clause A sub-Article (2) of Article 158 and through the deeming provision contained in sub-article (3) of Article 128 of the Constitution, the same did not require the consent of the Provincial Cabinet, as mandated under Rule 19 (1) of the Khyber Pakhtunkhwa Rules of Business, 1973. This Court is not in consonance with this line of the agreement advanced by the worthy Advocate General, simply for the reason that when the very *foundation* of the original Ordinance lacked constitutionality and authority under the law, then no *superstructure* could be built thereon. In the present case, the *Bill* was introduced after the decision of *Mustafa Impex's case* hence, the

Ordinance though promulgated prior to the said decision had to be legally *cleansed* by the approval of the Provincial Cabinet before it would be considered by the legislature. This crucial omission on the part of the Provincial Government had rendered the said legal enactment to be without lawful authority.

9. As far as the next contention of the worthy Additional Advocate General that this constitutional *disability* of the *Bill* so introduced, culminating in the impugned Act of 2016 was in fact a *procedural irregularity*, and thus beyond the mandate of a constitutional Court, as provided under Article 69 read with 67 of the Constitution. This Court is not in consonance with the submission of the worthy Additional Advocate General as the Act of 2016 lacked the most fundamental legal precedent of prior approval of the Provincial Cabinet, which goes to the very *root* of its constitutionality and thus cannot be ignored being *procedural*.

10. As this Court has by now declared the Act of 2016 to be *ultra vires* for the same to lack the prior approval of the Provincial Cabinet, it would not be legally appropriate to further dilate or pass

any finding on the other grounds of the challenge made by the petitioner in the present petition.

Accordingly for the reasons stated herein above, this Court holds and declare that;-

- I. Khyber Pakhtunkhwa Minerals Sector Governance Act, 2016 and the Khyber Pakhtunkhwa Mineral Titles (Large and Small Scale Mining) Rules, 2017 Rules (“the 2017 Rules”) made thereunder are without lawful authority and hence of no legal effect.
- II. Khyber Pakhtunkhwa Mineral Investment Facilitation Authority (MIFA) created under the Khyber Pakhtunkhwa Minerals Sector Governance Act, 2016 would also lack legal authority.
- III. All actions and decisions taken by the MIFA and the respondents under the Act and the Rules would hold the field for a period of sixty days from the date of this decision for the Provincial Government to take appropriate legislation measures.

The writ petition is disposed of in the above terms.

Announced.
17 /08/2017

CHIEF JUSTICE

JUDGE