

IN THE SUPREME COURT OF PAKISTAN  
(APPELLATE JURISDICTION)

**PRESENT:**

MR. JUSTICE EJAZ AFZAL KHAN

MR. JUSTICE SARDAR TARIQ MASOOD

**CIVIL PETITION NO. 548-P OF 2013.**

*(On appeal against the judgment dt. 02.07.2013 passed by the Peshawar High Court, Abbottabad Bench in C. R. No. 380 of 2005).*

Govt. of KPK thr. Secy Industries Commerce  
and Mineral Development, Peshawar and others.

...Petitioner(s)

**VERSUS**

The Frontier Chemical Industries Ram Bagh,  
Mardan.

...Respondent(s)

For the petitioner(s): Mr. Mujahid Ali Khan, Addl. A. G. KPK.

For the respondent(s): Mr. M. Naeem Anwar, ASC.

Date of Hearing: 19.04.2016 (Judgment Reserved)

**J U D G M E N T**

**EJAZ AFZAL KHAN, J.-** This petition for leave to appeal has arisen out of the judgment dated 2.7.2013 of the Peshawar High Court, Peshawar whereby the learned Single Judge in its Chambers dismissed the revision petition filed by the petitioner and maintained the judgments and decrees of the fora below.

2. The learned AAG appearing on behalf of the petitioner contended that where the law has provided a hierarchy of legal fora for the enforcement of rights and liabilities, resort must be had thereto and that bypassing of such fora would not only overcrowd the Civil Courts but also defeat the purpose, the rules were enacted for. While arguing the CMA for condonation of delay, the learned AAG contended that where delay in lodging the petition occurred

due to late supply of documents and lengthy correspondence between the various tiers of the department, it could well be condoned. The learned AAG, to support his contention placed reliance on the case titled **Deputy Collector of Customs and two others Vs. Muhammad Tahir and another** (PLD 1989 SC 627).

3. Learned ASC appearing on behalf of the respondent contended that since jurisdiction of the Civil Court is not barred by North-West Frontier Province Mining Concession Rules, 1976, Civil Court being a Court of plenary jurisdiction could entertain and adjudicate upon the dispute of this nature. The learned ASC next contended that where the question of jurisdiction has not been raised in the lower fora as well as the High Court, it cannot be raised before this Court for the first time. Controverting the arguments addressed in support of the application for condonation of delay, the learned ASC contended that late supply of documents or lengthy correspondence does not constitute a ground for condonation of delay. The learned ASC to support his contention, placed reliance on the cases titled **Aziz ur Rehman Hamid Vs. Crescent Commercial Bank** (2008 SCMR 54), **Engineer-in-Chief, G.H.Q. and another Vs. Abdul Khaliq Siddiqui** (2008 SCMR 60), **Gul Muhammad Vs. M.C.B. Bank Limited through President and others** (2012 SCMR 136) **Muhammad Idrees Alvi Vs. Employees Old-Age Benefits Institution and four others** (2001 SCMR 1967) and **Gul Muhammad Vs. M. C. B. Bank Ltd. through President and others** (2012 SCMR 136).

4. We have gone through the record carefully and considered the submissions of learned ASCs for the parties.

5. A wade through the North-West Frontier Province Mining Rules would reveal that it is a perfect code in itself dealing with all the aspects regulating grant and refusal of license and lease; terms and conditions thereof; other conceivable eventualities arising out of mining activities of the licensee and the lessee and imposition of penalties including cancellation, remedies thereagainst and finality of the decision of the Government on an appeal filed in this behalf. The purpose of the legislature behind enacting these rules was to provide an integrated set up and hierarchy for the enforcement of rights and liabilities arising out of license and lease. Order of Licensing Authority can be challenged through an appeal to the Government. Decision of the Government subject to the provisions and the rules, in view of Rule 93(3) is final. It despite being so is justiceable if passed on account of mala fide, without jurisdiction, or in violation of the rules. In the absence of any such manifestation, the decision of the Government being final cannot be questioned anywhere.

6. Now, we are to see whether respondent invoking the jurisdiction of the Civil Court proved anywhere that action taken against him is mala fide, without jurisdiction, or in violation of the rules. A good number of the witnesses was examined by the respondent, but its attorney who appeared as PW-5 unreservedly admitted in his cross-examination that none of the respondents has any ill will, animus or acrimony against the respondent. Yes, there is no clause ousting the jurisdiction of the Civil Court, but the very words used in Rule 93(3) of the Rules that "*subject to the provisions of these rules the decision of Government on an appeal shall be final*", rule out any other forum where the issue could be reopened or raised afresh. Want of jurisdiction or violation of the rules could have been

another ground to seek annulment of the decision of the Government, but, there is also nothing on the record to show that the Licensing Authority or Secretary Industries and Mineral Development Government of KPK acted without jurisdiction and lawful authority. Where neither mala fide has been established nor want of jurisdiction or violation of the rules has been pointed out, we don't understand how the Civil Court could arrogate to itself an authority to sit in judgment over the order passed by the Government in appeal. When faced with this situation, learned ASC stated at the bar that the respondent could not carry out mining activities because of force majeure. What is force majeure and who is competent to decide about it. Before we answer this question it is worthwhile to refer to the relevant provision which reads as under:-

***"94. Force Majeure.-(1) Where the failure on the part of the licensee or lessee to fulfil any of the terms and conditions of these rules arises from Force Majeure, the licensee or lessee shall stand absolved of responsibility.***

*(2) For the purpose of this rule the expression "Force Majeure" means an act of God, war, insurrection, riot, civil commotion, tide, storm, tidal wave, Flood, lightning, explosion, earthquake or any other happening which the licensee or lessee could not in the opinion of the licensing authority reasonably prevent or control."*

7. A bare reading of the rule quoted would reveal that 'Force Majeure' provides a basis of exonerating the licensee or lessee to fulfil any of the terms and conditions of the rules but in any case, it is the opinion of the licensing authority which matters in a dispute of this type. Civil Court does not figure anywhere in the scheme of the rules. In his last-ditch effort to defend the impugned judgment, the learned ASC contended that the petitioner instituted the suit when it was observed in the order dated 02.04.1998 of the

High Court that the question urged being question of fact has to be decided on the basis of evidence to be produced by the parties. But it will not help the respondent because a dispute of this type as observed above could be decided by the Licensing Authority or the Government itself. Assuming that in view of the observation made by the High Court, it was to be decided on the basis of evidence produced by the parties, the respondent should have produced evidence in this behalf. But the witnesses he examined have not produced any evidence, much less convincing on the record to show that the respondent could not carry out the mining activities due to force majeure. Instead an omnibus statement has been made by the attorney of the respondent that snowfall, rain and floods for the last 7-8 years and construction of Nawababad and Mandagucha road, with the aid of Asian Development Bank, obstructed the respondent's access to the mines. But it being a bold assertion cannot be treated as evidence. The impugned finding thus being based on no evidence cannot be sustained.

8. Next comes delay of 41 days in filing the petition for leave to appeal. According to the learned Addl. A. G., delay in filing the petition occurred because of late supplies of copies and lengthy correspondence between various tiers of the department. This explanation, in the matrix of the case, appears to be satisfactory. It is more so when we see the conduct of the subordinate functionaries who being sell-out are ever ready to do away with anything public for petty gains. In the case of **Deputy Collector of Customs and two others Vs. Muhammad Tahir and another** (supra) while dealing with an identical aspect held as under :-

*"It has recently been held by this Court that the petitions on behalf of the Government or Government functionaries in matters involving Government interest or public interest, the petitioners no doubt would be treated at par with ordinary citizens; but they would be given the same concessions and considerations as given to the other citizens. It has also to be observed that while examining the merits of application for condonation of delay the Court can look into the conduct of the subordinate functionaries, on whose conduct the higher policy maker functionaries have only a remote physical control. Hence, the conduct of the lower functionaries can in appropriate cases be taken as a good ground for condonation of delay. In this case, prima facie, some of the lower functionaries, as explained in the application, seem to have misconducted in the matter of vigilance and preparation for filing of petition for leave to appeal. And further, as admitted at the Bar, departmental action is being taken against them in this behalf. This amongst other shows bona fides on Government's part. We consider it a fit one for condonation of delay. Accordingly the application in that behalf is allowed and the delay is condoned."*

9. We, thus, by following the judgment cited above, condone the delay in filing the petition. The cases of **Aziz ur Rehman Hamid Vs. Crescent Commercial Bank, Engineer-in-Chief, G.H.Q. and another Vs. Abdul Khaliq Siddiqui, Gul Muhammad Vs. M.C.B. Bank Limited through President and others, Muhammad Idrees Alvi Vs. Employees Old-Age Benefits Institution and four others and Gul Muhammad Vs. M. C. B. Bank Ltd. through President and others (supra)** being distinguishable on facts and features of the case are not attracted to the case in hand. We, therefore, convert this petition into appeal, allow it and set-aside the impugned judgments and

decrees. While parting with the judgment, we hold that the Licensing Authority shall auction the lease after giving wide publicity in the newspapers having wide circulation. However, the respondent shall be given the right of first refusal.

JUDGE

JUDGE

Announced in open Court at Islamabad on \_\_\_\_\_

JUDGE

‘Not Approved For Reporting’  
M. Azhar Malik