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JUDGMENT SHEET

LAHORE HIGH COURT

MULTAN BENCH MULTAN

JUDICIAL DEPARTMENT

Writ Petition No.9661 of 2009

Muhammad Iftikhar Vs. Government of Punjab, etc.

J U D G M E N T

Date of Hearing:	27.02.2024
Petitioner by:	Mr. Abdul Rasheed Sheikh, Advocate.
Respondents by:	Mr. Imran Khan, Assistant Advocate General. Sahibzada Muhammad Saleem, Assistant Advocate General. Haji Muhammad Aslam Malik, Advocate/Legal Advisor, M.C., Dera Ghazi Khan. Mr. Muhammad Asif Malik, Advocate. Riaz Ahmad, SLO, Local Government South Punjab, Bahawalpur. Muhammad Falak Sher, Senior Clerk, M.C. Dera Ghazi Khan.

Anwaar Hussain, J. The present as well as connected petition bearing W.P. No.6114 of 2014 are simultaneously being decided through this common judgment as *vires* of sub-rule (3) of Rule 13 of the Punjab Local Government (Auctioning of Collection Rights) Rules, 2003 (“**Rules**”) have been challenged in both the petitions, whereby, the cancellation of the offer of contract awarded is presumed by the conduct of the contractor/successful bidder by not depositing the required amount of contract within period stipulated in the offer letter

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on the ground that the said Rule is in violation of Section 142 of the Punjab Local Government Ordinance, 2001 (“**Ordinance**”). In terms of sub-rule (3) of Rule 13, the cancellation of contract on account of non-deposit of a particular amount by the contractor also entails forfeiture of the deposits made by the contractor.

2. While the question of law involved in both the petitions is identical, the underlying factual landscape in both the petitions vary. The present petition relates to the auction of collection rights of Rickshaw Fee, whereas, the connected petition is related to the auction of collection rights of Advertisement Fee. Similarly, in the present case the petitioner was declared as successful bidder who was intimated about the outcome of the bid through notice dated 02.06.2008 requiring him to deposit certain amount within 03-days. It is the case of the petitioner that the notice was received on 04.06.2008 and when the petitioner approached the respondent Local Government, on 07.06.2008, the petitioner was intimated that the three days’ time period has elapsed on 05.06.2008 as the notice was issued on 02.06.2008. Consequently, the earnest/security money to the tune of Rs.100,000/- deposited at the time of participation in the auction had been forfeited in terms of sub-rule (3) of Rule 13.

3. In the connected matter filed by one Rehmat Ullah, the matter relates to collection rights of Advertisement Fee in which the auction was held on 29.05.2013 and the petitioner was declared as the highest bidder and the petitioner *vide* letter dated 31.05.2013 was directed to deposit certain amount within seven days. It is the case of the petitioner in connected matter that he deposited the additional amount demanded, however, to the utter surprise of the petitioner, he received another notice dated 25.06.2013, whereby, extra amount was demanded and when the petitioner objected to the said demand, not only the earnest/security amount but also the amount deposited in compliance with the letter dated 31.05.2013 was forfeited.

4. Mr. Abdul Rasheed Sheikh, Advocate, learned counsel for the petitioners submits that the impugned sub-rule (3) of Rule 13 is penal in nature as it offends the parent statute and also impinges upon due process right envisaged in terms of Article 10-A of the Constitution of the Islamic Republic of Pakistan, 1973 as no separate notice to forfeit the earnest/security amount was given and the same is also against the injunctions of Islam. Places reliance upon “*Province of Sind v. Public at Large*” (PLD 1988 SC 138) as also “*Meenakshinada Deikshtar v. Murugesu Nadar and another*” [AIR 1970 Madras 391 (V 57C 116)] in support of his contentions.

5. Conversely, Mr. Imran Khan, learned Assistant Advocate General vehemently refuted the contentions of the petitioners and submitted that sub-rule (3) of Rule 13 is not a stand-alone provision rather lays down the consequences of the failure of a successful bidder to deposit the amount in terms of sub-rule (1) of Rule 13 of the Rules whereunder notice dated 02.06.2008 was issued to the petitioner in present case as to confirmation of the bid by the auction committee and further directed the petitioner to deposit the stated amount failure whereof would be visited with the forfeiture of earnest/security amount, therefore, the present petitioner was well informed about the fact that earnest/security money would be forfeited in terms of the Rules if the petitioner fails to deposit the requisite amount and the petitioner duly acknowledged the receipt thereof. He further submits that the substantial human and financial resources are spent in conducting an auction and the forfeiture envisaged under the impugned Rule is to ensure that the serious participant(s) turn up in the auction and spoilsports are warded off and the earnest/security money is forfeited for defraying the cost of auction. As regards the connected case, submits that the petitioner therein was well aware of the fact that enhancement in the rate of Advertisement Fee was proposed before the auction was held and the bidders were well aware that if same is

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approved by the administrative department, enhanced rate of Advertisement Fee will be charged from bidders.

6. In rebuttal, learned counsel for the petitioners submits that even if sub-rule (3) of Rule 13 is considered legal and amount deposited as earnest/security money can be forfeited, the forfeiture of additional deposits is unjust and inequitable and hence, liable to set-aside and the respondent Local Government, in connected matter be directed to refund the same.

7. Arguments heard and record perused.

8. The Rules have been framed for auctioning of the collection rights of various fees and/or taxes of the Local Government. Perusal of the Rules reveals that a Local Government under Rule 3 may collect income through contractor(s) by awarding contract(s) of collection rights. Rule 5 lays down the auction procedure by providing that the public notice for the conduct of auction shall be given through two national daily newspapers, which shall, *inter alia*, include the minimum reserve price, period of contract with rates and details. Sub-rule (3) of Rule 11 empowers the Council to accept or reject the bid by setting out the reasons for rejection. Rule 13 provides that as soon as the confirmation of offer of the bid is received from the Council, the same shall be intimated through special messenger to the contractor with the direction to the contractor to enter into written agreement and fulfil his obligations in accordance with the terms and conditions of the contract within stipulated time and the failure of the contractor to deposit the dues recoverable from him and/or does not enter into written agreement would raise adverse presumption that the contractor is no more interested in the contract. Sub-rule (3) of Rule 13 further states that in such an eventuality, the offer shall automatically stand cancelled and the deposits made by the contractor shall stand forfeited. The income

shall also be put to re-auction. At this juncture, it would be convenient to reproduce the Rule 13 of the Rules which reads as under:

“13.Intimation of acceptance of bid:-(1) As soon as the confirmation from the Council about the acceptance of bid or offer is received, the Local Government administration shall communicate the acceptance of bid or offer to the contractor immediately by a letter through special messenger at his address provided by him at the time of participation in auction and direct him to enter into written agreement and fulfill his obligations in accordance with the terms and conditions of contract.

(2) The cost of written agreement shall be borne by the contractor.

(3) In case the contractor does not turn up to deposit dues recoverable from him in the light of terms and conditions of auction or does not enter into written agreement within the specified period mentioned in the communication, it shall be presumed that the contractor is no more interested in the contract. As such the contract shall automatically stand cancelled and the deposits made by the contractor shall stand forfeited. The income shall also be put to re-auction in such a case.”

(Emphasis supplied)

The Rules provide for the manner and mechanism for the auction of collection rights of fee/tax/income of the Local Government through private contractors. The process of the auction gobbles up substantial human and financial resources of the Local Government in carrying out the auction. The deposit of earnest/security money in order to participate in the public auction, purposively speaking, ensures that serious contenders participate in the process of auction. However, if a contractor participates in the auction process and subsequently retracts from it after confirmation of the bid by the Council, it would constrain the Local Government to re-auction involving not only the time and resources of the Local Government but also loss of time and finance in the collection of fees. Therefore, the forfeiture of earnest/security

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money of such a contractor ensures that serious contender(s) participates in the process of auction and if someone fails to deposit the outstanding/balance amount of the bid, the earnest/security amount stands forfeited in favour of the Local Government. Therefore, there appears to be no illegality in the impugned sub-rule (3) of the Rule 13.

9. The law does not envisage that a separate notice of consequence of failure to deposit the amount is required to be given. The only thing that is required to be ascertained is whether the notice was given and received by the successful bidder and within time stipulated therein the requisite amount was not deposited. In present petition, it is noted that the process of the advertisement was triggered by the newspaper publication on 22.04.2008 and was confirmed by the Council on 31.05.2008 which was subsequently intimated to the petitioner in present case *vide* notice dated 02.06.2008. The collection was to commence from 01.07.2008 and was to continue till 30.6.2009 under the contract. As far as non-service of notice is concerned, the same is misconceived for two-fold reasons. Firstly, under Rule 7 of the Rules, the terms and conditions of the contract are to be supplied by the Local Government at the time of participation in the bid. The terms and conditions of the tender documents clearly puts the contenders on notice that failure to deposit the balance amount within the stipulated time after the confirmation of bid shall result in forfeiture of the earnest/security money. Similarly, the petitioner was served notice in terms of sub-rule (1) of Rule 13, which clearly stipulates that failure to deposit the balance amount within 03-days would result in forfeiture of the earnest/security money. This shows that the petitioner was not only aware of the forfeiture of earnest/security money envisaged under the terms and conditions supplied at the time of carrying out the auction but was also served notice subsequent to the confirmation of the bid by the Council which clearly stated that failure to deposit the balance amount within three days would result in forfeiture. The receipt of the

notice is admitted on both hands. Thus, the stance of the petitioner that forfeiture under sub-rule (3) of Rule 13 is *ultra vires* on account of non-provision of opportunity of hearing is also against the facts. Not only the notice in terms of sub-rule (1) of Rule 13 provides for service of notice as to confirmation of the bid and deposit of balance amount but the same was also served. Sub-rule (3) of Rule 13 merely provides the consequences of non-adherence to the terms and conditions of the bid. Perusal of the notice makes it obvious that even the consequences envisaged under sub-rule (3) of Rule 13 were provided in the notice served upon the petitioner. It would be convenient to reproduce the notice served upon the petitioner, which reads as under:

”از دفتر تحصیل میونسپل ایڈمنسٹریشن بور یوالہ

نوٹس بنام محمد افتخار ولد عبدالغفار

سکنہ 451/EB بور یوالہ

مورخہ 2/6/2008 نمبر 71

عنوان منظور ی ٹھیکہ رکشافیس بابت سال 2008-2009 وادائیگی پیشگی واجبات ٹھیکہ

آپ نے مورخہ 14.5.08 کو نیلام عام میں حصہ لیا۔ آپ کی بولی مبلغ 3721000/- روپے سب سے زائد ہونے کی بنا پر تحصیل کونسل بور یوالہ کے اجلاس منعقدہ 31.05.2008 میں بذریعہ قرارداد نمبر 22 منظور کر لی گئی ہے۔

لہذا آپ کو مطلع کیا جاتا ہے کہ آپ نوٹس ہذا کی وصولی کے تین یوم کے اندر اندر درج ذیل تفصیل کے مطابق واجبات ادا کریں اور تحصیل میونسپل ایڈمنسٹریشن بور یوالہ کے ساتھ باقاعدہ تحریری معاہدہ مجوزہ اسٹامپ پیپر پر تحریر و تکمیل کرائیں اور دو صاحب جائیداد ضامن جو ضلع وہاڑی کے رہائشی ہوں ان کی ضمانت نامے جمع کروائیں اگر آپ نے اندر معیاد تین یوم واجبات تحصیل میونسپل ایڈمنسٹریشن فنڈ میں جمع نہ کرائے تو آپ کی جمع شدہ زر ضمانت (کال ڈیپازٹ) بحق T.M.A. ضبط کر لی جائیگی۔ اور آپ کا کوئی عذر قابل قبول نہ ہو گا اور نہ ہی آپ کو ٹھیکہ کا چارج دیا جائے گا۔

کل رقم ٹھیکہ = 3721000/-

5 فیصد = 186050/-

10 فیصد = 372100/-

کل اقساط پیشگی قسط = 304445/-

8625951/-

تحصیل آفیسر (فنانس)

تحصیل میونسپل ایڈمنسٹریشن

بور یوالہ

10. The other contention raised by learned counsel for the petitioner in respect of present case is that service of the notice dated 02.06.2008 was effected on 04.06.2008 and the three days' time period stipulated in the notice was to lapse on 07.06.2008 and when the petitioner approached the respondents on the said date, he was intimated that his earnest/security money has been forfeited as time lapsed on 05.06.2008. Perusal of copy of notice reveals that it is dated 02.06.2008 and the petitioner has affixed his signature on the bottom of the same where no date of receipt has been mentioned. Therefore, in the absence of any date of receipt, the date of issuance of the notice will be presumed to be its date of receipt as the same was to be communicated immediately through special messenger in terms of sub-rule (1) of Rule 13. When confronted, there was no explanation available with the petitioner side. Even otherwise, it is settled law that this Court, in exercise of its constitutional jurisdiction, cannot venture into such factual controversy which requires recording of evidence. It is worth observing that Section 74 of the Contract Act, 1872 also provides that where the liquidated damages are settled in the contract, the party aggrieved of the breach of contract is not bound to prove the same. The Supreme Court of Pakistan in case reported as "Space Telecom (Private) Limited, Lahore v. Pakistan Telecommunication Authority, Islamabad through Chairman"(2019 SCMR 101) involving identical question of law upheld the forfeiture of the earnest/security money on account of failure of the petitioner consortium to deposit the subsequent amount within stipulated period of ten days.

11. As regards the connected petition, it is noted that the petitioner therein deposited the earnest/security money and turned out to be successful bidder which was confirmed by the Local Government concerned whereupon the petitioner further deposited the balance amount of Rs.1,443,547/-. However, the controversy revolves around the increase in the Advertisement Fee by the Local Government during

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the process of auction. Therefore, the petitioner was asked to further deposit the increase made in the reserve price by the respondent Local Government concerned, during the auction process, which he refused to do. Consequently, not only the earnest/security money but the further deposit of balance amount in pursuance of notice under sub-rule (1) of Rule 13 was also forfeited. It is noted that the advertisement/public notice for auction included a clause that the proposals for the increase in Advertisement Fee has been forwarded by the Local Government concerned to the Secretary Local Government and Community Development, Government of Punjab, which were to be made applicable to the disputed auction proceedings when approved and notified in the Official Gazette. The same clause was also incorporated in the terms and conditions delivered to the participants at the time of auction including the petitioner in connected petition. Subsequently, the said enhancement was approved and notified by the Secretary Local Government and Community Development Department. As observed above, the earnest/security money under the Rules is received as a measure to ensure that serious contenders participate in the auction and if successful bidder fails to enter the contract and deposit of the balance amount in accordance with the terms and conditions, the earnest/security money stands forfeited. The object of such forfeiture has been spelled out in sub-rule (3) of the Rules by the legislature by contemplating that "*The income shall also be put to re-auction in such a case*". No doubt the petitioner in connected matter was fully aware of the likelihood of subsequent enhancement in the Advertisement Fee and participated in the auction of his own volition, however, bare reading of Rule 13 makes it clear that the legislature has made a correlation between the earnest/security money and the object of forfeiture, which is to meet the cost of re-auction on account of failure of the successful bidder to deposit the balance amount and/or non-adherence to terms and conditions. Once the first deposit was made, the contract came into existence between

the parties and the forfeiture of additional deposit was to be regulated by the provisions of said contract executed between the parties and not the terms of the auction. Though the term “deposits” has been used to be forfeited in terms of sub-rule (3) of Rule 13, it is settled principle of interpretation that the words have no constant meanings rather they imbibe colour from their context. Therefore, the term “deposits” is required to be construed in the context in which it has been used in Rule 13, which deals with the intimation of acceptance of the bid requiring the contractor/successful bidder to enter into formal contract. The forfeiture of deposits envisaged in sub-rule (3) of Rule 13 relates to pre-contracts stage as the relations between the respondent and the petitioner were to be regulated by the terms and conditions of the auction whereas the relations between the parties transform into contractual relations subsequent to the execution of the contract. Therefore, while the forfeiture of the earnest/security amount deposited prior to holding of auction is justifiable in terms of sub-rule (3) of Rule 13, however, any contractual violation subsequent to the execution of the contract is to be resolved as per the mechanism provided under the contract (including arbitration clause) and not by the terms of the auction. Even otherwise, the rate of Advertisement Fee, which was likely to be enhanced after approval was uncertain as nothing has been brought on record that any specific amount was clearly made known to the petitioner of connected matter and similarly placed person. An uncertain term of the contract cannot be enforced under the law. Therefore, this Court is of the opinion that the forfeiture of only earnest/security amount is envisaged by the law and forfeiture in connected petition of additional amount is unjustified as the same is beyond the scope of the liquidated damages envisaged under the terms and conditions of the auction and is also harsh and arbitrary, hence, not justified.

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12. In view of the above discussion, this Court is of the opinion that sub-rule (3) of Rule 13 is not *ultra vires* the Ordinance. The present petition is devoid of merits and hence, **dismissed**. The connected constitutional petition bearing W.P No.6114/2014 has force to the extent that forfeiture of additional amount deposited in terms of letter dated 31.05.2013 was arbitrary and is hereby declared illegal. The respondent Local Government concerned in connected petition i.e., W.P. No.6114/2014 is obligated to return the said additional amount to the petitioner of the connected petition, namely, Rehmat Ullah, within a period of 30-days from receipt of certified copy of this judgment. The connected W.P. No.6114/2014 is **disposed of** in the said terms.

(ANWAAR HUSSAIN)
JUDGE

Approved for reporting

Judge

Maqsood