

BEFORE THE
MONOPOLY CONTROL AUTHORITY

IN THE MATTER OF

M/s. Tharparkar Sugar Mills Limited
(File No. 2(301)/Enq (DC-R&I)/MCA/06)

Present:	Mr. Khalid A. Mirza Chairman
	Raja Raza Arshad Member
	Mr. Abdul Ghaffar Member
Date of hearing :	August 22 and 23, 2006
Present for the Respondent :	Mr. Munawar Hussain, Advocate & Mr. Fayaz Waheed, Company Secretary

ORDER

The facts of this case, in datewise sequence, are as follows:

- (i) M/s. Tharparkar Sugar Mills Limited (hereinafter referred to as the 'undertaking'), was directed by the Monopoly Control Authority (hereinafter referred to as the 'Authority'), vide its Order, dated February 23, 2006, to supply information, under Section 21 of the Monopolies and Restrictive Trade Practices (Control & Prevention) Ordinance 1970 (hereinafter referred to as the 'Ordinance'), pertaining to production, lifting, ex-factory price, sugarcane purchase price, recovery percentage, production

cost per ton and lifting by TCP, on fortnightly basis, on the prescribed format, as given below:

- a). for the fortnight ending 15th of every month to be supplied latest by the 20th of the same month, and
 - b). for the fortnight ending 30th of every month to be supplied latest by the 5th of the next month.
- (ii) The undertaking failed to supply the information for the fortnight ending April 30, 2006 and earlier fortnights ending March 15, March 31 and April 15, 2006, in violation of the Order dated February 23, 2006. The undertaking was, therefore, served a Hearing Notice dated May 17, 2006 wherein it was directed to appear before the Authority on June 3, 2006 to show cause as to why appropriate action under Section 19 of the Ordinance should not be taken against it.
- (iii) Subsequently, it was noted that the undertaking had failed to supply the information for the fortnight ending on May 15, 2006, in violation of the Order of the Authority dated February 23, 2006. The undertaking was, therefore, provided an opportunity of being heard on June 14, 2006, vide Hearing Notice dated May 27, 2006, to show cause as to why appropriate action under Section 19 of the Ordinance should not be taken against it.
- (iv) On June 3, 2006 the undertaking failed to appear before the Authority. It also failed to supply the requisite information in compliance with the Order of February 23, 2006. Consequently, the Authority decided to proceed ex-parte against the undertaking and issued an Order dated June 10, 2006 imposing a penalty of Rs. 40,000/- (Rupees forty thousand) on the undertaking. The Order also directed the undertaking to provide the outstanding information immediately as well as ensure that the information in respect of the ensuing fortnights is duly provided, complete as per prescribed format.
- (v) On June 14, 2006, the undertaking again failed to appear before the Authority as required by the hearing Notice dated May 27, 2006. The

undertaking also failed to provide the requisite information for the fortnight ending on May 15, 2006. The Authority decided to proceed ex-parte against the undertaking in this respect as well.

- (vi) On June 15, 2006, a letter dated June 14, 2006 was received from the undertaking which is reproduced below:

“We are in receipt of your letter No. 02(301)ENQ(DC-R&I)/MCA/2006 dated 10-06-2006 regarding captioned subject, containing a decision of the said Authority in which authority has passed an order, without being heard, whereas you have called us vide your letter No.3(31)/REG/MCA/2006 of 27-05-2006 to appear before the said authority on 14-06-2006 at 10.00 am to explain (copy enclosed for reference).

We were astonished to receive your unheard decision which, in our opinion, is not justified at all and may kindly be reviewed.

You are therefore, requested to either withdraw the penalty imposed unheard or give us a fair chance of being heard accordingly.”

- (vii) On June 22, 2006, the Authority issued an Order imposing a penalty of Rs. 100,000 (One hundred thousand) for not providing the information in respect of the fortnight ending May 15, 2006 with respect to which a hearing had been scheduled on June 14, 2006 but the undertaking had not put in an appearance. Since the failure of the undertaking in complying with the Authority’s Order dated February 23, 2006 was a continuing one, the Authority in terms of the power vested in it under sub-section (2) of Section 19 of the Ordinance imposed a further penalty of Rs. 10,000 (Rupees ten thousand) per day from the date of the issue of the Order till the date of the receipt of all outstanding information in the prescribed format. The undertaking was also asked to ensure that the information in respect of the ensuing fortnights is duly provided on due dates as required by the Authority.

- (viii) On June 26, 2006, the Authority gave a reply to the undertaking’s letter of June 14, 2006 (see (vi) above) which stated :

“An opportunity of being heard was provided to you on 03-06-2006, vide Hearing Notice No.2(301)/Enq/(DC-R&I)MCA/2006, dated 17-05-2006 (copy attached) but you failed to attend the hearing. The Authority, therefore, passed an Order as provided under MRTPO, 1970, imposing a penalty.

The Order No.2(301)Enq(DC-R&I)MCA/2006, dated June 10, 2006, pertaining to the imposition of penalty cannot be withdrawn.”

- (ix) Under cover of a letter dated June 28, 2006 the undertaking supplied information for the period March 16, 2006 to June 30, 2006. However, the undertaking did not make the necessary payments in respect of the penalties imposed on it by Orders of the Authority dated June 10 and 27, 2006. Instead, the Authority received from Dr. Muhammad Farogh Naseem, Advocate of the undertaking a letter dated July 29, 2006 which is reproduced below:

“ On the behalf of our client M/s. Tharparkar Sugar Mills Ltd (hereafter referred as the “Applicant”) we submit as follows:

1. That the Applicant received a hearing notice dated 15.5.2006(copy enclosed) as Annex-A), whereby the Applicant was called upon to appear before the Monopoly Authority (hereafter referred as the Authority”) on 3.6.2006. It is humbly submitted that the Applicant had every intention to cause appearance and explain the reasons for delay in providing the required information by the Authority.

2. In the meanwhile, i.e. on 29.5.2006, the Applicant was served upon another hearing notice dated 27.5.2006 (copy enclosed as Annex A-1), wherein it was informed that the hearing of the matter would take place on 14.6.2006. The second notice i.e. dated 27.5.2006 created a confusion as the Applicant got the impression that the hearing (as stated in para 1 above) was postponed from 3.6.2006 to 14.6.2006).

3. The Applicant while waiting for the next date of hearing i.e. 14.6.2006, received on 12.6.2006 an order dated 10.6.2006 (Annex-B) from the Authority wherein the authority was pleased to impose a penalty of Rs. 40,000/- (Rupees forty thousand only) on the Applicant for not providing the required information and for not appearing at the hearing conducted on 3.6.2006. Immediately the Applicant vide its letter dated 14.6.2006(Annex-C) protested to the passing of the order on the ground that the hearing was fixed on 14.6.2006 whereas the authority had passed the order on 10.6.2006 without hearing the Applicant.

4. It seems either due to some mistake of fact or confusion created by the Authority, the applicant did not appear before the authority on 3.6.2006. The honest intention on the part of the Applicant is evident from the issuance of its letter dated 14.6.2006 to the Authority. However, despite the above the authority passed another order dated 22.6.2006 (Annex-D) imposing:-

- a) penalty of Rs. 100,000/- (Rupees one lac only) for not providing the required information and for not appearing before the authority; and
- b) additional penalty of Rs. 10,000/- per day from the date of issuance of the order till the date of the receipts of all the outstanding information.

5. The impugned orders dated 10.6.2006 (Annex-B) and 22.6.2006 (Annex-D) are illegal, arbitrary, unconstitutional and against the principles of natural justice on the grounds, inter alia, as under:-

- A. Two separate notices were sent, which prevented the applicant from attending the hearing; the action amounts to deciding without giving a proper opportunity of being heard, which is, along with principles of natural justice, a mandatory statutory requirement.
- B. Malafides on the part of the authority are evident from the fact that despite our reply dated 14.6.2006 to the impugned order dated 10.6.2006, the authority passed another order dated 22.6.2006 and that too without hearing the Applicant.
- C. The Applicant was restrained from attending the hearings due to a mistake of fact and confusion created by the Authority. There was no malafide or willful default on the part of the Applicant. It is a settled principle of law and upheld by the Honorable Supreme Court in the cases of DG Khan Cement Co. Ltd and others v. Federation of Pakistan 2004 SCMR 456 and Humayun Ltd v. Pakistan and others PLD 1991 SC 963 that where failure to perform an act is neither willful nor malafide, no penalty can be imposed.
- D. The Applicant has already sent all the information required by the authority vide its letters dated 21.6.2006 and 28.6.2006 (copies enclosed as Annex-E and E-1). Despite that the authority has passed the order for additional penalty of Rs. 10,000/- per day till the receipt of required information.

- E. The malafides on the part of the authority could be seen from the fact that the authority did not respond to the applicant's letter dated 14.6.2006. But rather passed the second impugned order dated 22.6.2006.
 - F. There is no finding in the impugned order that there has been any malafides or willful default on the part of the applicant, in view whereof the orders imposing penalty and additional penalty are illegal.
 - G. Once the required information has already been submitted, there is no justification to impose penalty/additional penalty.
 - H. Admittedly, the hearing in relation to the first impugned order was fixed on 3.6.2006 but no order was passed on that date. The first impugned order was however passed on 10.6.2006. Similarly, the hearing in relation to the second impugned order was fixed for 14.6.2006. Admittedly no order was passed on that date and the second impugned order was only passed on 22.6.2006. It is a settled proposition of law that where a matter is fixed for hearing and the party does not cause appearance on that date, any adverse order for non compliance or default of appearance can only be passed on the date fixed for hearing. If the authority does not pass an order on the said date, it has to give a fresh notice fixing a fresh date of hearing. As in this case, if the authority does not pass the order on the date fixed for hearing, and the order is passed subsequently, the said order is void. In this regard attention is invited to CIT v. M.B. Qureshi (1975) 32 Taxation 219 (Lahore High Court).
 - I. The two judgments cited in ground C above are authored by Hon'ble Supreme Court of Pakistan whereas the one judgment mentioned in ground H above is authored by the Lahore High Court. Both the judgments are binding on you in view of Articles 189, 201 and 202 of the Constitution of the Islamic Republic of Pakistan, 1973. As an authority subordinate to the superior courts you are requested to comply with the said judgments cited above.
6. It is therefore requested that the impugned orders may be withdrawn and the penalty and additional penalty be remitted."

2. In view of the significant issues of both law and fact raised in the application of Dr. Farogh Naseem, the Authority deemed it fit, in response to this application, to give the undertaking a hearing. The object was to give the undertaking and its counsel an opportunity to fully explain the contentions made in the application to enable the

Authority to adopt an informed and fair position in this respect. It was further decided to hold the hearing in Karachi for the convenience of the undertaking and its counsel and to facilitate attendance by them.

3. On the date of the hearing viz August 22, 2006, Mr. Fayaz Waheed, Secretary of the undertaking, appeared before the Authority. Counsel was not present. When the Authority inquired of Mr. Waheed as to whether he would be able to address all aspects of the application, including legal issues, he readily admitted that it would be necessary for counsel to appear before the Authority. As agreed with him, the Authority fixed 12.30 p.m. the next day, i.e. 23.8.2006, for the hearing. In fixing this time and date, it was made clear to Mr. Waheed that if for any reason this was not convenient to counsel, the Authority would be prepared to hold the hearing at any other time – even late afternoon or evening.

4. On 23.8.2006, instead of Mr. Farogh Naseem, an associate of his, Mr. Munawar Hussain, Advocate, appeared alongwith Mr. Waheed. After Mr. Hussain had briefly outlined the basic arguments contained in the application of July 29, 2006, the Authority pointed out a clear mis-statement in the application. Mr. Munawar was told that in para 2, the first sentence alleged that the hearing notice of May 27, 2006 informed the undertaking that the hearing of the “matter” would take place on June 14, 2006. In other words, it was averred that as per the Authority’s notice dated May 27, 2006 the hearing that was to take place on June 3, 2006 would now occur on June 14, 2006. This was not true at all. The record showed that the hearing that was to take place on June 14, 2006 very clearly pertained to a different “matter” i.e. the default of the undertaking with

respect to the information which it was expected to provide for the fortnight ending May 15, 2006 whereas the hearing that was to take place on June 3, 2006 pertained to the earlier defaults of the undertaking in respect of several fortnights ending on April 30. These were clearly different “matters”. Yet Counsel of the undertaking chose to describe them as the same matter. When this was brought home to Mr. Munawar, he admitted the obvious mis-statement and apologized. The Authority then drew attention to the fact that the application of 29.7.2006 to a some extent appeared to rest on this fundamental mis-statement.

5. The Authority also pointed out that the application had stated that the undertaking’s letter of June 14, 2006 demonstrated the “honest intention” on the part of the undertaking whereas actually this letter was somewhat obtuse and obfuscatory, if not vexatious. The plain reading of this letter would show that it essentially protested that the Authority had penalized them without being heard and had also issued another notice to appear before the Authority on June 14, 2006. The letter then proceeded to request withdrawal of the penalty imposed. It is, however, noteworthy that on the date of this letter the undertaking had not: (i) supplied the information for which it had been penalized, (ii) provided any explanation as to why the information required had not been supplied, and (iii) given any explanation as to why an appearance had not been made by the undertaking on June, 3, 2006 or for that matter, on June 14, 2006. Also, the undertaking’s letter did not mention the opportunity to be heard given but not availed. Mr. Munawar was told that in issuing the letter of June 14, 2006, the undertaking had not come with clean hands. Neither Mr. Munawar nor Mr. Waheed were able to provide any explanation with regard to all this. It is true that subsequently the undertaking supplied

the information required but that was after they had been penalized for the second time and a continuing penalty had been imposed on them.

6. The Authority also drew attention of Mr. Munawar to the kind of language used in the application of July 29, 2006 with regard to the Authority, in particular it was mentioned that the Authority had been accused of “malafides”. Mr. Munawar had no explanation to give in this respect either. He then requested that it would be best if Dr. Farogh Naseem was to personally appear before the Authority and provide all the necessary clarifications or explanations required by the Authority. It was also suggested that the legal issues raised in the application of July 29, 2006 could also be appropriately addressed by Dr. Farogh Naseem. The Authority then adjourned the hearing for the next day i.e. 24.8.2006.

7. On 24.8.2006, Mr. Munawar again appeared before the Authority but was not accompanied by Dr. Farogh Naseem. Instead a letter dated 23.8.2006 by Dr. Farogh Naseem was presented by Mr. Munawar. In this letter Dr. Farogh Naseem basically expressed regrets if he had “personally offended” the Authority since it was not his intention to cause any “personal insult” to the Authority. He also requested that the Authority may expunge from the application of July 29, 2006 any word that the Authority might find causing it insult since that was not his intention. The Authority was taken by surprise by this letter since during the hearing the Authority had not indicated, in any sense whatsoever, whether by what was said, or by tone of voice or in any other way that it had been offended. In this letter Dr. Farogh Naseem also pointed out that “malafides” does not necessarily connote actual malice but also violation of law relying on

Hashmatullah vs KMC PLD 1971 Kar 514 ((O) 1971, Karachi and that he had used the term “malafides” in that sense. However, we find two places where the word ‘malafides’ was used to describe the Authority’s conduct but the context does not indicate that this was in relation to violation of law. For instance, at one place, he says “malafides on the part of the Authority could be seen from the fact that the Authority did not respond to the applicant’s letter dated 14.6.2006 but rather passed second impugned Order dated 22.6.2006.” This does not unequivocally denote violation of the law – rather the word is clearly used to suggest probable ill intent on part of the Authority . There had not occurred any incontrovertible violation of law to indicate that the word “malafides” had been used to suggest “malafides at law”. Unless a clear violation of law can be demonstrated, it seems to us that the only meaning that can be attributed to malafides is the plain English meaning of the word which as per the Concise Oxford English Dictionary is “bad faith; intent to deceive”.

8. When it was pointed out to Mr. Munawar that we found Dr. Farogh Naseem’s letter of 23.8.2006 objectionable because he had suggested that the Authority had been personally offended by the application of 29.7.2006 which was a gross mis-statement, Dr. Naseem withdrew this letter. He also indicated that they may withdraw the application of 29.7.2006. Subsequently we received a brief letter from Dr. Naseem withdrawing the application of 29.7.2006 which is reproduced below:

“Reference our letter dated 29.7.2006. Further to our letter dated 23.8.2006 (submitted by our associate Mr. Munawar Husssin, Advocate in today’s hearing), we withdraw our application/letter dated 29.7.2006 while reserving our client’s right to move a fresh application on merits.”

We find it odd that this letter makes reference to the objectionable letter of 23.8.2006 which had been duly withdrawn and was consequently not on record.

9. While the application of 29.8.2006 has been withdrawn, the Authority has noted with grave concern the clear mis-statements made by counsel to the undertaking, Dr. Farogh Naseem: first, in the application of 29.7.2006 (discussed above); and second, in his letter of 23.8.2006 in which he stated that the Authority had been personally insulted which was not true at all. It may be correct to say that this was a figment of his imagination; or perhaps, instead of addressing the issue of the mis-statement in the application of 29.7.2006 (as well as some of the other inaccuracies or errors in this application), and coming out clean in this connection with a consequential written apology to the Authority, he chose to obfuscate and suggest that the Authority had been personally insulted by the language used by him. This, as stated earlier, is simply not true. It is not possible for the Authority to turn a Nelson's eye to this. It is the duty of the Authority, as a responsible public agency, to carefully consider whether or not to make a reference in this respect to the Pakistan Bar Council and to the S. M. Law College, where Dr. Farogh Naseem teaches law, for adoption of such steps as may be deemed appropriate under the circumstances.

-sd-
(Khalid A. Mirza)
Chairman

-sd-
(Raja Raza Arshad)
Member

-sd-
(Abdul Ghaffar)
Member

Islamabad, the 11th September, 2006