IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT: MR. JUSTICE MIAN SAQIB NISAR
MR. JUSTICE IQBAL HAMEEDUR RAHMAN
MR. JUSTICE MAQBOOL BAQAR

CIVIL APPEALS NO.1428 TO 1436 OF 2016
(Against the order dated 9.3.2016 of the Islamabad High Court, Islamabad passed in ICAs No.204, 205, 210/2014 and 793/2013, W.Ps.No.3025 to 3027/2014 and ICAs No.201 & 202/2014)

M/s Mustafa Impex, Karachi ...in C.As.1428 & 1429/2016
M/s SSS Enterprises, Karachi ...in C.A.1430/2016
M/s Fact International, Karachi ...in C.A.1431/2016
M/s Broadways, Karachi ...in C.A.1432/2016
M/s M. A. Enterprises, Karachi ...in C.A.1433/2016
M/s Bulash Enterprises, Karachi ...in C.A.1434/2016
Muhammad Rehman & another ...in C.A.1435/2016
Naveed Gaba Proprietor of "G Mobile", Karachi and another ...in C.A.1436/2016
...Appellant(s)

VERSUS

The Government of Pakistan through Secretary Finance, Islamabad etc.
...Respondent(s)
(in all cases)

For the petitioner(s): Mian Muhammad Athar, ASC
Mr. Shafqat Mahmood Chohan, ASC
(in C.As.1428 to 1434 & 1436/2016)

Mr. Farhat Nawaz Lodhi, ASC
Syed Rifaqat Hussain Shah, AOR
(in C.P.1435/2016)

For the respondent(s): Sh. Izhar-ul-Haq, ASC
Mr. M. S. Khattak, AOR
(for Respondent No.3 in C.As.1428 & 1430/2016 & Respondent No.2 in C.As.1429, 1431, 1432 & 1433/2016)

Raja Muhammad Iqbal, ASC
(for Respondent No.5 & 6 in C.As.1428 & 1430/2016 & Respondent No.4 & 5 in C.As.1429 & 1431/2016)

Ms. Misbah Gulnar Sharif, ASC
Mr. M. S. Khattak, AOR
(for Respondent No.4 in C.As.1428, 1430 & 1433/2016 & Respondent No.3 in C.As.1429, 1431, 1435 & 1436/2016)

Mr. Khalil Dogar, ASC
(for Respondent No.7 in C.As.1432 & 1434/2016 & Respondent No.6 in C.A.1433/2016)

Ch. Muhammad Zafar Iqbal, ASC
(for Respondent No.7 in C.As.1429 & 1431/2016, Respondent No.8 in C.As.1428, 1430 & 1433/2016, Respondent No.4 in C.As.1432 & 1434/2016)

On Court's call: Mr. Muhammad Waqar Rana,
Additional Attorney General
Mr. Abid Hussain Channa, S.O. M/o Finance
Mr. Sajid Javed, Legal Assistant M/o Finance

Amicus Curiae: Syed Ali Zafar, ASC

Dates of hearing: 23.5.2016 & 24.5.2016

...

JUDGMENT

MIAN SAQIB NISAR, J:- These appeals with the leave of the Court entail the following facts:- the appellants are importers of cellular phones and textile goods. Earlier they enjoyed certain exemptions from sales tax granted by the Federal Government. Subsequently the exemptions were either withdrawn or the tax rates were modified *vide* notifications No.280(I)/2013, 460(I)/2013 *(both relating to cellular phones)* issued pursuant to Sections 3(2)(b), 3(6), 8(1)(b), 13(2)(a) and 71 of the Sales Tax Act, 1990 *(the Act)*, and 682(I)/2013 *(relating to textile goods)* issued under Sections 4(c), 3(2)(b), 3(6), 8(1)(b) and 71 of the Act dated 4.4.2013, 30.5.2013 and 26.7.2013 respectively. Aggrieved of this withdrawal and/or modification *(in the rate)* of sales tax, the appellants challenged the same through constitution petitions before the learned Islamabad High Court on the primary ground that such notifications had not been issued by the Federal Government in accordance with Section 3 of the Act. The petitions were dismissed by the learned High Court through a consolidated judgment. The Intra-Court Appeals *(ICA)* initiated by the appellants also failed *(note:- some constitution petitions were decided through the impugned judgment in ICA)*. Leave in these matters was granted to consider *inter alia* the following points:-

> *"Learned counsel for the petitioners while attacking the impugned judgment of the learned Division Bench of the High Court affirming the judgment of the learned single Judge-in-Chambers submits that the petitioners have no cavil to the proposition that the Federal Government does have the power, jurisdiction and authority to issue the notification, however his argument is that the notifications in question dated 4.4.2013 and 30.5.2013 challenged in the constitution petitions were not issued by the Federal Government rather by the Additional Secretary who was not competent to do so. It is also submitted that to grant the exemption is only the privileged authority of the Cabinet as per the provisions of Article 90 of the Constitution of Islamic Republic of Pakistan, 1973 and even the Secretary or Advisor to the Prime Minister has no competence to issue such notifications and grant exemption. It is also submitted that the notification dated 4.4.2013 was issued before the approval was granted by the Advisor to the Prime Minister which was done ex-post facto. This again renders the said notification as nullity in the eyes of law."*

Notice was also issued to the learned Attorney General for Pakistan in terms of Order 27A of the Code of Civil Procedure, 1908 *(CPC)*; and in view of the importance of the matter Mr. Ali Zafar, learned ASC was appointed as an *amicus curiae*.

2. Learned counsel for the appellants has argued that only the Federal Government has the authority to issue notifications under Section 3(b) of the Act. Federal Government is not defined in the Act, but according to the provisions of Article 90 of the Constitution of the Islamic Republic of Pakistan, 1973 *(the Constitution)* the Prime Minister and the Ministers, i.e. the Cabinet as a whole, constitute the Federal Government for all intents and purposes. Neither the Prime Minister nor any Minister singularly has the authority to exercise the power(s) provided in Section

3 *ibid.* He submitted that as per Article 90 as it existed prior to the 18th Amendment, the President was to exercise the executive authority either directly or through the officers subordinate to him, but after the noted amendment such exercise can only be done by the Cabinet which has not been so done. He submitted that approval was sought from and granted by the Advisor to the Prime Minister on Finance, as has been conceded by the respondents in their comments *(before the learned High Court)*, as opposed to the Cabinet which he *(Advisor)* was not authorized in law to give. Further, Rules 3 and 5 of the Rules of Business, 1973 *(Rules of Business)* only provide for the transaction and allocation of business, and there is nothing in the said Rules which empowers any individual to act or take decisions on behalf of the Federal Government, particularly with regard to levy of tax or grant of exemptions, etc. Learned counsel contended that there has been non-compliance with Rule 16(d) of the Rules of Business according to which proposals for levy/alteration of tax must be brought before the Cabinet. Learned counsel has relied upon **Watan Party and another Vs. Federation of Pakistan and others (PLD 2011 SC 997)** to support his concept of the executive.

3. On the other hand, the crux of the collective arguments of the learned counsel for the respondents is that the impugned notifications have been lawfully issued. According to them, the purport of Article 90 of the Constitution, as is made clear by sub-article (2), is that the Prime Minister or a Minister is empowered to exercise the executive authority, and not the Cabinet as a whole. According to Article 99 of the Constitution executive actions shall be taken by the Federal Government in the name of the President and pursuant to the article *ibid* the Rules of Business have been framed which specify the manner in which orders and instruments made and executed in the name of the President are to

be authenticated, and also provides for the allocation of business. They submitted that Division has been defined in Rule 2(vi) of the Rules of Business as the administrative unit responsible for the conduct of business of the Federal Government. Rule 3(3) provides that the business of the government would be allocated to the Divisions in accordance with Schedule II, which in turn provides that tax policy and tax administration fall within the domain of the Revenue Division *(Entries 1 and 2 of Clause 35 of Schedule II)*. Therefore the Chairman FBR, who is the *ex-officio* Secretary of the Revenue Division is duly empowered under Rule 4(2) read with Rule 3(3) to issue notifications pertaining to modification of tax which falls within the purview of tax policy and tax administration. Reference was also made to Rule 7(2) read with Schedule IV which allows the Secretary to authenticate by signature all orders and other instruments made and executed in the name of the President. It was further argued that despite the fact that the Secretary was competent to issue such notification under the Rules of Business, he sought approval of the Advisor by issuing the note for the Advisor to the Prime Minister on Finance dated 24.5.2013. They submitted that there is no requirement for matters pertaining to tax administration to be routed to and approved by the Cabinet.

4. The summary of the submissions of the learned Additional Attorney General is that:-

(i) The Federal Government consists of the President and the Cabinet. The Federal Government conducts its business in accordance with the Rules of Business framed pursuant to Article 99(3) of the Constitution.

(ii) The levy and exemption of tax is the function of Parliament under Article 77 of the Constitution and grant of exemption

by the competent authority under the relevant law is in the nature of subordinate legislation.

(iii) The power of exemption if given to the executive per se, would amount to the negation of the doctrine of parliamentary supremacy and the doctrine of separation of powers.

(iv) If the proposition that exemption is not subordinate legislation is rejected and it is held that on the contrary it is an executive act, even then the Federal Government would conduct its business in accordance with the Rules of Business.

(v) The impugned notification has been competently issued by the Secretary in exercise of the powers conferred upon him.

Learned law officer stated at the very outset that Federal Government has not been defined, therefore the meaning of Federation, Federal Government, and executive authority of the Federation all need elucidation. In this context he gave us a broad view of the Constitution. Part III of the Constitution deals with the Federation which *(part)* consists of 3 chapters. Chapter 1 relates to the President, his term of office and his powers, etc. *(Articles 41-49; particularly Article 48)*; Chapter 2 deals with the Parliament *(Articles 50-89)*; and Chapter 3 pertains to the Federal Government *(Articles 90-100)*. In the context of the matters at hand, he also made reference to Articles 7 *(definition of the State)* and 77 *(deals with taxation power of the State which is to be "by or under the authority of law")*.

5. In elucidating the meaning of "executive authority" the learned Additional Attorney General submitted that it was the residuary power after accounting for legislative and judicial power. The rationale behind this contention was that the earliest powers surrendered by the British Crown were the legislative and judicial powers, thus the only

power left with the British Crown, and keeping in mind the fact that our Constitution is based upon the British Parliamentary form of government with modifications according to our needs, was the executive power which was two-fold – prerogative powers and powers vesting in the Crown. With a written constitution such as ours the only powers are those which are provided in the Constitution and there are no inherent powers. Therefore according to him the source of the executive authority of the Federation is the Constitution itself and the laws enacted by Parliament. With this background, he referred to the judgment reported as **Rai Sahib Ram Jawaya Kapur and others Vs. The State of Punjab (AIR 1955 SC 549 at page 554 paragraph 7)** in which the interpretation of Article 73 of the Indian Constitution was involved which *(article)* is *pari materia* to Article 90 of our Constitution except that the phrase "subject to the Constitution" was not present, and that the executive authority of the Federation "vests in the President". The ratio of the case of **Rai Sahib**[1] *(supra)*, that the executive authority in Article 73 *ibid* is the residue of the legislative and judicial authority has been recently upheld in **Pu Myllai Hlychho and others Vs. State of Mizoram and others (AIR 2005 SC 1537)** and **Satya Narain Shukla Vs. Union of India and others [(2006) 9 SCC 69]**. He stated that there is a similar provision in the Australian Constitution and the Australian High Court has defined "executive authority" in the case reported as **The State of Victoria and another and The Commonwealth of Australia and Hayden [(1975) 134 CLR 338]**. Further, Article 2 of the US Constitution provides that the "executive power" shall vest in the President, however according to the learned law officer, power and authority can be used interchangeably. The judgment from the US jurisdiction cited in this

[1] *AIR 1955 SC 549 = (1955) 2 SCR 225*

regard is the seminal case of **Lois P. Myers, Adninistratix of Frank S. Myers, Appt. Vs. United States [272 U.S. 52 (1926) at 128 and 129].**

6. As regards the definition of "Federal Government", he submitted that the President is the Head of the State *(Article 41 of the Constitution)*, exercising the sovereign power of the State. According to Article 48(2) of the Constitution the President is to act upon the advice of the Cabinet, which could mean two things:- one is the Cabinet itself, the other is in Article 90 which very specifically refers to the Prime Minister and Federal Ministers. Article 91 defines the Cabinet as including the Ministers of State *(Article 92)*, who have been deliberately omitted from Article 90. Therefore according to him, the Federal Government is the President along with the Cabinet headed by the Prime Minister. The Federal Government conducts its business in accordance with the Rules of Business framed pursuant to Article 99(2) of the Constitution. The word "business" has been defined in Rule 2(iii) of the Rules of Business as all work done by the Federal Government, which he submits includes both executive and legislative work. When the Federal Government conducts its business which includes the business which has been conferred on it pursuant to an Act of Parliament *(reference was made to Article 77 whereby the Parliament is empowered to levy tax)*, that Act or law becomes relevant. The Sales Tax Act, 1990 provides that the grant of exemption is to be made by the Federal Government. Therefore this is not the executive, but legislative business. Levy of tax *(which includes exemption from tax)* is a legislative business, and accordingly the grant of exemption itself is a part of subordinate legislation. To conduct the business of subordinate legislation, the Federal Government has allocated this business to the Divisions concerned, in this case the Revenue Division. In this regard he relied upon the judgment reported as **Tanveer A.**

Qureshi Vs. President of Pakistan, President House, Islamabad and 3 others (PLD 1997 Lahore 263). In support of the above contention he referred to the Pakistan Telecommunication (Re-Organisation) Act, 1996 which defines "Federal Government" as the Ministry of Information Technology and Telecommunication Division. By making reference to Article 97 of the Constitution, he submitted that once a law made by Parliament occupies the field then the authority is to be exercised in the manner provided by the law itself. While referring to Article 99(3) of the Constitution, he stated that granting exemption from tax is in the nature of subordinate legislation, therefore Article 90 which pertains to the exercise of executive authority, would not be relevant.

7. In Article 90, the phrase "officers subordinate" was replaced by "Prime Minister and Federal Ministers". He referred to **Emperor Vs. Sibnath Banerji and others (AIR 1945 PC 156)** and **The Crown Vs. Muhammad Afzal Bangash (PLD 1956 FC 1)**. He submitted that though the phrase "officers subordinate" as opposed to "Prime Minister and Federal Ministers" was used in our previous constitutions, the former phrase still included Ministers. He submitted that rationale behind the insertion of the words "subject to the Constitution" in Article 90, as in other articles of the Constitution beginning with the same phrase, was to differentiate the extent of the executive authority of the Federation in those situations from what was provided in Article 99. Article 90 of the Constitution starts with "subject to the Constitution", which is a departure from the corresponding articles in the previous constitutions and the Indian Constitution. This phrase was never used earlier. Therefore the Federal Government constitutes the President along with the Cabinet headed by the Prime Minister and the business of the Federal Government is to be conducted in the manner provided and

mandated by the Constitution in Article 99. As far as exemption is concerned, that falls under the power to levy tax which is dealt with by Article 77 and such power vests with Parliament, thus it is Parliament which will determine the manner in which such power is to be exercised. Since, according to him, the grant of exemption from sales tax is subordinate legislation it falls within the business of the executive which is to be exercised in the manner provided in the Rules of Business. Ministers have been accorded protection in terms of Article 248 of the Constitution. Finally while referring to Rules 4(2), 3(3), Schedule II, Rules 5(8) and 5(9) of the Rules of Business, learned law officer submitted that the business pertaining to tax has been allocated to the Revenue Division whose official head is the Secretary. In support of his contentions, he referred to the judgments reported as **M. Afzal & Son and others Vs. Federal Government of Pakistan and another (PLD 1977 Lah 1327 at 1330 paragraph 7), Collector of Customs, Sales Tax and Central Excise etc. Vs. M/s Sanghar Sugar Mills Ltd., Karachi etc. (PTCL 2007 CL 565 at page 591 paragraph 24), Principles of Statutory Interpretation (14th Ed.) by Justice G. P. Singh, Indian Express Newspapers (Bombay) P. Ltd. and others Vs. Union of India and others (AIR 1986 SC 515), Union of India Vs. Paliwal Electricals (P) Ltd. and another (AIR 1996 SC 3106), British India Corporation Ltd. Vs. Collector of Central Excise, Allahabad and others (AIR 1963 SC 104), A. Sanjeevi Naidu etc., etc. Vs. State of Madras and another (AIR 1970 SC 1102 at paragraphs 10 and 11), Islamic Republic of Pakistan through the Secretary, Ministry of Defence, Government of Pakistan, Rawalpindi and another Vs. Amjad Ali Mirza (PLD 1977 SC 182 at page 192), Aman Ullah Khan and others Vs. The Federal Government of Pakistan through Secretary, Ministry of Finance,**

Islamabad and others (PLD 1990 SC 1092), **Mohtarma Benazir Bhutto Vs. The President of Pakistan through the Secretary to the President (PLD 1992 SC 492 at page 516)**.

8. The learned *amicus* stated at the very outset that the State is like a ship and the Government its crew. The State has to be run by natural persons. The impugned notifications were purportedly issued under the provisions of the Act and have been challenged on the ground that the decision to issue them was not taken by the Federal Government i.e. the Prime Minister and the Cabinet. In this context the questions which require resolution are, first, who is the Federal Government/who are the natural persons who will run the State; secondly, what is the business that these persons, i.e. the Federal Government, are to run/what is their executive authority/what is the extent or limit of that authority; and thirdly, how does the Federal Government conduct this business/how does it exercise the power to decide and how does it then implement the law and the decision.

9. The learned *amicus* submitted that in a Parliamentary system, the Federal Government consists of the Prime Minister and Cabinet who are elected under the Constitution and they run the business of the State. In doing so, they have to exercise executive authority. Within the realm of such executive authority they may also be called upon by law to exercise legislative functions also known as delegated legislation and quasi-judicial functions as well. All such functions fall within the business of the State which they have to perform. The issuance of notifications and grant of exemptions pertaining to tax are an executive function given to the government as delegated legislation.

10. After tracing a brief history of executive authority in Pakistan, learned *amicus* submitted that the position presently is that the executive authority no longer vests in the President although it is to be exercised in his name, but it is now to be exercised directly by the Federal Government which consists of the Prime Minister and Federal Ministers. This Federal Government is to act through the Prime Minister who is the Chief Executive. Therefore direct executive authority has been given to the Federal Government. However he very candidly stated that whether the executive authority vests in the President or in the Prime Minister and Cabinet is not relevant for the decision of the third question *(identified hereinabove)* which is how that executive authority is to be exercised.

11. The framers of the Constitution envisaged that if every decision were to be taken by the President himself or the Cabinet as a whole, the business of the government would fail. Thus the Constitution provides for making of rules for allocation of business. These rules create a cascading hierarchy of authority with the Prime Minister and the Cabinet at the top, then Ministers, under whom there are Ministries, then Divisions which have a Secretary in charge with officers subordinate to the Secretary and each Division is given a business. Every Division is divided into sections with an officer and such sections also have businesses allocated thereto. Finally there are departments. The most important binding force according to the learned *amicus* is the concept of collective responsibility, enshrined in our Constitution. The scheme whereby, for example, a Minister is responsible for the acts of his Ministry; this is not delegation of power, but acting on behalf of.

12. The learned *amicus* referred to the **Watan Party**[2] case *(supra)* **(at paragraph 108)** and **Mian Muhammad Nawaz Sharif Vs. President of Pakistan and others (PLD 1993 SC 473)** to elucidate the meaning of executive authority. According to him, executive authority is the administration of the government in accordance with law. There is no inherent executive authority and such authority has to be as provided for in the Constitution or the law, as held by Kaikaus, J. in **Mian Jamal Shah Vs. (1) The Member Election Commission, Government of Pakistan, Lahore (2) The Returning Officer, Constituency of the National Assembly of Pakistan No. NW-II, Peshawar II, and (3) Khan Nasrullah Khan (PLD 1966 SC 1)**. Further, delegated legislation of exemption from tax or modification of rates under the umbrella of the general law is permissible. In this regard he referred to **Zaibtun Textile Mills Ltd. Vs. Central Board of Revenue and others (PLD 1983 SC 358)** and **Messrs Sh. Abdur Rahim, Allah Ditta Vs. Federation of Pakistan and others (PLD 1988 SC 670)**.

13. The learned *amicus* made extensive reference to Articles 90, 91, 92, 97 98, 99, 41 and 48 of the Constitution and the relevant Rules of Business *(as amended up to 16.1.2016)*. According to him, Article 90 provides that:- (i) executive authority is to be exercised in the name of the President *(as he is the head of the State as per Article 41)*; (ii) executive authority is to be exercised by the Federal Government through the Prime Minister and the Federal Ministers; and (iii) the Federal Government shall act through the Prime Minister who shall be the Chief Executive of the Federation. He stated that the corresponding Article 39(1) of the Constitution of 1956 used to provide that:- (i) executive authority shall vest in the President; (ii) executive authority shall be exercised by the

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[2] *PLD 2011 SC 997*

President; and (iii) that he may do so directly or through officers subordinate to him. Previously there was no concept of Federal Government. Article 31 in the Constitution of 1962 corresponded to the current Article 90; in which the position was the same as Article 39(1) of the Constitution of 1956. The same position was reflected in the Constitution of 1972. However, in the Constitution of 1973 *(as originally enacted)* the scheme was the same as it is today. In the Constitution of 1985, the old 1956 provision(s) was brought back. Article 53 of the Indian Constitution corresponds with and reflects the position at the time of our Constitution of 1956. However learned *amicus* submits that the issue as to how the President *(when the power previously vested in him)*, or the Prime Minister and/or the Cabinet is to exercise that power *(when the power is to be exercised by them)* will remain the same. The jurisprudence may change as to who is to exercise decision making powers but the concept of allocation of powers will not change.

14. He then referred to Article 91 of the Constitution which also reflects the concept that executive authority would be exercised by the Prime Minister and the Cabinet. Article 91(6) provides for the concept of collective responsibility, which was there in Article 37(1) and (5) in the Constitution of 1956, but interestingly was absent in the Constitution of 1973 as originally enacted, rather it was reintroduced in the Constitutional amendment of 1985. Article 74 of the Indian Constitution is more or less the same as Article 91 of our current Constitution. Going further, our Constitution also defines the limits of executive authority in Article 97; the same is restricted to the items contained in the Federal Legislative List.

15. He then moved on to the question of how the executive authority is to be exercised for which he referred to Article 99 of which

sub-article (3) is the most important and relevant according to which framers of the Constitution deemed it fit to empower the Federal Government to make rules for the allocation and transaction of business. However in the Constitution of 1973 *(as originally enacted)* the language was slightly different and rather clearer according to him which provided that the Federal Government was empowered to delegate its functions to officers or authorities. In 1985, the article was shortened, empowering the President to make such rules, but such powers were then given to the Federal Government through the 18th Amendment. Therefore the concept of delegation contained in the original Constitution of 1973 does not exist anymore and this departure is most relevant. Now the officers exercise executive authority on behalf of the Federal Government as opposed to acting in delegation of such powers *(note:- Article 77 of the Indian Constitution provides for allocation of business)*.

In view of the foregoing, he concluded as follows:- executive authority is to be exercised in the name of the President; executive authority is to be exercised by the Prime Minister and the Cabinet; the Federal Government may act through the Prime Minister who is the Chief Executive of the Federation; this executive authority extends to subjects enumerated in the Federal Legislative Lists; and that the Federal Government can make rules for the allocation of its business, i.e. the Rules of Business. He referred to the judgments reported as **Tariq Aziz-ud-Din and others: in re (2010 SCMR 1301)**, **Government of Punjab through Secretary, Industries Mines and Minerals Development, Department, Lahore and another Vs. Shakeel Ahmad (2006 SCMR 485)**, **Ahmad Nawaz Shah, Senior Intelligence Officer, Director General, Intelligence and Investigation (Customs and Excise), Islamabad Vs. Chairman, Central Board of Revenue, Islamabad and**

10 others (2002 SCMR 560) and **The State Vs. Anwar Saif Ullah Khan (PLD 2016 SC 276)** which held that the Rules of Business have been framed under the Constitution and are therefore to be followed.

16. Coming to the Rules of Business, learned *amicus* referred to the definitions of the words "business", "Cabinet", "case", "Division", and "Ministry" provided in Rule 2. He discussed Rules 3, 4, 5 *[particularly 5(9)(d) as per the same the Secretary is empowered to dispose of some business, Rule 5(10) and Rule 5(11)]*, and 6. He then read extensively from a book titled "The Government and the Law" authored by Professor Griffith. He relied upon the cases of **Sibnath Banerji**[3] *(supra)* and **Afzal Bangash**[4] *(supra)*. He also referred to a series of seven cases that have arisen from this very issue in India, they are:- **Rai Sahib**'s[5] case *(supra)*, **M/s Bijoya Lakshmi Cotton Mills Ltd. Vs. State of West Bengal and others (AIR 1967 SC 1145), A. Sanjeevi Naidu, etc. Vs. State of Madras and another [1970 (1) SCC 443], U.N.R. Rao Vs. Smt. Indira Gandhi [1971 (2) SCC 63], Bk. Sardari Lal Vs. Union of India and others [1971 (1) SCC 411], Samsher Singh Vs. State of Punjab and another (AIR 1974 SC 2192)** and **State of Sikkim Vs. Dorjee Tshering Bhutia and others [(1991) 4 SCC 243], Gulabrao Keshavrao Patil and others Vs. State of Gujarat and others [(1996) 2 SCC 26], MRF Ltd Vs. Manohar Parrikar and others [(2010) 11 SCC 374]** and **Delhi International Airport Ltd. Vs. International Lease Finance Corpn & others (AIR 2015 SC 1903)** which pertain to allocation as opposed to delegation. He concluded that because there is allocation under the Rules of Business, the decisions have to be taken in accordance with it.

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[3] *AIR 1945 PC 156*
[4] *PLD 1956 FC 1*
[5] *AIR 1955 SC 549 = (1955) 2 SCR 225*

Finally he referred to Rule 16 of the Rules of Business which provides for Cabinet Rules and according to him sub-rule (d) which pertains to levy, alteration etc. of tax seems to be applicable to the instant matter, according to which the proposal may have been made by the relevant Division but has to eventually be brought before the Cabinet.

17. Heard. This case raises important and interesting questions of constitutional significance in relation to various key concepts found embedded in the Constitution of Pakistan. The most important of these is the connotation of the term "Federal Government". Furthermore, we are also required to examine the concept of "executive powers" exercised by the Federal Government in addition to the various allied provisions, all of significant constitutional import, which are referred to below. Analysis is also required for, and in relation to, the Rules of Business.

18. Prior to analyzing the constitutional provisions we need to make a quick survey of their constitutional predecessors in the earlier constitutional arrangements in the subcontinent. For this purpose a convenient take off point is provided by the Government of India Act, 1935. However, prior to examining it closely, a brief reference to earlier Government of India Acts would be advantageous.

19. The first significant Government of India Act was passed in 1833, the Preamble whereof reads, "as an Act for effecting an Arrangement with the East India Company and for the better government of His Majesty's Indian territories". It was to remain in force till the 30th day of April 1854[6]. This Act was followed by the Government of India Act,

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[6] *Prior to the enactment of the 1833 Act the East India Company had certain rights of governance in relation to the territories in India. These rights were given statutory effect by means of the East Indian Company Act, 1773, which, however, is not relevant for our purposes. These rights were then surrendered by the Company to the British Government for various considerations*

1853. The necessity for this enactment was obvious since the previous arrangement was due to expire in 1854.

20. It was followed by the Indian Councils Act, 1861, the preamble whereof stated that it was an Act to make better provision for the constitution of the Council of the Governor General of India and for various other contingencies. The 1861 Act was amended in 1892 to effect certain changes in the constitution of the Councils.

21. The next major development took place in 1915 through the enactment of the Government of India Act, 1915. This was the forerunner of the Government of India Act, 1935. Section 1 of the 1915 Act dealt with the powers of the Crown and stipulated that the territories for the time being vested in the Crown shall be governed in the name of the King and the rights which were previously exercised by the East India Company prior to the 1853 Act would be exercised by, and in the name of, the King *(this is a formulation, which, in a modified form, persists till today)*. Section 2 dealt with the Secretary of State and Section 3 related to the constitution of the Council of India. Under Section 6 all powers required to be exercised by the Secretary of State in Council were to be exercised by the Council of India. Part-IV provided that the superintendence, direction and control of the civil and military government of India was to vest in the Governor General in Council who, in turn, was required to obey orders passed by the Secretary of State. The Governor General was authorized to set up an Executive Council under Section 35. Section 40 has bearing on the present case inasmuch as it is the legislative predecessor, and forerunner, of subsequent corresponding articles in the successive constitutions of Pakistan. Section 40 is reproduced below:

> *"40. – (1) All orders and other proceedings of the Governor-General in Council shall be expressed to be made by the Governor-General in Council, and shall be signed by a Secretary to the Government of India, or otherwise, as the Governor-General in Council may direct.*
>
> *(2) The governor-general may make rules and orders for the more convenient transaction of business in his executive council, and every order made, or act done, in accordance with such rules and orders, shall be treated as being the order or the act of the Governor-General in Council."*

It is not necessary for purposes of the present case to examine the other provisions of the Act.

22. We may note in passing that the 1915 Act was the first comprehensive legislation for, and in relation to, the governance of India and marked an attempt, perhaps a tentative first step, towards the rule of law as opposed to actions taken in exercise of the royal prerogative or based on the decisions of the Secretary of State. By means of the Fourth Schedule thereto the previous enactments dealing with the governance of India, beginning with the East India Company Act, 1770 onwards, were repealed.

23. The 1915 Act was succeeded by the Government of India Act, 1924, which was essentially intended as a consolidating Act and hence does not require any further discussion. Then followed the Government of India Act, 1935. Part-I of the Act was essentially introductory in nature and provided, in terms of Section 2, for the Government of India by the Crown. Part-II related to the Federation of India and conferred authority on the Crown to declare, by Proclamation, that from the appointed date the Federation of India would be created. However, in

terms of Section 320 it was stipulated the Act would come into force in separate stages. It read as under:-

> *"320(1) Part II of this Act shall come into force on such date as His Majesty may appoint by the Proclamation establishing the Federation and the date so appointed is the date referred to in this Act as the date of the establishment of the Federation.*
>
> *(2) The remainder of this Act shall, subject to any express provision to the contrary, come into force on such date as His Majesty in Council may appoint and the said date is the date referred to in this Act as the commencement of Part III of this Act."*

24. Due to various political vicissitudes which were an integral part of the struggle for freedom it was Part-III of the Act, which related to the Provinces, which came into full force. The part relating to the Federation was not enforced in pre-partition India *(after partition the Government of India Act, 1935, as radically re-structured by Governor General's Order No.22, was applied in Pakistan as a precursor of the 1956 Constitution. However, for purposes of our analysis it is the original version of the Act which is material)*.

25. The Federal Executive is the title of Chapter-II of the Act. Section 7 related to the functions of the Governor General on behalf of the King and Section 9 related to the Council of Ministers and its functions. Both sections are reproduced below in order to illustrate the striking similarity with their constitutional successors in Pakistan:-

> *"7(1) Subject to the provisions of this Act, the executive authority of the Federation shall be exercised on behalf of His Majesty by the Governor-General, either directly or through officers subordinate to him, but nothing in this section shall prevent the Federal Legislature from conferring functions upon*

subordinate authorities, or be deemed to transfer to the Governor-General any functions conferred by any existing Indian law on any court, judge or officer, or on any local or other authority.

(2) References in this Act to the functions of the Governor-General shall be construed as references to his powers and duties in the exercise of the executive authority of the Federation and to any other powers and duties conferred or imposed on him as Governor-General by or under this Act, other than powers exercisable by him by reason that they have been assigned to him by His Majesty under Part I of this Act.

(3) The provisions of the Third Schedule to this Act shall have effect with respect to the salary and allowances of the Governor-General and the provision to be made for enabling him to discharge conveniently and with dignity the duties of his office."

"9(1) There shall be a council of ministers, not exceeding ten in number, to aid and advise the Governor-General in the exercise of his functions, except in so far as he is by or under this Act required to exercise his functions or any of them in his discretion:

Provided that nothing in this subsection shall be construed as preventing the Governor-General from exercising his individual judgment in any case where by or under this Act he is required so to do.

(2) The Governor-General in his discretion may preside at meetings of the council of ministers.

(3) If any question arises whether any matter is or is not a matter as respects which the Governor-General is by or under this Act required to act in his discretion or to exercise his individual judgment, the decision of the Governor-General in

his discretion shall be final, and the validity of anything done by the Governor-General shall not be called in question on the ground that he ought or ought not to have acted in his discretion, or ought or ought not to have exercised his individual judgment."

26. Section 17 is also relevant and stipulated that all executive actions of the Federal Government shall be expressed to be taken in the name of the Governor General. The said section is reproduced below:-

"17 - (1) All executive actions of the Federal Government shall be expressed to be taken in the name of the Governor-General.

(2) Orders and other instruments made and executed in the name of the Governor-General shall be authenticated in such manner as may be specified in rules to be made by the Governor-General, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor-General.

(3) The Governor-General shall make rules for the more convenient transaction of the business of the Federal Government, and for the allocation among ministers of the said business in so far as it is not business with respect to which the Governor-General is by or under this Act required to act in his discretion.

(4) The rules shall include provisions requiring ministers and secretaries to Government to transmit to the Governor-General all such information with respect to the business of the Federal Government as may be specified in the rules, or as the Governor-General may otherwise require to be so transmitted, and in particular requiring a minister to bring to the notice of the Governor-General, and the appropriate secretary to bring

to the notice of the minister concerned and of the Governor-General, any matter under consideration by him which involves, or appears to him likely to involve, any special responsibility of the Governor-General.

(5) In the discharge of his functions under subsections (2), (3) and (4) of this section the Governor-General shall act in his discretion after consultation with his ministers."

27. We propose to begin with the term "Federal Government". It has been submitted before us on behalf of the Government, that the concept of Federal Government had not been defined and hence was required to be determined. This, we must point out, is less than accurate. The General Clauses Act, 1897, at Section 3(8-ab) contains a compendious description of the meaning of the said term for, and in relation to, five different time periods. In brief, it will be noted that the concept of Federal Government has not remained static but has varied with the passage of time. The definition in the General Clauses Act thus provides a convenient overview of the concept. The said definition is reproduced hereinbelow:-

"Federal Government". Federal Government shall –

(a) in relation to anything done before the commencement of Part III of the Government of India Act, 1935 mean the Governor General in Council or the authority competent at the relevant date to exercise the functions corresponding to those subsequently exercised by the Governor General;

(b) in relation to anything done after the commencement of Part III of the said Act, but before the establishment of the Federation of Pakistan, mean, as respects matters with respect to which the Governor General was by or under the

provisions of the said Act then in force required to act in his discretion, the Governor General and as respects other matters, the Governor General in Council;

(c) in relation to anything done after the establishment of the Federation of Pakistan but before the twenty third day of March, 1956, mean the Governor General; and shall include-

(i) in relation to functions entrusted under subsection (1) of section 124 of the said Act to the Government of a Province, the Provincial Government acting within the scope of the authority given to it under that subsection; and

(ii) in relation to the administration before the fourteenth day of October, 1955, of a Chief Commissioner's Province, the Chief Commissioner acting within the scope of the authority given to him under subsection (3) of section 94 of the said Act, and

(d) In relation to anything done or to be done, after the twenty third day of March, 1956, mean the President; and shall include in relation to functions entrusted to the Government of a Province, the Provincial Government acting within the scope of the authority given to it by the President.

(e) In relation to anything done or to be done, after the fourteenth day of August, 1973, mean the Prime Minister and the Federal Ministers; and shall include in relation to functions entrusted to the Government of a Province, the Provincial Government acting within the scope of the authority given to or power conferred on it by the Federal Government;

28. It can be observed that the legislature elucidated the concept of Federal Government over five phases. The first began prior to the commencement of Part-III of the Government of India Act, 1935, and refers to the Governor General in Council, or the authority competent, at the relevant date, to exercise those functions which were subsequently exercised by the Governor General. During this period executive authority vested in the Crown was exercised in a manner untrammeled by restrictions and at the absolute discretion of the Crown. The second time period began after the commencement of Part-III of the said Act but before the establishment of the Federation of Pakistan. This was, in essence, the nascent functioning of constitutional rule in a country which was still subservient to the Crown. It draws a distinction between the Governor General *(exercising his discretionary power)* and the Governor General in Council *(a concept which is analogous to the functioning of a cabinet)*. The third time period commenced after the creation of the Federation of Pakistan but prior to the 23rd day of March, 1956 and refers to the Governor General *(it is clarified that functions, in relation to provincial administration do not concern us in this analysis)*. The fourth time period began after the 23rd day of March, 1956, i.e. with the introduction of the Constitution of 1956, and refers to the President, in whom the executive authority of the state was vested, in name, to be exercised in accordance with various constitutional provisions *(as well as certain functions in relation to the provinces)*. This definition omits any specific reference to the Constitution of 1962. Finally, we come to the period after the 14th day of August, 1973 which refers to the Prime Minister and the Federal Ministers and, once again, includes, in relation to the functions entrusted to the Government of a Province, the Provincial Government acting within the scope of the

authority given to it, or power conferred on it, by the Federal Government.

29. This is essentially a descriptive definition. As observed earlier, for our purposes it will not be necessary to embark on a discussion for, and in relation to, the provincial sphere conceptualized by it. However, before we embark upon a normative analysis of the concept of Federal Government it will be advantageous to place it within a historical perspective. Sections 7, 9 and 17 of the Government of India Act, 1935 are of seminal importance for, and in relation to, the development of constitutional terminology in the subsequent constitutional dispensations relating to the exercise of political power. Essentially the 1935 Act furnished the template on which the Constitution of Pakistan, 1956, was based, which, in turn laid down the architectural framework within which the Constitution of Pakistan, 1973 was framed.

30. Chapter II of Part-II of the 1935 Act bore the heading “the Federal Executive”. The term Federal Executive considered contextually appears to be a synonym and means exactly the same thing as the Federal Government. Section 7 is the first section contained in Chapter-II and has been reproduced above.

Section 7 is followed by Section 8 which clarifies the matters in relation to which the executive authority of the Federation extends. It is coterminous with the Federal legislature’s powers to make laws. It is not necessary for purposes of this case to deal with the other topics covered by Section 8. Section 8, in turn, is followed by Section 9 which bears the heading “Administration of Federal affairs”.

Thereafter we have Section 10 which relates to the appointment of Ministers by the Governor General. Travelling further, we come to

Section 17 which, as noted, provides that all executive action(s) of the Federal Government are to be expressed to be in the name of the Governor General.

31. It can be seen, at a glance, that the above provisions are the foundations on the basis of which Articles 90 and 99 of the Constitution of 1973 were drafted. However, before we arrive at the 1973 Constitution we can examine the comparable provisions of the 1956 Constitution.

32. Part-IV of the 1956 Constitution bears the heading "The Federation". Chapter-I, which follows, bears the title "The Federal Government". Article 32 deals with the office of the President and the relevant part thereof is reproduced below:-

> *"32. **The President**. – (1) There shall be a President of Pakistan, in the Constitution referred to as the President, who shall be elected by an electoral college consisting of the members of the National Assembly and the Provincial Assemblies, in accordance with the provisions contained in the First Schedule.*

The Cabinet is dealt with under Article 37 which is reproduced below:-

> *"37. **The Cabinet**. – (1) There shall be a Cabinet of Ministers with the Prime Minister at its head, to aid and advise the President in the exercise of his functions.*
>
> *(2) The question whether any, and if so, what, advice has been tendered by the Cabinet, or a Minister or Minister of State, shall not be inquired into in any court.*
>
> *(3) The President shall, in his discretion, appoint from amongst the members of the National Assembly a Prime Minister who, in his opinion, is most likely to command the*

confidence of the majority of the members of the National Assembly.

(4) Other Ministers, Ministers of State and Deputy Ministers shall be appointed and removed from office by the President, but no person shall be appointed a Minister of State or Deputy Minister unless he is a member of the National Assembly.

(5) The Cabinet, together with the Ministers of State, shall be collectively responsible to the National Assembly.

(6) The Prime Minister shall hold office during the pleasure of the President, but the President shall not exercise his powers under this clause unless he is satisfied that the Prime Minister does not command the confidence of the majority of the members of the National Assembly.

(7) In the exercise of his functions, the President shall act in accordance with the advice of the Cabinet or the appropriate Minister or Minister of State, as the case may be, except in cases where he is empowered by the Constitution to act in his discretion, and except as respects the exercise of his powers under clause (6).

Explanation. – For the avoidance of doubt it is hereby declared that for the purpose of clause (4) the appropriate Minister shall be the Prime Minister."

The next relevant article for our purposes is Article 39 which deals with the executive authority of the Federation and reads as under:

*"39. **Extent of executive authority of the Federation**. – (1) The executive authority of the Federation shall vest in the President and shall be exercised by him, either directly or through officers subordinate to him, in accordance with the Constitution.*

(2) The executive authority of the Federation shall extend to all matters with respect to which Parliament has power to make laws:

Provided that, save as expressly provided in the Constitution or in any Act of Parliament which Parliament is, under the Constitution, competent to enact for a Province, the said authority shall not extend in any Province to any matter with respect to which the Provincial Legislature also has power to make laws."

Thereafter we come to Article 41 which deals with the conduct of business of the Federal Government and reads as under:-

*"41. **Conduct of business of the Federal Government**. – (1) All executive actions of the Federal Government shall be expressed to be taken in the name of the President.*

(2) The President shall by rules specify the manner in which orders and other instruments made and executed in his name shall be authenticated, and the validity of any order or instrument so authenticated shall not be questioned in any court on the ground that it was not made or executed by the President.

(3) The President shall also make rules for the allocation and transaction of the business of the Federal Government."

33. The Constitution of 1962 is not really relevant to the present discussion since the entire axis was altered from a parliamentary form of government into a presidential one. Nevertheless, it is striking that despite this, many of the key concepts were borrowed from the preceding constitutional instruments.

Part-III of the 1962 Constitution bore the heading “The Centre” i.e. the Federation. Chapter-III was titled The Central Government, which was the original term for the Federal Government. Article 31 dealt with the Executive Authority of the Federation and read as under:-

> *“31. Executive Authority of Republic vests in President. – The executive authority of the Republic is vested in the President and shall be exercised by him, either directly or through officers subordinate to him in accordance with this Constitution and the law.”*

Thereafter, comes Article 32 which relates to the Business of Government and is reproduced below:-

> *“32. Execution of instruments, etc. – The President may –*
>
> *(a) Specify the manner in which orders and other instruments made and executed in pursuance of any authority or power vested in the President shall be expressed and authenticated; and*
>
> *(b) Regulate the allocation and transaction of the business of the Central Government and establish divisions of that Government.”*

34. The Constitution of 1972, being merely an interim arrangement does not require analysis.

35. The present Constitution came into force on 12th of April, 1973. Once again Part-III deals with the Federation of Pakistan. Chapter-III bears the heading “The Federal Government”. Article 90, the article with which we are primarily concerned, is the opening article of Chapter-III and is reproduced below *(as originally enacted)*:-

> *“90. The Federal Government. – (1) Subject to the Constitution, the executive authority of the Federation shall be*

exercised in the name of the President by the Federal Government, consisting of the Prime Minister and the Federal Ministers, which shall act through the Prime Minister who shall be the chief executive of the Federation.

(2) In the performance of his functions under the Constitution, the Prime Minister may act either directly or through the Federal Ministers.

(3) The Prime Minister and the Federal Ministers shall be collectively responsible to the National Assembly."

The important point to note about the original structure of Article 90 is that the first two clauses are identical to those contained in its present version. The third clause, which deals with the subject of collective responsibility to the National Assembly no longer remains a part of Article 90 since it has been moved to Article 91(6) with a minor terminological emendation. However, what is important to note is that in the interregnum between the enactment of Article 90, as it originally stood, and its present restoration, a radical change was introduced in 1985. By means of the Revival of the Constitution Order *(Presidential Order No.14 of 1985, which was the forerunner of the 8th Amendment to the Constitution)* Articles 90 to 95 were substituted therefor. The substituted version of Article 90 under the 8th Amendment is reproduced below:-

"90. Exercise of executive authority of the Federation. – (1) The executive authority of the Federation shall vest in the President and shall be exercised by him, either directly or through officers subordinate to him, in accordance with the Constitution.

(2) Nothing contained in clause (1) shall –

> *(a) be deemed to transfer to the President any functions conferred by any existing law on the Government of any Province or other authority; or*
>
> *(b) prevent the Majlis-e-Shoora (Parliament) from conferring by law functions on authorities other than the President."*

36. Article 91, which currently deals with the Cabinet, at that time dealt with the election or appointment of the Prime Minister. It is not necessary for our purposes to examine this intermediate version of Article 91.

37. Article 99 of the constitution was also substituted in 1985. The original Article 99 read as under:-

> *"99. **Conduct of business of Federal Government**. – (1) Orders and other instruments made and executed in the name of the President shall be authenticated in such manner as may be specified in rules to be made by the Federal Government, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the President.*
>
> *(2) The Federal Government may regulate the allocation and transaction of its business and may for the convenient transaction of that business delegate any of its functions to officers or authorities subordinate to it."*

However, in 1985 it was substituted to read as under:

> *"99. **Conduct of business of Federal Government**: (1) All executive actions of the Federal Government shall be expressed to be taken in the name of the President.*

> *(2) The President shall by rules specify the manner in which orders and other instruments made and executed in his name shall be authenticated, and the validity of any order or instrument so authenticated shall not be questioned in any Court on the ground that it was not made or executed by the President.*
>
> *(3) The President shall also make rules for the allocation and transaction of the business of the Federal Government."*

At present, after the 18th Amendment it reads as under:-

> *"99. **Conduct of business of Federal Government**: (1) All executive actions of the Federal Government shall be expressed to be taken in the name of the President.*
>
> *(2) The Federal Government shall by rules specify the manner in which orders and other instruments made and executed in the name of President shall be authenticated, and the validity of any order or instrument so authenticated shall not be questioned in any Court on the ground that it was not made or executed by the President.*
>
> *(3) The Federal Government shall also make rules for the allocation and transaction of its business."*

It will be observed that except for the substitution of the term Federal Government for the President the latter two versions are identical.

38. The 18th Amendment, which was passed in 2010, made a conscious attempt, *(albeit not consistently)* to eradicate from the text of the Constitution amendments which had been made in 1985, as they were considered as remnants of a military government. Thus we find that Article 90 was returned to its original formulation except for clause (3).

Similarly Article 91 was replaced, although not in identical terms. We are not, however, concerned with this aspect of the matter.

39. Reverting to Article 99, we note there are two very important alterations, which are material in the facts of the present case *(however learned counsel for the parties did not address any submissions in regard to the same)*. Article 99, as originally framed, contemplated two sets of rules: the first were intended for the authentication of orders and were thus formal in nature, as also mandatory. The second set was very important and served a dual purpose:

(i) The first purpose was in relation to the allocation and transaction of business, and

(ii) The second was to enable the convenient transaction of that business by the Federal Government by conferring on it the power to delegate any of its functions to officers or authorities.

It is important to note, however, that the word “may”, connoting a discretionary element, was used in the original article.

40. The two critically important changes which have been made in the present formulation are:-

(a) the power of delegation to officers and subordinate authorities has been taken away, and

(b) the making of rules has been made mandatory. Two very significant inferences follow ineluctably from the changes.

(i) The executive power of the Federal Government has now been channelized and the exercise thereof is to be through the mandatory modality of Rules of Business. These Rules are therefore binding on the Government and a violation of the terms thereof can be fatal to the exercise of executive power. It needs emphasizing that

the conscious substitution of the word “may” by “shall” speaks to the intention of Parliament to leave no doubt in the matter.

(ii) Whereas originally the Federal Government had the power to delegate any of its functions to officers or authorities i.e. it would have been possible to delegate functions pertaining to fiscal matters to the Finance Ministry; this is no longer possible.

There is no discretion left in the Executive in relation to this. Obviously, the framers of the 18th Amendment felt so strongly about this that, notwithstanding, their reluctance to retain any vestiges of the 1985 Amendments, in this matter they preferred to retain the phraseology adopted in it. There has, therefore, been a radical re-structuring of the law. We will revert to this aspect of the matter below.

41. We may clarify, in relation to the first set of Rules, that they are merely intended to ensure that the genuineness of orders passed by the Federal Government cannot be questioned in any court once they have been authenticated in accordance with the Rules. However, and this is an important point, this does not mean that any or every order passed will be held to be valid merely because it has been authenticated. The scope of this provision is limited only to questions of formal authentication and, in each case, it would have to be independently determined whether or not the power exercised was in fact available and the exercise was validly made in accordance with law.

42. We are now in a position to examine the contents of the Rules of Business themselves. The present formulation of the Rules of Business dates back to 1973. A quick synoptic overview of the relevant Rules would not be out of place at this point of time. Rule 2, clause (iii) defines “business” as meaning all work done by the Federal Government.

Then follows Rule 3 which relates to the allocation of business and clause (3) thereof provides that the business of Government shall be distributed among the various Divisions *(i.e. the administrative units)* in the manner indicated in Schedule-II. Rule 4 deals with the organization of Divisions and Rule 5 bears the heading "Transaction of Business". It prescribes that no important policy decision is to be taken except with the approval of the Prime Minister. The responsibility of a Minister, as head of a Division, is to assist the Prime Minister in relation to the formulation of policy and also to keep him informed of any important cases disposed of by him. Subject to the above, a Minister is responsible for the policies of his Division. Clause (8) further clarifies that the business of a Division shall ordinarily be disposed of by, and under the authority of, the Minister in charge and Clause (9) lays down the responsibilities of the Secretary. Clauses (8) and (9) of Rule 5 insofar as relevant are reproduced below:-

> *"(8) The business of the Division shall ordinarily be disposed of by, or under the authority of the Minister-in-Charge.*
>
> *(9) The Secretary shall –*
>
> *(a) assist the Minister-in-Charge in the formulation of policy;*
>
> *(b) duly execute the sanctioned policy;*
>
> *(c) submit all proposals for legislation to the Cabinet with the approval of the Minister;*
>
> *(d) Keep the Minister-in-Charge generally informed of the working of the Division and of any important case disposed of without reference to the Minister;*
>
> *(e) be the principal accounting officer of his Division, its Attached Departments and Subordinate Offices, and ensure that the funds controlled by him are spent in*

accordance with the rules laid down by the Finance Division;

(f) Subject to the provisions of these rules and with the approval of the Minister-in-Charge issue standing orders laying down the manner of disposal of cases in the Division, including the distribution of work amongst the officers of his Division and such orders may specify the cases or class of cases which may be disposed of by an officer subordinate to him; and

(g) be responsible for the careful observance of these rules and, where he considers that there has been any material departure from them, either in his own or any other division, he shall bring the matter to the notice of the Minister-in-Charge and, if necessary, to the notice of the Prime Minister or the Cabinet."

43. Rule 6 reflects the constitutional concept of individual and collective responsibility and reads as under:-

*"6. **Individual and collective responsibility**. – The Cabinet shall collectively be responsible for the advice tendered to, or the executive orders issued in the name of the President whether by an individual Minister or as a result of decision by the Cabinet; but the Minister shall assume primary responsibility for the disposal of business pertaining to his portfolio."*

Rule 7 provides that, subject to Article 173, all executive actions of the Government shall be expressed to be taken in the name of the President. Rule 12 renders consultation with the Finance Division mandatory in relation to matters which may involve the relinquishment, remission or assignment of revenue or expenditure for which no provision exists in the Budget. Rule 14 bears the heading "Consultation

with the Law, Justice and Human Rights Division" and Clause (1) is material and is reproduced below insofar as relevant:-

> *"14.* ***Consultation with the Law, Justice and Human Rights Division****. – (1) The Law, Justice and Human Rights Division shall be consulted –*
>
> *(a) on all legal questions arising out of any case;*
>
> *(b) on the interpretation of any law;*
>
> *(c) before the issue of or authorization of the issue of an order, rule, regulation, by-law, notification, etc. in exercise of statutory powers;"*

Rule 15 makes it mandatory to obtain the approval of the Prime Minister in relation to important policy matters.

44. Rule 16 is an important rule and, insofar as material, is reproduced below:-

> *"16.* ***Cases to be brought before Cabinet****. – (1) The following cases shall be brought before the Cabinet :-*
>
> *(a) proposals for legislation, official or non-official, including money bills;*
>
> *(b) promulgation and revocation of Ordinances;*
>
> *(c) the budgetary position and proposals before the presentation of the Annual Budget Statement and a Supplementary Budget Statement or an Excess budget Statement under articles 80 and 84.*
>
> *(d) Proposals for levy, abolition, remission, alteration or regulation of any tax and floatation of loans;*
>
> *(e) to (m)*
>
> *(2) Notwithstanding the provisions of sub-rule (1), the Prime Minister may in any case give directions as to the manner of its disposal without prior reference to the Cabinet."*

It will be noted, and this is relevant for purposes of the present matter, that it is mandatory to bring any proposal for the levy, abolition, remission, alteration or regulation of any tax to the Cabinet. Whilst it is no doubt true that the Prime Minister has been given discretionary power in the matter it is clear that the exercise thereof is circumscribed by the following conditions:

(i) There must be a conscious application of mind by the Prime Minister to the existing circumstances justifying the need for this departure through passing of a reasoned and formal order prior to the action taken, and

(ii) More critically, and definitively, a determination whether the constitutional provisions justify such a departure? This is a matter which we will examine *infra*.

We note that, *ex facie*, this Rule has been violated by the Finance Division in issuing the impugned notification merely on the basis of the approval of the Secretary and the Advisor. This is a matter we will further discuss at a later stage in this judgment, when we will also consider the question of the constitutionality of Rule 16(2).

45. Rule 17 deals with the method of disposal of cabinet cases and is reproduced below:

> *"17. Method of disposal of Cabinet cases. – (1) Cases referred to the Cabinet shall be disposed of –*
>
> *(a) by discussion at a meeting of the Cabinet; or*
> *(b) by circulation amongst Ministers; or*
> *(c) by discussion at a meeting of a committee of the Cabinet.*
>
> *Provided that the decisions of the Committee shall be ratified by the Cabinet unless the Cabinet has authorized otherwise."*

The procedure for the submission of matters for decision making by the Cabinet is set out in Rule 18 and again is important. The relevant provisions thereof are reproduced below:-

> *"18. Manner of submissions of Cabinet cases. (1) In respect of all cases to be submitted to the Cabinet, the Secretary of the Division concerned shall transmit to the Cabinet Secretary a concise, lucid and printed memorandum of the case (hereinafter referred to as the "summary"), giving the background and relevant facts, the points for decision and the recommendations of the Minister-in-Charge. In the event of the views of the Division being different from the views of the Minister both the views shall be included in the summary.*
>
> *Provided that the Executive Director, Higher Education Commission, shall be the ex-officio Federal Secretary and may submit summaries, or cases to cabinet directly with the approval of Chairman, Higher Education Commission, having the status of a Federal Minister. (note:- this proviso, however, has been deleted vide SRO 226(I)/2010 dated 2.4.2010)*
>
> *(2) In the case of a proposed legislation to which approval is sought in principle, the summary shall bring out clearly the main issues to be legislated upon.*
>
> *(3) The summary shall be self-contained as far as possible, not exceeding two printed pages and may include as appendices only such relevant papers as are necessary for the proper appreciation of the case. The number of copies of the summary and the form in which it is to be drawn up shall be prescribed by the Cabinet Secretary.*
>
> *(4) Where a case concerns more than one Division, the summary shall not be submitted to the Cabinet unless it has been considered by all the Divisions concerned. In the event of a difference of opinion between them, the points of difference*

shall be clearly stated in the summary, a copy of which shall be sent by the sponsoring Division to the other Division concerned simultaneously with the transmission of the summary to the Cabinet Division.

(5) All draft Bills, Ordinances or Orders shall be submitted to the Cabinet after they have been scrutinized by the Law, Justice and Human Rights Division, and no changes shall be made therein except in consultation with that Division.

(6) No case for inclusion in the agenda of a meeting of the Cabinet shall be accepted unless it reaches the Cabinet Secretary at least several clear days in advance of the meeting:

Provided that, if a case is urgent and is required to be taken up at short notice, the Secretary concerned will obtain approval of the Prime Minister for its inclusion in the agenda before it is transmitted to the Cabinet Secretary.

(7) It shall be the duty of the Cabinet Secretary to satisfy himself that the papers submitted by a Secretary are complete and in appropriate form. He may return the case until the requirements of the rules have been complied with. If the Cabinet Secretary is satisfied that the case does not merit consideration of the Cabinet he may advise the matter to be placed before an appropriate forum or require it to be submitted to the Prime Minister."

46. The procedure to be followed in Cabinet meetings is set out in Rule 20 which prescribes that they are normally to be held once a week *(we note, in passing, that it appears that presently this Rule is being honoured more in the breach than in the observance thereof. The political implications of this do not concern us here, but we will revert to the question of the constitutional implications flowing from decision making lacking the prior sanction of the Cabinet).* It may be noted that it is not mandatory for the Prime Minister to preside at all meetings of the Cabinet. In this

connection, reference may be made to Clauses (3) and (4) which are reproduced below:-

> *"20. Procedure regarding Cabinet Meetings.*
>
> *(3) The Prime Minister may authorize the holding of Cabinet meetings during his absence.*
>
> *(4) The Prime Minister shall preside at all Cabinet meetings. In the absence of the Prime Minister a Minister nominated by the Prime Minister shall preside. The decisions taken in the Prime Minister's absence shall be subject to the approval of the Prime Minister, unless the Cabinet feels that a particular case is so urgent that immediate action may be taken in anticipation of the Prime Minister's approval."*

Rule 20, clause (6) is an important provision and provides that no case shall be discussed in Cabinet, nor any issue raised, without a summary relating to it first being circulated. There is a proviso, in terms whereof this requirement may be dispensed with but for that purpose a formal order of the Prime Minister is required. What is significant about the above provisions is that they indicate that a mere formal consent of the Cabinet without following the detailed provisions in the Rules may render the decision open to question. *The Cabinet, being the supreme body of the Executive, with a high constitutional status, cannot and ought not to be treated as a mere rubber stamp for decision making by the Prime Minister*. Article 90 envisages a parliamentary form of Government which is based on decision making by the Cabinet. To turn the Cabinet into such a rubber stamp in pursuit of decision making by the Prime Minister to the exclusion of his Cabinet would violate the letter and spirit of our Constitution. That would be to reduce a cabinet form of government into a prime ministerial one which is a concept which is alien to the

Constitution, as it stands at present. However, it should be noted in passing, that the original formulation of the constitution, was certainly more amenable to a greater construction of power in the hands of the Prime Minister *(originally Article 48 of the constitution contained a clause stating that the orders passed by the President required for their validity the counter-signature of the Prime Minister. It is, on the face of it, a little difficult to reconcile this clause with the dignity and status of the head of state).* We shall revert to this aspect of the matter later.

47. It will be recollected that the word "business" was defined in terms of Rule 2 to mean all work done by the Federal Government. This necessarily means that the concept of business of Government includes not merely executive matters but also those which pertain to legislation. This is borne out by the provisions of Part-E of the Rules which bears the heading "Legislation". Rule 27 provides for official Bills relating to proposed legislation. The procedure envisages the involvement of the Law Division in relation to drafting and so forth. In all cases the draft Bill has to be put up before the Cabinet by the concerned Division for its approval. Even legislation of a formal nature forms the subject matter of the Rules and sub-clauses (7) and (8) of Rule 27 are relevant in this context.

> *"(7) Legislation relating to the codification of substantive law or for the consolidation of existing enactments or legislation of a purely formal character, e.g., repealing and amending Bills and short title Bills, may be initiated in the Law, Justice and Human Rights Division. It shall, however, consult the Division concerned, if any, which shall consider the draft legislation from the administrative point of view and send their views to the Law, Justice and Human Rights Division.*
>
> *(8) After taking action in terms of sub-rule (5), the Division concerned shall forward to the Law, Justice and Human Rights*

Division the draft legislation in its final form with a statement of objects and reasons duly signed by the Minister-in-Charge. The Law, Justice and Human Rights Division, after satisfying itself that all legal requirements have been complied with for the introduction of the Bill in the Assembly or, as the case may be, the Senate, transfer the Bill along with the statement of objects and reasons to the Parliamentary Affairs Division for arranging its introduction in the appropriate House."

48. Against the above backdrop we can now turn to the facts of the present case. As observed earlier, the appellants are importers of cellular phones and other goods. Certain exemptions from sales tax were granted to them by the Federal Government. They were then either withdrawn or the tax rates were modified in terms of different notifications issued pursuant to Sections 3(2)(b), 3(6), 8(1)(b), 13(2)(a) and 71 of the Act. These notifications relate to cellular phones. Similar notifications had been issued earlier in relation to textile goods and, once again, the exemptions granted were withdrawn and/or modifications took place in relation to the rates of sales tax.

49. The sole ground urged before us was that these notifications had not been issued by the Federal Government, as that term ought to be construed in the light of the constitutional provisions. We will, therefore, assume for purposes of the present case, that the notifications issued were otherwise in order and not open to any exception save and except in relation to the above point.

50. The importance of the Rules of Business cannot be understated within a constitutional framework. Although, generally speaking, it is correct to state that all rules are binding for, and in relation to, the powers thereby conferred on the Executive, this is especially so in the case of the Rules of Business. The concept of rules,

as is obvious, is subsumed in subordinate or delegated legislation. It is an integral part thereof. All legislation is binding and should be acted upon. The Federal Government does not have the prerogative to follow, or not to follow, legislation, both primary as well as secondary or delegated, in its discretion. The authority to frame rules is normally conferred by an Act of Parliament. In the case of the Rules of Business this authority flows from the Constitution itself. As noted above, Clause (3) of Article 99 makes it mandatory for the Federal Government to make rules which cover two related sub-fields; firstly, for and in relation to the allocation of the business of the Government and secondly, for transacting the said business. This clause is to be read as essentially ancillary to the overarching concept of the rule of law. The Constitution confers vast powers on the Government for the transaction of executive business. There is no reason to suppose, or believe, that the framers of the Constitution intended, in disregard of the explicit language employed, that the Federal Government could, in its discretion, either follow, or not follow, the provisions of the Rules of Business. *The framer of rules is as much bound by the content thereof as anyone else is subject thereto*. These are basic precepts of constitutional interpretation. To allow the Executive to depart from the language of the Rules, in its discretion, would be to permit, and legitimize, unconstitutional executive actions. Quite independently of the above, there is ample case law stressing the importance of a structured exercise of discretionary power. In this case the discretionary executive powers have already been fettered by the Constitution. The framing of rules for this purpose is inextricably linked to the guided exercise of official power. The following of the Rules of Business is a salutary exercise intended to enhance, and amplify, concepts of good governance. We have no doubt that it is mandatory and

binding on the Government, and so hold. A similar view was taken by this Court in the case of **Ahmad Nawaz Shah**[7] *(supra)*.

51. The argument is sometimes advanced, in order to defeat the language of subordinate legislation, that it is merely directory and not mandatory. It is necessary to emphasize the point that, in the normal course, there is no reason whatsoever why the language of rules should not be considered to be mandatory unless it is *ex facie* discretionary. The rules are framed to achieve a certain objective and to achieve this within the channels relating to the devolution and flow of statutory authority. In the absence of compelling reasons to the contrary all rules are, and should be considered to be mandatory and binding. The burden of proof lies on anyone asserting that the rules in question are directory and not mandatory. He must establish that there is a sound and powerful reason why they should not be considered mandatory and binding. This principle applies with redoubled force, for and in relation to two sets of rules; firstly, constitutionally mandated rules i.e. the Rules of Business, and secondly, rules framed under fiscal enactments. Constitutionally mandated rules are closely intertwined with the concept of good governance for and in the public interest. Allowing a departure therefrom would be detrimental to open and transparent forms of governance. If a government department admits that although it has violated explicit provisions of the rules, its violation should be condoned by treating the breach as non-actionable merely on the ground of its supposedly being directory, then surely serious questions arise in relation to the good faith of the department. In each and every case the presumption of law would be that the rules are mandatory and should be observed and followed. If, and only if, a compelling public interest is

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[7] *2002 SCMR 560*

established as a reason for non-compliance with the rules i.e. other than inadvertence, or negligence, or incompetence then, and only then, can the court consider whether or not to condone the breach in the observance of the rules. These considerations are fortified and amplified for, and in relation to, fiscal enactments. The reason is twofold; firstly Article 77 of the Constitution only enables the levy of tax under law and, secondly, the levy of a tax inevitably implies a restriction of a citizen's right to property. Payments of tax amount to a corresponding deprivation of property and, since the right to property is a fundamental right, this can only be done by means of strict compliance with the law. It follows that the breach of Rule 16 is fatal to the case of the Government. Although this is sufficient to dispose of the case it is necessary that we should also clarify the constitutional position, for which it is necessary to revert to the concept of Federal Government.

52. Article 90, as pointed out above, states that the executive authority of the Federation shall be exercised in the name of the President by the Federal Government. The Federal Government is then described as "consisting of the Prime Minister and the Federal Ministers". The question is, what is the precise interpretation of this provision?

53. The learned Additional Attorney General advanced, at some length, his submissions for, and in relation to, the concept of Federal Government as well as the allied concept of the executive authority of the Federation. He developed his argument by referring to Article 41 of the Constitution. The said article provides, in terms of Clause (1) thereof, that the President shall be the Head of State and shall represent the unity of the Republic. He then travelled to Article 48. Clause (1) of the said Article provides that, in the exercise of his functions, the President shall act on, and in accordance with, the advice of the Cabinet or the

Prime Minister. Incidentally, at this point we may note, in passing, that the original formulation of Article 48(1) stipulated that the President was obligated to act on, and in accordance, with the advice of the Prime Minister and it was further added that such advice shall be binding on him. In brief, the importance and significance of the Cabinet which lies at the heart of the parliamentary form of Government, was downplayed in the original formulation and an alternate template of virtual prime ministerial rule was laid down. We have already referred to this aspect of the matter above. By means of the 8th Amendment to the Constitution Article 48 was reformulated into its present form so as to give primacy to the advice of the Cabinet and thus restore the Cabinet to a pristine position at the heart of the Executive. Reverting to the submissions of the learned counsel, he then developed his argument by contending that the definition of the Federal Government should now be considered to be the President along with the Cabinet headed by the Prime Minister. This argument certainly has the merit of novelty, if nothing else.

54. We are unable to agree with him. Article 90 states categorically what the Federal Government is; it consists of the Prime Minister and the Federal Ministers *(i.e. the Cabinet)* and not the President who is not mentioned therein *(we note, in passing, the similarity with Articles 176 and 192 which respectively define the Supreme Court and the High Court as consisting of the Chief Justice and judges).* We are unaware of any principle of constitutional interpretation which would allow us to construe Article 41 and Article 48, on the basis of a presumed intention, so as to override the explicit provisions of Article 90. Neither article purports to do so. The concept of the President being the Head of State should not be confused with the completely different concept of the Head of Government and nor should the two offices be conflated. Article 48 merely stipulates that, in the

discharge of his functions, the President is mandated to act on, and in accordance with, the advice of the Cabinet or the Prime Minister. This article relates to the performance of the constitutional functions of the President by making it binding on him to follow the advice of the Cabinet. This is by no means the same as asserting that, by doing so, he becomes a part of the Federal Government. He is not. He is the Head of State. There are many functions of state which are discharged by different organs without their becoming part of the Federal Government. To take an obvious illustration; the judicial functions of the State, which lie at the heart of the rule of law, are discharged by the Supreme Court and the High Courts as well as such other courts as are established by law in terms of Article 175. By doing so they do not become part of the Federal Government *(at least for purposes of the domestic law of the State)*. Article 175 does not in any manner qualify the position stated in Article 90. The concept of Head of State is distinct from that of head of government and remains as such.

55. In English constitutional law, which forms the bedrock on which the parliamentary form of government is based, the status of the sovereign has been developed over the years. In the classic tome "The Law of the Constitution" by A.V. Dicey *(first published in 1886)* there is a detailed exposition of the rule of English law which states that "the King can do no wrong." The following passage is reproduced from page 24 of the 9th Edition:-

> *"To the law of the constitution belong the following rules:-*
> *"The King can do no wrong." This maxim, as now interpreted by the courts, means, in the first place, that by no proceeding known to the law can the King be made personally responsible for any act done by him; if (to give an absurd example) the King were himself to shoot the Premier through the head, no*

> *court in England could take cognizance of the act. The maxim means, in the second place, that no one can plead the orders of the Crown or indeed of any superior officer in defence of any act not otherwise justifiable by law; this principle in both its applications is (be it noted) a law and a law of the constitution, but it is not a written law. "There is no power in the Crown to dispense with the obligation to obey a law;" this negation or abolition of the dispensing power now depends upon the Bill of Rights; it is a law of the constitution and a written law. "Some person is legally responsible for every act done by the Crown." This responsibility of Ministers appears in foreign countries as a formal part of the constitution; in England it results from the combined action of several legal principles, namely, first, the maxim that the King can do no wrong; secondly, the refusal of the courts to recognize any act as done by the Crown, which is not done in a particular form, a form in general involving the affixing of a particular seal by a Minister, or the counter-signature or something equivalent to the counter-signature of a Minister; thirdly, the principle that the Minister who affixes a particular seal, or countersigns his signature, is responsible for the act which he, so to speak, endorses; this again is part of the constitution and a law, but it is not a written law. So again the right to personal liberty, the right of public meeting, and many other rights, are part of the law.*

56. In England the Government is often referred to as Her Majesty's Government. Everything is done in the name of the sovereign, although the actual and effective power of the Crown is strictly limited. Hence the distinction between the sovereign and the Government. The Government is carried on in the name of the Crown. The courts of law are described as the Royal Courts of Justice although the Crown has no influence over them. In brief, the Crown is considered theoretically as the fountainhead of all authority and power. This goes back to the time when the monarch wielded absolute power and authority.

57. The underlying concept that government is to be carried on in the name of the President was borrowed from English constitutional practices as embodied in the Government of India Act, 1935, which was then followed in successive constitutional dispensations. However, formal terminology is one thing, the constitutional reality is another. Thus, under Articles 90 and 99 although all executive actions are to be expressed to be taken in the name of the *President,* this does not change the underlying reality.

58. The learned Additional Attorney General also submitted, in relation to the concept of "business", as defined in Rule 2, that it includes both executive and legislative work. So far the argument is unexceptionable and we have no difficulty in accepting it. It is obvious that an important part of the functions of the Government relates to the formulation and initiation of legislative measures. Thus the Rules of Business must encompass both executive as well as legislative business. However, the inference drawn by him from this premise is not justifiable. There is a vast gulf between considering, or taking, policy decisions regarding legislative measures and the actual power to frame or enact legislation, whether primary or secondary. Although the overwhelming majority of legislation is proposed by the Government, which enjoys the majority to pass the same in parliament, the Executive, as such, cannot make laws. This is the legislative function. It is distinct from the executive function. Indeed, the Rules of Business themselves make this clear although the proposition is obvious even otherwise *(we will separately deal with the ordinance making power of the State at a later stage of this judgment)*.

59. Part-E of the Rules of Business deals specifically with legislation. Rule 27 stipulates that the Division concerned shall be responsible for determining the contents of the proposed legislation and

for consultation with other Divisions. Other rules further develop, and lay down, in some detail, the procedure to be adopted. All this is part of the legislative business which is governed by the Rules of Business. However, once the proposed legislation is finalized and then placed before the House, the powers of the Executive, as such, come to an end. The legislature takes over. It is inconceivable that on account of the fact that the Rules of Business cover legislative work they could also be deemed to confer power on the Executive to enact legislative measures. All statutory rules, including those of a fiscal nature, are subordinate legislation. The power to enact subordinate legislation has to be conferred by substantive law. The Rules of Business, which merely regulate procedural modalities, cannot conceivably do so.

60. His further argument that Rule 3(3) provides that the business of government is to be allocated to Divisions in accordance with Schedule-II, which in turn provides that tax policy and tax administration falls within the Revenue Division is, confined to that extent, and that extent alone, correct. It cannot be stretched any further, and it by no means follows that the Chairman, FBR, who is the *ex officio* Secretary of the Revenue Division is empowered, *ipso facto* under Rule 4(2) read with Rule 3(3) to issue notifications pertaining to modifications of tax merely because the subject falls within the scope of his responsibilities. The conferment of power, the exercise of power and the formal notification of the exercise of power are all independent *(albeit interlinked)* concepts. The Chairman FBR, in his capacity as Secretary to the Revenue Division can no doubt make proposals pertaining to modification of tax policy. He can either directly, or through his subordinate officials, process proposals. If the processing of tax proposals were, for example to be done by another Division that would

quite clearly be illegal. However, his power does not extend any further. The power to make fiscal changes is a substantive power, and moreover, one of great constitutional importance. It has to be clearly spelt out from the scheme of the constitution and the language used in any enactment. The Rules of Business neither confer such a power, and nor can they, on any meaningful interpretation of the constitution, conceivably confer such a power. If the Rules of Business were to be amended to purportedly confer such a power, the amendment would be clearly *ultra vires*.

61. His reference to Rule 7(2), read with Schedule-IV which allows the Secretary to authenticate by signature all orders and other instruments made, or executed, in the name of President disregards the fact that this is a purely formal power. The exercise of this power establishes the genuineness of the document. It does not confer the statutory power to issue such a document.

62. The continuation of his argument to the effect that the Secretary sought, and obtained, the approval of the Advisor is equally flawed. Neither the Secretary, nor the Advisor, has any power to make subordinate or delegated legislation. This power has been conferred solely and exclusively on the Federal Government in terms of Section 3 of the Sales Tax Act. Indeed it could not have been conferred on any other subordinate authority, or body, without violating the Constitution. We have already noted that the constitutional power to delegate functions to officials or other authorities has been taken away.

63. It needs to be stressed, with clarity and precision, that the allocation of business, i.e. by whom, and how a matter is to be dealt with, is not equivalent to the grant of power. Allocation of business is merely a matter of inter-departmental procedure to indicate which

Division of the Government is going to deal with a certain subject. The mere fact that a certain Division is going to deal with a specified subject does not confer any extra, or additional, constitutional or statutory powers on the said Division. In each and every case it has to be established as to what power has been conferred and in what manner it is to be exercised. Certain powers have been conferred under the Sales Tax Act. They have been conferred, and rightly so, on the Federal Government. The conferment of such a power on any other authority would have been clearly unconstitutional. Now it is up to the Federal Government to allocate, through the modality of the Rules of Business, which of the different Divisions is to deal with the matter. But this most emphatically does not mean that the Revenue Division has been transformed into the Federal Government. It has not. It remains what it always was. The concept of Federal Government is a foundational concept of the Constitution and must be interpreted and construed exactly as specified in Article 90. The Secretary of the Revenue Division has full power and authority to *process* a case relating to fiscal matters. Once he has processed it, he then has to forward it, in accordance with the normal constitutional channels, to the Federal Government, for decision. In other words, the decision would then be taken by the Cabinet comprising of the Prime Minister and the Ministers. The mere fact that the Secretary of the Revenue Division has processed the case does not elevate his status to that of the Federal Government.

64. The above clarification is further fortified by the language of Article 97 of the Constitution which is reproduced below:-

> *"97. Extent of executive authority of Federation. --- Subject to the Constitution, the executive authority of the Federation shall extend to the matters with respect to which [Majlis-e-*

> *Shoora (Parliament)] has power to make laws, including exercise of rights, authority and jurisdiction in and in relation to areas outside Pakistan.*
>
> *Provided that the said authority shall not, save as expressly provided in the Constitution or in any law made by [Majlis-e-Shoora (Parliament)], extend in any Province to a matter with respect to which the Provincial Assembly has also power to make laws."*

It will be noted that this Article lays down the extent of the executive authority of the Federation i.e. the powers of the Federal Government. It begins with the qualifying phrase "subject to the Constitution", which is significant, for reasons to be explained below, and goes on to state that the executive authority of the Federation is coterminous with Parliament's power to make laws. The exercise of both powers falls within a congruent sphere. If Parliament can make laws about a certain matter, the Federal Government can take executive action in relation thereto. The executive authority of the Federation vests in the Federal Government and it can operate within the corresponding legislative sphere. However, it should be noted that it is the Federal Government – *as constitutionally defined* - which is the repository of this executive power and no one else. Article 99 carries the argument logically forward by stating that all executive actions of the Federal Government *(and no one else)* are expressed to be taken in the name of the President. The use of the phrase "subject to the constitution" in Article 97 indicates that the executive authority of the Federation, as exercised by the Federal Government, is subordinated to the constitutional schema in relation to the conferment of constitutional powers and responsibility on the three great organs of the State. It would be recollected that all executive actions of the Federal Government are expressed to be taken in

the name of the President. It is not the actions of the Secretary, or head of a Division, as such, but the executive actions of the Federal Government which are to be taken in the name of the President.

65. We now turn to a consideration of the status of "subordinate authorities" which is a matter dealt with in Article 98. This article provides that, on the recommendation of the Federal Government, Parliament may, by law, confer functions upon officers, or authorities, subordinate to the Federal Government. It is reproduced below:-

> *"98. Conferring of functions on subordinate authorities. – On the recommendation of the Federal Government, [Majlis-e-Shoora (Parliament)] may by law confer functions upon officers or authorities subordinate to the Federal Government."*

66. This article, read contextually with the other relevant articles, envisages a multi-stage procedure. Each stage has to be strictly complied with.

The sequence of developments is as follows:-

(i) The original concept in Article 90 *(which now stands restored to its initial configuration)* was that the executive authority of the Federation was to be exercised in the name of the President by the Federal Government.

(ii) The Federal Government was defined to be the Prime Minister and the Federal Ministers *(i.e. the Cabinet)*.

(iii) The Cabinet was to act through the Prime Minister who was to be the Chief Executive.

(iv) The Prime Minister could act directly or through Federal Ministers.

(v) This hierarchical exercise of powers was stated to be subject to the constitution i.e. the exercise of

governmental power was subjected to the constitutional provisions in their totality. This obviously postulates a referential base of a parliamentary democracy with the Cabinet at the heart of the Executive.

(vi) In 1985 a radical change was made in Article 90 by vesting the totality of executive authority in the President instead of the Federal Government i.e. the Cabinet. The flow of authority was then the following:

(a) The President now became the constitutional repository of all executive authority.

(b) He could exercise this authority, either directly or through officers subordinate to him *(this would obviously include the exercise of power through ministers)*.

(c) There was no delegation of power as such. When powers were exercised by officials it was, in the eye of law, the President acting through them.

(d) The effective restraint on the President was that power was to be exercised in accordance with the constitution. This, therefore, restored the power of the Cabinet, albeit by a rather circuitous route. However, the formulation as a whole, was really a reversion to the structure of the Government of India Act, 1935 which we have already discussed above.

(vii) By the 18th Amendment the original language of Article 90 was restored, but other changes were also made. When it came to Article 99, which in its original formulation, conferred the power on the Federal Government to delegate its functions to subordinate officials, this power was not restored. It is, however, important to bear in mind that in the original constitution the power to delegate was purely discretionary. It could be exercised, or not exercised,

> at the will of the Government. In actual practice it was perhaps rarely exercised. It follows from the above that the mere taking away of a discretionary power to delegate does not make any substantial difference to the exercise of constitutional power as matters stand at present.

It is important to note that designated functions can *only* be conferred on officers or authorities who are subordinate to the Federal Government. They cannot, for example, be conferred on private entities or companies. Official power can only be exercised through official channels. However, as is obvious, even the passing of a law to such effect would not elevate the status of officers of the Federal Government and enable them to be treated as the Federal Government itself. Furthermore, this provision very clearly does not contemplate the transfer of legislative powers of any nature whatsoever to subordinate officials. All it permits is the discharge of certain functions by designated officials. The transfer of legislative powers would be a clear cut violation of the structure of the constitution and the concept of separation of powers. We are, therefore, unable to agree with the contention of the learned Additional Attorney General in this behalf. Neither the constitutional provisions, nor the Rules of Business, confer power on a Secretary or head of a Division, to be treated as the Federal Government. Contrary to what he has submitted, the phrase “subject to the constitution” used in Article 90 was not intended to differentiate the extent of the executive authority of the Federation from that as set out in Article 99. Both articles are to be read in conjunction with each other and not in opposition thereto. There is no conflict between the two articles which requires resolution by reference to the phrase “subject to the constitution”. Article 99 supplements the contents of Article 90.

67. He has, however, correctly contended that the levy of tax is the function of Parliament under Article 77 of the Constitution and the regulation and issuance of fiscal notifications is in the nature of subordinate legislation. He has further, again correctly, contended that such powers, if given to the Executive *per se,* would amount to a negation of the doctrine of parliamentary supremacy and the doctrine of separation of powers. Both these propositions are valid and make the distinction between executive and legislative power clear.

68. We may now refer to the provisions of the Pakistan Telecommunication (Re-Organization Act), 1996 to which reference was made by the learned Additional Attorney General to buttress his submissions. While it is perfectly true, as stated by him, that the said Act does contain a definition of the Federal Government as being the Ministry of Information Technology and Telecommunication we have no doubt about the fact that a statutory definition must yield before the provisions of the Constitution of Pakistan. These provisions, as discussed above, leave no doubt in the matter as what the term Federal Government means. It means the Prime Minister and the Ministers. Hence, this statutory definition is clearly violative of Article 90 of the Constitution and, therefore, is *ultra vires*.

69. There was a sharp difference of opinion between the learned Additional Attorney General and the learned *amicus* appearing in the matter as to the meaning of the phrase “executive authority”. The learned Additional Attorney General submitted that the executive power of the state was the residue of legislative and judicial power. In support of his contention he relied on English parliamentary practice in terms of which, although initially all powers were concentrated in the monarch, they were gradually subjected to the rule of law which implied that legislative

and judicial powers were essentially surrendered to parliament and the judiciary. Thus the executive power left with the Crown was essentially a residuary power. The executive power of the Crown was further modified with the passage of time. He has, in support of his submissions relied on **Rai Sahib**'s[8] case *(supra)* as reaffirmed in two subsequent decisions of the Indian Supreme Court. Paragraph 12 of the former judgment is reproduced below:-

> *"It may not be possible to frame an exhaustive definition of what executive function means and implies. Ordinarily the executive power connotes the residue of governmental functions that remain after legislative and judicial functions are taken away.*
>
> *The Indian Constitution has not indeed recognized the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another. The executive indeed can exercise the powers of departmental or subordinate legislation when such powers are delegated to it by the legislature.*
>
> *It can also, when so empowered, exercise judicial functions in a limited way. The executive Government, however, can never go against the provisions of the Constitution or of any law. This is clear from the provisions of Article 154 of the Constitution but, as we have already stated, it does not follow from this that in order to enable the executive to function there must be a law already in existence and that the powers of the executive are limited merely to the carrying out of these laws."*

70. As against the above contention, the learned *amicus* contended that the argument that the executive power is the residual

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[8] *AIR 1955 SC 549 = (1955) 2 SCR 225*

power is fallacious. He relied on various decisions in support of his contention. According to him, the executive authority is set out in the constitution and is the administration of the Government in accordance with law.

71. In our opinion the difference between the two learned counsel is largely semantic in nature. One has traced the origin of executive power in the light of the history of the parliamentary form of government which indicates that although the sovereign enjoyed powers which were originally an amalgam of executive, legislative and judicial power, but gradually with the passage of time it is the executive power alone which has remained with the government of the day. The Constitution of Pakistan, which essentially accepts the separation of all power into three broad divisions *(albeit without a formal statement to this effect)* by treating legislative, executive and judicial powers separately arrives at the same conclusion, not as a historical process but on an analytical plane. Both paths converge. The conclusion in both cases is the same. There is no conflict between the two approaches; one is predicated on the evolutionary process while the other is descriptive of the culmination of that process in the form of three separate categories of power in terms of the present constitution.

72. It should, however, be clarified that the above noted division of power which is sometimes referred to as the trichotomy of powers, is not rigidly adhered to in our Constitution. The term is in that sense somewhat misleading. The parliamentary form of government essentially envisages a broad categorization of power but not the erection of rigid walls of separation. The distinction is of great significance jurisprudentially. There are no impassable barriers between the different types of power. There is often an overlapping or blurring of boundaries.

The executive also exercises some legislative powers while the judiciary is not entirely devoid of other forms of power including the power to make rules. A rigid division, or separation, is sometimes to be found in presidential forms of government although there too, in practice, there is often some blurring of boundaries. In this connection, reference may be made to the opening sections of Articles 1, 2 and 3 of the Constitution of the United States which are reproduced below:-

> *Article I*
>
> *"Section 1 All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.*
>
> *Article II*
>
> *Section 1 The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice-President, chosen for the same term, be elected, as follows….*
>
> *Article III*
>
> *Section 1 The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The Judges, both of the Supreme and inferior Courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office."*

73. At this point we can conveniently revert to the question of the constitutional classification of the ordinance making power. We should note, at the very inception, that this question raises formidable issues of interpretation. It is located in Article 89, and is only exercisable under clause (1) thereof when the National Assembly or Senate are not in

session. This provision by itself gives a hint as to the nature of the power. Clause (2) then follows and is reproduced below:-

> *"(2) An Ordinance promulgated under this Article shall have the same force and effect as an Act of Majlis-e-Shoora (Parliament) and shall be subject like restrictions as the power of Majlis-e-Shoora (Parliament) to make law, but every such Ordinance-*
>
> *(a) shall be laid-*
>
> *(i) before the National Assembly if it contains provisions dealing with all or any of the matters specified in clause (2) of Article 73, and shall stand repealed at the expiration of one hundred and twenty days from its promulgation or, if before the expiration of that period a resolution disapproving it is passed by the Assembly, upon the passing of that resolution:*
>
> *Provided that the National Assembly may by a resolution extend the Ordinance for a further period of one hundred and twenty days and it shall stand repealed at the expiration of the extended period, or if before the expiration of that period a resolution disapproving it is passed by the Assembly, upon the passing of that resolution:*
>
> *Provided further that extension for further period may be made only once; and*
>
> *(ii) before both Houses if it does not contain provisions dealing with any of the matters referred to in sub-paragraph (i), and shall stand repealed at the expiration of one hundred and twenty days from its promulgation or, if before the expiration of that period a resolution disapproving it is passed by either House, upon the passing of that resolution: and*
>
> *Provided that either House may by a resolution extend it for a further period of one hundred and twenty days and it shall*

stand repealed at the expiration of the extended period, or if before the expiration of that period a resolution disapproving it is passed by a House, upon the passing of that resolution:

Provided further that extension for a further period may be made only once;

(b) may be withdrawn at any time by the President.

(3) without prejudice to the provisions of clause (2),-

(a) an Ordinance laid before the National Assembly under subparagraph (i) of paragraph (a) of clause (2) shall be deemed to be a Bill introduced in the National Assembly; and

(b) an Ordinance laid before both Houses under sub-paragraph (ii) of paragraph (a) of clause (2) shall be deemed to be a Bill introduced in the House where it was first laid."

The following characteristics of an ordinance may be noted:-

(i) It has "the same force and effect as an Act of Parliament." It is important to note a subtle distinction at this point. The language does not state that an ordinance is an Act of Parliament. It also, more importantly, does not state that it is to be *deemed* an Act of Parliament – it only has the same force and effect as an Act of Parliament. This distinction is important from the jurisprudential point of view. It raises a taxonomic issue of importance.

(ii) It is mandatory that it be laid before Parliament. The reason is obvious – we are now in the constitutionally mandated legislative field.

(iii) It shall *stand* repealed on the expiry of 120 days *(unless extended)* i.e. it is not that it shall be repealed *(since only Parliament can repeal a law)*, nor that it shall be deemed to be repealed *(since the word repeal is limited in its application to an Act of Parliament and an ordinance is not deemed to be an Act of Parliament).* It follows necessarily

that an ordinance falls into an anomalous category, all by itself.

(iv) The question is, how is an ordinance to be classified? Is it legislative in nature? Or, is it executive in nature? Or, is it quasi-legislative? In order to resolve this issue it is imperative to bear a crucial jurisprudential distinction in mind. *This is the distinction between the nature of a constitutional power and the person who is exercising it*. These are conceptually distinct matters. This distinction points the way forward to resolving the issue.

74. The nature of the power is clearly legislative, since it contemplates a change, or alteration, in the corpus of laws in the country. Thus there is no ambiguity on this point. It is not quasi-legislative. The other, essentially independent, although inter-linked, question is as to who is exercising this power. The answer is the Executive. However, this mere fact will not transform the nature, or classification, of the power. The power to make laws is *ex hypothesi* a legislative power irrespective of who is exercising it. Clause (2) of Article 260 further corroborates this inference by explicitly providing that Act of Parliament includes an ordinance. However, it has to be added that the legislative drafting of the above provisions is by no means free from ambiguity since it should not be forgotten that Article 89 has already declared that an ordinance is to be deemed to be a bill pending in Parliament. The question is, how can an ordinance *(i.e. an Act of Parliament)* be at the same time a bill pending in Parliament? The only way to resolve this dilemma is to hold that for purposes of Article 89, it is deemed to be a Bill pending in Parliament, which, however, is to be treated as having the same force and effect as an Act of Parliament and Article 260 is

merely a brief re-statement of the position, although set out in a different terminology.

75. We may now deal with the submission of the learned *amicus* to the effect that previously there was no concept of the Federal Government. He has developed this argument by referring to Article 39(1) of the Constitution of 1956 which stipulates that the executive authority shall vest in the President, and that he may exercise the same either directly or through officers subordinate to him. He has stressed the fact that this article does not mention the Federal Government at all. He has contrasted this with the language of Article 90 to contend that it follows that there was previously no concept of Federal Government. This is clearly erroneous, both factually as well legally. The implied conclusion that a parliamentary form of government can exist without a government is inconceivable. The word government, in its normal connotation, is equivalent to the term Executive. It is one of the three principal organs of the State. Contrary to his contention, the term Federal Government has been explicitly used in the constitution of 1956 and indeed it is hardly possible that it could not have been used. Part-IV of the said Constitution bearing the heading “The Federation” sets out the title of Chapter-I as being “The Federal Government”. Article 41 of the constitution explicitly deals with the Federal Government. The said Article is reproduced below:-

> *“41.* ***Conduct of business of the Federal Government****. -- (1) All executive actions of the Federal Government shall be expressed to be taken in the name of the President.*
>
> *(2) The President shall by rules specify the manner in which orders and other instruments made and executed in his name shall be authenticated, and the validity of any order or instrument so authenticated shall not be questioned in any*

court on the ground that it was not made or executed by the President.

(3) The President shall also make rules for the allocation and transaction of the business of the Federal Government."

76. His further contention that the concept of collective responsibility which is found in Article 91(6) of the present Constitution *(as well as in Article 37(1) and (5) of the Constitution of 1956)* was absent in the Constitution of 1973, as originally enacted, and was only introduced for the first time by means of the amendments made in 1985, is equally erroneous. If reference is made to Article 90 clause (3)[9] of the 1973 Constitution, as originally enacted, it will be found that this concept is clearly set out therein.

77. At this stage we may also clarify another confusion. This is in relation to the concept of delegation of power. It was contended before us that in the Constitution of 1973, as originally enacted, the Federal Government was empowered to delegate its functions to officers and authorities. It was further contended that in 1985 the provisions of Article 99 were amended and the power of delegation was taken away. The contention was that the concept of delegation contained in the original constitution does not exist anymore and hence that officers exercise executive authority on behalf of the Federal Government as opposed to acting in delegation of such powers. The implied inference that the taking away of the power of delegation by itself amounts to the conferment of power to act directly through someone is certainly not justified. There has to be an independent conferment of power. It needs to be clarified that there is a significant conceptual distinction between the exercise of power through a designated person and the delegation of

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[9] *90(3), "The Prime Minister and the Federal Ministers shall be collectively responsible to the National Assembly"*.

powers to him. If reference is made to the provisions of the 1973 Constitution, as enacted originally, it will be seen that Article 90(1) explicitly stated two things. Firstly, it was stated that the executive authority of the Federation was to be exercised in the name of the President. This is merely a question of nomenclature and nothing substantial turns on it. The mere fact that the executive authority was to be exercised in the name of the President does not amount to an explicit conferment of powers either on the President or anyone else. It is the further statement in Article 90 to the effect that the executive authority shall be exercised by the Federal Government consisting of the Prime Minister and the Federal Ministers which creates conferment of constitutional power. This power is conferred on the Prime Minister and the Federal Ministers who are authorized to act through the Prime Minister who is to be the chief executive of the Federation. This is a direct conferment of power on the constitutional plane. The question of delegation arises, however, when powers are transferred from one person to another person and is constitutionally and analytically quite distinct from the exercise of power by one person through another person *(in a delegation of power, there is a transfer of power from the donor to the donee).* By way of illustration *(but only of illustration, since the constitutional position in England is distinguished from that prevailing in Pakistan)* we may refer to the position in England, as set out in Halsbury's Laws of England (4th edition) on page 748, which is reproduced below:

> *"748.* ***Ministers of the Crown and local authorities.*** *Where functions entrusted to a minister are performed by an official employed in the minister's department there is in law no delegation because constitutionally the act or decision of the official is that of the minister. Similarly where a local authority appoints a committee for the discharge of certain of*

> *its functions, the committee is merely machinery for the discharge by the authority of the business entrusted to the committee all of whose acts are subject to the authority's approval."*

78. At this stage it would be convenient to also deal with the position of the Prime Minister. He was, and still is, described as the Chief Executive. This formulation is unknown to all the prior constitutions. It was introduced in 1973 but no definition was given of the term. His powers and responsibilities accordingly have to be determined on the basis of the overall structuring of power in the constitution. The concept of a Chief Executive is a familiar one in corporate law. The Companies Ordinance, 1984 contains a definition of the term, but, as is obvious, this was not in force in 1973 and so one cannot infer that the legislature had the statutory definition in mind when using the term Chief Executive *(prior to the enactment of the Companies Ordinance, 1984, the Companies Act, 1913, was in force and it was customary at that time to appoint a managing director under the articles of association)*. Even otherwise, it would be manifestly inappropriate, both analytically as well as historically, to equate the position of a Head of Government with that of an executive head of a limited liability company engaged in protecting the financial interests of his shareholders. Furthermore, the powers of a corporate chief executive, at present, are statutorily conferred and defined, while no such definition exists in the constitution. Accordingly, we set aside this analogical mode of reasoning and proceed to discuss the matter solely on the basis of the language used which, as stated above, lacks clarity and precision.

79. We begin with the postulate that the constitutional definition of Federal Government under Article 90 is absolutely clear in its scope and ambit – it means the Prime Minister and the Federal Ministers,

which, in turn, means the Cabinet. The Cabinet is a composite concept and its components are the Prime Minister and the Federal Ministers. Together they constitute the Cabinet. Article 91, as it stands at present, bears the heading “The Cabinet”, and restates the same proposition from a slightly different perspective. Under Article 90 it was posited that the executive authority was to be exercised by the Federal Government i.e. the Cabinet. But, it was added that the Cabinet was to exercise the executive authority in the name of the President. In brief, the executive authority of the state was to be exercised by the Cabinet, as a collective entity, in the name of the President. Another way of articulating this proposition, is to state that whatever the Cabinet did was to be described not as its action but the action of the President. Article 91 then re-states this, and amplifies it, by placing it within a different framework by positing that the function of the Cabinet is to aid and advise the President. In either case, the actions would be of the Cabinet but in the name of the President. The central role in both theoretical formulations is played by the Cabinet which is, in fact, a re-description of the Federal Government. The Prime Minister is the head of the Cabinet but he can neither supplant it nor replace it. In Article 90 he is described as the Chief Executive while in Article 91 his description is that of the Head of the Cabinet. *He is the single most important person in the Cabinet, but he does not stand in the position of the Cabinet. He is neither a substitute nor a surrogate for the Cabinet. He cannot exercise its powers by himself. The reason that he cannot stand in the position of the Cabinet is because the Cabinet is, in fact, the Federal Government and is so described in article 90. If we treat the office of the Prime Minister as being equivalent to that of the cabinet, it would follow that the Prime Minister, by himself, as a single individual, becomes the Federal Government. This is simply inconceivable.*

It is the antithesis of a constitutional democracy and would amount to a reversion to a monarchical form of Government reminiscent of King Louis XIV's famous claim that "I am the State" *(literally "L'etat, c'est moi")*. It is most emphatically not the function of this court to surrender the hard won liberties of the people of Pakistan to such a fanciful interpretation of the constitution which would be destructive of all democratic principles. We have no doubt in rejecting it, in its entirety. It follows from the above that Rule 16(2) which enables the Prime Minister to dispose of matters by by-passing the Cabinet is *ultra vires* and it is so declared.

80. It only remains, in this context, to examine what precisely is the meaning to be assigned to the term Chief Executive and it is to this that we now turn. Article 90, as stated above, describes the Prime Minister as Chief Executive and contemplates the Cabinet acting through him. Clause (2) of Article 90 adds that he may act either directly or through Federal Ministers. This is his discretionary choice. From the above the logical inference follows that the function of the Chief Executive is to execute and implement the policy decisions taken by Cabinet i.e. the Federal Government. He executes policy decisions, he does not take them by himself. The executive function, even on a literal basis, is to execute or implement decisions. On this interpretation the whole structure now falls into place. *The Prime Minister cannot take decisions by himself, or by supplanting or ignoring the Cabinet because the power to take decisions is vested with the Federal Government i.e. the Cabinet, and unilateral decisions taken by him would be a usurpation of power.* As our parliamentary system of government is based on the British system it would be more useful to relate the term 'Chief Executive' to the British concept of the Prime Minister as "primus inter pares" or a first among equals. The Rules of Business, if they carry, or

imply, a different impression, must yield to the superior mandate of the Constitution. The decisions of the Federal Government are the decisions of the Cabinet and not of the Prime Minister. Any decisions taken by the Prime Minister on his own initiative lack the authority of the law or the Constitution.

81. The above views are buttressed by the provisions of Article 91(6) which provide that the Cabinet shall be “collectively responsible to the Senate and the National Assembly”. It should be noted that it is not the Prime Minister by himself who is responsible to Parliament. It is the body known as the Cabinet, which is *collectively* responsible. It follows that to allow him to act on his own would enable him to escape from responsibility to Parliament for the consequences of his actions, which cannot conceivably be the intention of the constitution. The underlying substratum of any representative form of government is to link acceptance of responsibility with the exercise of power. This principle applies across the board. It applies with special force in relation to fiscal or budgetary matters. He cannot make fiscal changes on his own and nor can he engage in discretionary spending by himself. Furthermore, the Prime Minister is not constitutionally mandated to authorize expenditure on his own. In all cases the prior decision of the Cabinet is required since it is unambiguously that body alone which is the Federal Government. All discretionary spending without the prior approval of the Cabinet is contrary to law. We clarify that an *ex post facto* approval by the Cabinet will not suffice since money once spent cannot be unspent. An attempt to confront the court with a *fait accompli* by contending that since the money has already been spent it should be regularized is unacceptable. Any provisions of the Rules of Business to the contrary are *ultra vires* since there is no constitutional provision to justify them. It appears that,

at the bare minimum, an Act of Parliament would have to be passed to grant retrospective approval for the illegal expenditure *(we leave aside for consideration on another occasion the question of constitutionality of such a law)*. Such a law would have to set out the full particulars of the illegal spending, from time to time, to enable Parliament to consider the advisability of validating the expenditure and to try and bring it in line with normal constitutional principles. It would of course have to be passed by the National Assembly as well as the Senate since it would not be a normal money bill.

82. What is the procedure to be followed, in case the need arises for unforeseen spending. The answer is to be found in Article 84 of the Constitution which is reproduced below:-

> *"84. Supplementary and excess grants: If in respect of any financial year it is found –*
>
> *(a) that the amount authorized to be expended for a particular service for the current financial year is insufficient, or that a need has arisen for expenditure upon some new service not included in the Annual Budget Statement for that year; or*
>
> *(b) that any money has been spent on any service during a financial year in excess of the amount granted for that service for that year;*
>
> *The Federal Government shall have power to authorize expenditure from the Federal Consolidated Fund, whether the expenditure is charged by the Constitution upon that Fund or not, and shall cause to be laid before the National Assembly a Supplementary Budget Statement or, as the case may be, an Excess Budget Statement, setting out the amount of that expenditure, and the provisions of Articles 80 to 83 shall apply to those statements as they apply to the Annual Budget Statement."*

Once again, it would be noted that the power has been conferred not on the Prime Minister but the Federal Government i.e. the Cabinet. Similarly, Article 85 confers power, not even on the Federal Government, but on the National Assembly to make a grant in advance for a period not exceeding 4 months pending completion of the budgetary procedure laid down in Article 82, and Article 86 confers a similar power on the Federal Government but only during the period when the National Assembly stands dissolved. Clause (3) of Article 82 explicitly states that no demand for a grant shall be made except on the recommendation, not of the Prime Minister, but of the Federal Government i.e. the Cabinet. What are the powers of the Prime Minister in relation to such matters? They are set out in Article 83 and are confined to a mere authentication of the grants made by signing a schedule setting them out. These provisions are clearly articulated and must not be violated in any circumstances. This court has already dealt with the question of the constitutionality of discretionary spending by the Prime Minister in the case reported as **Action against distribution of development funds by Ex-Prime Minister Raja Pervaiz Ashraf (PLD 2014 SC 131)** paragraph 52 of which reads as follows:

> *"52. For the foregoing reasons it is held as under:-*
>
> *(1) The National Assembly, while giving assent to a grant which is to be utilized by the Executive at its discretion, has to follow the procedure provided in Articles 80 to 84 of the Constitution as well as the Rules of Procedure, 2007. However, such discretionary grant cannot be spent at the absolute discretion of the Executive*

and the discretion has to be exercised in a structured manner;

(2) The Constitution does not permit the use/allocation of funds to MNAs/MPAs/Notables at the sole discretion of the Prime Minister or the Chief Minister. If there is any practice of allocation of funds to the MNAs/MPAs/Notables at the sole discretion of the Prime Minister/Chief Minister, the same is illegal and unconstitutional. The government is bound to establish procedure/criteria for governing allocation of such funds for this purpose;

(3) Though funds can be provided for development schemes by way of supplementary grant but for that purpose procedure provided in Articles 80 to 84 of the Constitution and the rules/instructions noted hereinabove has to be followed strictly;

(4) Funds can be allocated by way of re-appropriation but the procedure provided in the Constitution and the rules has to be followed in its true perspective;

(5) No bulk grant can be made in the budget without giving detailed estimates under each grant divided into items and that every item has to be specified;

(6) The amounts as approved in the budget passed by the National Assembly have to be utilized for the purpose specified in the budget statement. Any re-appropriation of funds or their utilization for some other purpose, though within the permissible limits of the budget, are not justified. In such circumstances, the supplementary budget statement has to be place before the Parliament following the procedure provided in Articles 80

to 84 of the Constitution and the rules/instructions noted hereinabove."

It follows from the above that any discretionary spending at the initiative of the Prime Minister alone is manifestly unconstitutional and contrary to law. This illegality will continue until such time when, at the very least, the procedure set out in paragraph 66 above is adopted and followed. Failure to do so would mean that the Prime Minister would remain personally responsible.

83. Having decided the questions of law on the plane of principle we now turn to a brief consideration of the case law. A large number of cases were cited before us. Many of them were only peripherally relevant or merely contained generalized propositions of law or stray observations. A number of Indian authorities were also cited before us, some of which dealt with some similar issues. We were referred to a series of seven cases decided by the Indian Supreme Court. These included the cases of **B.K. Sardari Lal** *(supra)* and **Samsher Singh** *(supra)*. However, we noted that the latter judgment explicitly overruled the view expressed in the former case. In fact, the latter case was explicitly taken up by a larger bench for the express purpose of re-considering the earlier view. We have not found it necessary to discuss those cases either since it would merely prolong this judgment. There is, however, one case to which we would like to make specific reference since it is a decision of the Federal Court. In the case of **Afzal Bangash**[10] *(supra)* the Court had occasion to consider the provisions of the NWFP Public Safety Act, 1948. The facts of the case were that the Court of the Judicial Commissioner struck down the order of detention which had been passed by the Chief Minister which, according to him, was without jurisdiction and *ultra vires*. The Judicial

[10] *PLD 1956 FC 1*

Commissioner was of the opinion that in respect of matters as important as the liberty of the subject, the responsibility of curtailing that liberty by means of an executive order was intended by the Constitution to rest upon the Governor and his Ministers and not the Chief Minister alone. Under the Act in question the duty of satisfaction regarding the existence of the conditions necessary for the making of an order of detention rested upon the Provincial Government. His view was that the use of the term provincial government implied the Governor conducting the affairs of the government of a Province as aided and advised by his Council of Ministers. In doing so he followed the views expressed by the Federal Court in the case of **Emperor Vs. Sibnath Banerji and others (AIR 1943 FC 75)**. He, apparently inadvertently, omitted to note that the decision of the Federal Court in that case had been set aside by the Judicial Committee of the Privy Council **(reported in 72 IA 241)**. In arriving at his conclusion the Judicial Commissioner placed a strangely limited interpretation on the phrase “business of the provincial government”. He arbitrarily restricted the definition of the word “business” to confine it only to day to day and routine work of the Government. He considered matters relating to the liberty of a subject as being of such great importance as not to fall within the said term. This was rather surprising since, on the face of it, there is no reason to exclude important matters from the “the business of the provincial government.” The Federal Court had no difficulty in setting aside his views, basing itself on the earlier decision of the Privy Council. The admitted facts were that under the Rules of Business the Chief Minister had been allocated the subject of preventive detention *(quite apart from an office memorandum to the said effect as well).* The order passed by the Chief Minister clearly fell within the ambit of the relevant provisions of the

Government of India Act, 1935 and the Rules of Business made under Section 59. The discussion deals with this aspect of the matter alone and not the wider constitutional issues and hence is distinguishable.

84. 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-Organisation) 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)*.

(viii) In consequence of the above findings the impugned notifications are declared *ultra vires* and are struck down.

Prior to concluding this judgment we would like to express our appreciation for the valuable assistance provided by the learned counsel who have appeared in this matter. We are grateful to each one of them.

85. In view of the above by accepting these appeals and while setting aside the impugned judgment(s), all the writ petitions filed by the appellants are allowed.

JUDGE

JUDGE

JUDGE

Announced in open Court
on **18.8.2016** at **Islamabad**
Approved For Reporting
Ghulam Raza/*