

Stereo.HCJDA 38.
Judgment Sheet
LAHORE HIGH COURT
RAWALPINDI BENCH RAWALPINDI
JUDICIAL DEPARTMENT

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WRIT PETITION NO.4315 of 2023

MUHAMMAD YOUNAS KHAN and 15 others

Versus

SUI NORTHERN GAS PIPELINES LIMITED (SNGPL) Through
its Managing Director and 4 others

JUDGMENT

Date of hearing: 15.02.2024

Petitioners by: Mr. Hassan Raza Pasha,
Advocate.

Respondents by: Raja Anwar ul Hassan,
Advocate.

MIRZA VIQAS RAUF, J. The petitioners are the registered distribution contractors under their respective names and styles for various categories of ditching, backfilling, reinstatement, etc. with the Sui Northern Gas Pipelines Limited (hereinafter referred to as “SNGPL”). It is asserted by the petitioners that in the year 2018 at the time of pre-qualification of distribution contractors for enlistment, the respondent-company introduced an invitation to bid/tender inquiry document wherein an amount of Rs.2,00,000/- as refundable security was fixed which was paid by the petitioners including the other contractors without any objection. As per contents of the petition, in the year 2020-2021 the same criterion was repeated for the purpose of pre-qualification for enlistment of distribution contractors. In furtherance thereof, the petitioners deposited an amount of Rs.20,000,00/- with respondents No.4 & 5

with their free will and consent. It is the stance of the petitioners that in the meanwhile one of the contractors from Islamabad region challenged the condition of security amount before the Islamabad High Court through constitutional petition, which was allowed and in pursuance thereto, the respondent-company decided to refund security amount to the contractors of all region in order to avoid any further controversy and instead issued memorandum dated 13th September, 2023 wherein it is decided to return the security amount deposited by the contractors against their pre-qualification and proceeded to adopt a new procedure laid therein. Feeling aggrieved the petitioners moved their respective applications to respondent No.4 but on account of non-decision, the petitioners filed Writ Petition No.3798 of 2023, which was disposed of by way of order dated 16th November, 2023 directing the respondent No.4 to decide the applications of the petitioners within a period of one month from the receipt of certified copy of the order strictly in accordance with law by providing opportunity of hearing to all concerned. In pursuance thereof, through decision dated 15th December, 2023 the applications of the petitioners were turned down, hence this petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973.

2. On this petition notice was issued to the respondents, who submitted their written statement wherein the maintainability of the instant petition is questioned on the ground that matter in issue relates to the terms and conditions of the contract, which cannot be enforced through writ jurisdiction. It is further asserted by the respondents that memorandum dated 13th September, 2023 had been issued in compliance of the order of the Islamabad High Court Islamabad and the conditions imposed therein were inserted only to safeguard the company's interest.

3. Heard. Record perused.

4. The petitioners are admittedly enlisted as distribution contractors with the "SNGPL". The petitioners were awarded respective contracts for ditching, backfilling, reinstatement, etc. on

09th March, 2021 through a written contract which was for three years from issuance of pre-qualification letter by the respondents. It is an admitted fact that the contract period of the petitioners is to expire in March, 2024. As per Standard Operating Procedure (SOP) for pre-qualification of distribution contractors, the contractor who was pre-qualified/enlisted for the company shall provide within ten days a performance bond of 05% of contract value below (excluding PST) in shape of CDR/pay order/demand draft or bank guarantee issued by a scheduled bank in Pakistan. The petitioners after being declared as pre-qualified/enlisted contractors deposited Rs.20,00,000/- with the respondents in terms of the contract. In the meanwhile, the respondents issued memorandum dated 13th September, 2023 in the light of decision of the Islamabad High Court, Islamabad wherein they decided to return the security amount deposited by each contractor against their pre-qualification and instead they were asked to comply the following conditions :-

1. The contractor will provide 5% Performance Bond/Warranty of the total value of the Work Order before assigning the Work Order/Contract (excluding casual labour payment), in shape of Pay-Order / Demand Draft issued by a scheduled bank in Pakistan.
2. In case of jobs currently in progress / assigned to contractors, it must be ensured that 5% Performance Bond is obtained before returning of Security amount.
3. The 5% of the total FPC amount shall be withheld as retention money.
4. Both, performance bond / retention money, shall be released after 06 months from completion of the work (subject to the condition that work carried out by the contractor is satisfactory as per Company's SOPs).
5. The first and foremost question which arises herein is that as to whether a memorandum can be given effect retrospectively. It is an admitted position on the record that the petitioners were awarded work and in terms thereof work order was issued on 09th March, 2021 for three years, which has to expire in the next month. It is

trite law that a notification/memorandum or an executive order cannot operate retrospectively unless it is specifically provided therein. Through memorandum dated 13th September, 2023 the respondents decided to return the security amount deposited by the petitioners and instead they were directed to fulfill the conditions mentioned hereinabove for their pre-qualification.

6. As already observed that the contracts awarded to the petitioners would expire in March, 2024 and it is not the case of the respondents that the petitioners failed to abide the terms and conditions of the contracts. In such a situation any condition detrimental to the interest of the petitioners cannot be introduced during the currency of the already executed contract. Reference to this effect can be made to GOVERNMENT OF PAKISTAN through Secretary Establishment Division, Islamabad versus MUHAMMAD ISMAIL and another (2021 SCMR 1246).

7. The root cause for issuance of impugned memorandum is the decision of the Islamabad High Court Islamabad in Writ Petition No.186 of 2022. Perusal whereof reveals that one of the contractors registered in Islamabad region with the “SNGPL” being aggrieved of the decision of the company to demand the payment of security deposit for enlistment of the contractors approached the Islamabad High Court challenging the said demand. In that backdrop the demand made by “SNGPL” for the deposit of security in Invitation to Bid (ITB) as a condition of enlistment of contractors was declared as unlawful and violative of the Public Procurement Rules, 2004.

8. There is no cavil that this Court in exercise of constitutional jurisdiction can neither settle the terms and conditions of the contract interse parties nor direct the executive to insert or exclude certain condition in the contract, which undoubtedly is within the domain of the executive. There is also no denial to the proposition that in the matter of enforcement of contractual obligations, this Court in ordinary course abstains to exercise constitutional jurisdiction for enforcement of the terms and conditions of the contract or to remedy the breach of contract but at the same time

the constitutional jurisdiction cannot be abridged if some perversity or patent illegality is floating on the surface of the record. It is an oft repeated principle of law that though constitutional jurisdiction ordinarily should not be exercised in case of breach of contract but if such breach does not entail any inquiry or examination of minute or controversial questions of fact, if committed by Government, semi-Government or Local Authorities it can adequately be addressed in exercise of jurisdiction contemplated under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973. Guidance to this effect can be sought from Messrs AIRPORT SUPPORT SERVICES versus THE AIRPORT MANAGER, QUAID-E-AZAM INTERNATIONAL AIRPORT, KARACHI and others (1998 SCMR 2268). The relevant extract from the same is reproduced below :-

“Neither of the conclusions of the High Court is sustainable. It has consistently been held that while routine contractual disputes between private parties and public functionaries are not open to scrutiny under the Constitutional jurisdiction, breaches of such contracts, which do not entail inquiry into or examination of minute or controversial questions of fact, if committed by Government, semi-Government or Local Authorities or like controversies if involving dereliction of obligations, flowing from a statute, rules or instructions can adequately be addressed for relief under that jurisdiction. Further a contract, carrying elements of public interest, concluded by functionaries of the State, has to be just, fair, transparent, reasonable and free of any taint of mala fides, all such aspects remaining open for judicial review. The rule is founded on the premises that public functionaries, deriving authority from or under law, are obligated to act justly, fairly equitably, reasonably, without any element of discrimination and squarely within the parameters of law, as applicable in a given situation. Deviations, if of substance, can be corrected through appropriate orders under Article 199 of the Constitution. In such behalf even where a contract, pure and simple, is involved, provided always that public element presents itself and the dispute does not entail evidentiary facts of a disputed nature, redress may be provided. A number of precedents have contextually come to occupy the field and, inter alia, may be noted (1) Anjuman-e-Ahmadiya, Sargodha v. Deputy Commissioner, Sargodha, PLD 1966 SC 639, (2) The D.F.O. South Khari v. Ram Sanehi Singh, 1971 (3) Supreme Court Cases 864-AIR 1973 SC 205; (4) Rashid A. Khan v. West Pakistan Railway Board PLD 1973 Lahore 733; (5) The Majilis-i-Intizamia, Jamia Masjid, Ghulam Muhammad Abad Colony v. Secretary to Government of West Pakistan,

Communication and Works Department, PLD 1975 SC 355; (6) Muhammad Ashraf Ali v. Muhammad Naseer and 2 others 1986 SCMR 1096 (7) M/s. Dwarkadas Marfatia & Sons v. Board of Trustees, Bombay Port, AIR 1989 Supreme Court 1642; (8) M.H. Abidi v. State Life Insurance Corporation, 1990 MLD 563; (9) Mahabir Auto Stores v. Indian Oil Corporation, AIR 1990 Supreme Court 1031; (10) Shrilekha Vidyarthi v. State of U.P. AIR 1991 Supreme Court 537; (11) M/s Pacific Multinational (Pvt.) Ltd. v. Inspector-General of Police Sindh. PLD 1992 Karachi 283; (12) M/s Presson Manufacturing Ltd. v. Secretary Ministry of Petroleum & Natural Resources and 2 others 1995 MLD 15 (Lahore) and (16) Shoaib Bilal Corporation v. Government of Pakistan KLR 1997 Rev. Cas. 27 Lahore.”

Reference to the above effect can also be made to HAZARA (HILL TRACT) IMPROVEMENT TRUST through Chairman and others versus Mst. QAISRA ELAHI and others (2005 SCMR 678).

9. In the case of Messrs AMEER KHAN & CO. versus GOVERNMENT OF THE PUNJAB through Secretary, Local Government, Lahore (PLD 2010 Lahore 443) in somewhat similar circumstances this Court held as under :-

“The preliminary objections taken by the respondents with regard to the maintainability of this petition are to be addressed in the first instance. There can be no cavil with the proposition that routine contractual disputes between private parties are not to be scrutinized by this court while exercising its extraordinary constitutional jurisdiction under Article 199 of the Constitution of Islamic Republic of Pakistan 1973. However, an exception to this rule would be that this court would have the jurisdiction to examine a contract concluded by public functionaries which do not entail any factual inquiry and it would be open to judicial review, since such contracts have to be just, fair, transparent and reasonable. Similarly, bar of proceedings as envisaged under the Arbitration Act, 1940 would not take away this court's jurisdiction of judicial review in matters emanating from a contract concluded between private individuals and State functionaries as has been held by the august Supreme Court of Pakistan in Messrs Airport Support Services v. The Airport Manager, Quaid-e-Azam International Airport, Karachi and others 1998 SCMR 2268.”

Reliance in this regard can also be placed on DEWAN PETROLEUM (PVT.) and others versus GOVERNMENT OF PAKISTAN and others (PLD 2010 Lahore 404).

10. In the case of HAJI AMIN versus PAKISTAN TRADING CORPORATION (PVT.) LTD and another (PLD 2009 Karachi 112) the Sindh High Court held as under :-

“Normally a writ for the enforcement of a contractual obligation is not maintainable. However State and any functionary acting under the State has to act in a fair and transparent manner and, if disputed question of facts are not involved relief in exercise of power under Art.199 of the Constitution of Islamic Republic of Pakistan 1973 in appropriate matters have not been denied, merely because issues in the matter relates to contractual obligation.”

11. The petitioners have not canvassed any issue involving intricacy of facts. They have entered into a lawful contract with “SNGPL” on the terms and conditions settled by the latter, so now the petitioners could not be confronted with conditions, which are alien to existing contract and prejudicial to the interest of the petitioners almost at the fag end of the contractual period. Needless to reiterate that the terms of impugned memorandum can be enforced for the upcoming contracts provided these are in accord with law.

12. Needless to mention here that right of trade and business is guaranteed under the Constitution of the Islamic Republic of Pakistan, 1973. While discharging official functions efforts should be made to ensure that no one should be denied to earn his livelihood because of the unfair or discriminatory treatment on the part of any State functionary. Guidance to this effect can be sought from SHAUKAT ALI and others versus GOVERNMENT OF PAKISTAN through Chairman, Ministry of Railways and others (PLD 1997 Supreme Court 342).

13. For the foregoing reasons, this petition is **partly allowed**, the impugned order dated 15th December, 2023 is set aside being illegal and unlawful, as a result thereof, the respondents are restrained from refunding the security already deposited and asking the petitioners to abide notification dated 13th September, 2023 for the current contracts with no order as to costs.

(MIRZA VIQAS RAUF)
JUDGE

APPROVED FOR REPORTING

JUDGE