

**JUDGMENT SHEET**  
**IN THE ISLAMABAD HIGH COURT, ISLAMABAD.**  
**JUDICIAL DEPARTMENT.**

W.P.No.3850 of 2016

Raja Imran Akhtar

**Versus**

National Highway Authority and others

<b>Date of Hearing:</b>	07.07.2017
<b>Petitioner by:</b>	Ch. Rizwan Bagri, Khawaja Shahid Rasool, and Muhammad Ali, Advocates,
<b>Respondents by:</b>	M/s Yaser Aman Khan and Raja Junaid Ahmad Raja, Advocates.

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**MIANGUL HASSAN AURANGZEB, J:-** Through this common judgment, I propose to decide writ petitions No.3850/2016, 4547/2016, and 252/2017 as they involved common questions of law and facts.

2. Through writ petition No.3850/2016, the petitioner, Raja Imran Akhtar, is challenging letter dated 15.01.2016, issued by the National Highway Authority ("NHA"), whereby lease agreement dated 11.05.2004 executed between the NHA and the petitioner, was terminated. The lease was for land measuring 04 Kanals, 04 Marlas, at KM 1489+500, situated in Mouza Nagayal Umer Khan, near Gulyana More, Gujar Khan, Punjab for the construction, operation and maintenance of shops. Similarly, in writ petition No.4547/2016, the petitioner, Muhammad Malik Afsar, impugns NHA's letter dated 15.01.2016, whereby the lease agreement dated 26.03.2004, executed between the NHA and Mrs. Bushra Firdous Alvi, was terminated. The lease was for land measuring 04 Kanals, 03 Marlas, at Khasra No.1556, Village Talvandi near Rahwali Sugar Mills, Tehsil and District Gujranwala, Punjab for the construction, operation and maintenance of a filling station and restaurant. Through writ petition No.252/2017, the petitioner, Raja Khalid Mehmood, impugns NHA's letter dated 15.01.2016, whereby the lease agreement dated 14.05.2013, executed between the NHA and Mr. Khalid Mehmood, was terminated. This lease was for land measuring 16 Marlas situated at Khasra No.127, KM 1491+200,

Gujar Khan, District Rawalpindi, Punjab for the construction, operation and maintenance of Khokhas and Mini Shops.

3. The termination of all these lease agreements is stated to have been pursuant to clause 4.10.2 of the conditions of the lease agreements. In the said termination letters, the position taken by the NHA was that the lessees did not pay the advance ground rental charges and the approach rental charges within a period of six months of the execution of the lease agreements.

4. Learned counsel for the petitioner in writ petition No.3850/2016 submitted that on 11.05.2004, a lease agreement was executed between NHA and the petitioner, whereby land measuring 4 kanals, 4 marlas situated in Mouza Nagayal Umer Khan, near Gulyana More, Gujar Khan, Punjab, was leased to the petitioner for erecting, commissioning, operating and maintaining shops thereon; that the said lease agreement was for a period of thirty years, extendable with the mutual consent of the parties; that after the execution of the said lease agreement, the petitioner expended a huge amount on the construction of shops; that at no material stage did the NHA issue any notice of default in the payment of rent to the petitioner; that NHA's allegation that the petitioner did not pay the advance ground rental charges and the approach rental charges within six months of the execution of the lease agreement is based on *malafides*; that the lease agreement provides a remedy to the NHA for the delay in the payment of the said charges; that the default in the payment of rent was due to the fact that the petitioner had moved abroad; that on 16.01.2010, the petitioner paid Rs.110,000/- to the NHA through a demand draft; that no opportunity of hearing was afforded to the petitioner before terminating the lease agreement; that the NHA did not issue a notice in terms of clause 4.10.2 (a) of the conditions of the lease agreement before terminating the lease agreement; that the NHA should have given an opportunity to the petitioner to cure the default within a period of ninety days of the issuance of a notice of an intention to terminate the lease agreement; and that the termination of the lease agreement is liable to be set aside in the

constitutional jurisdiction of this Court on the ground that the same does not satisfy the test of reasonableness and procedural propriety.

5. Learned counsel for the petitioner in writ petition No.4547/2016 adopted the arguments advanced by the learned counsel for the petitioner in writ petition No.3850/2016. Additionally, it was submitted that the original lessee (Mrs. Bushra Firdous Alvi) died on 12.10.2007; that since the legal heirs of the original lessee could not manage the affairs regarding the leased property, they executed a general power of attorney in favour of Malik Ishaque who in turn executed an agreement with the petitioner for the lease of the said property after receiving Rs.3,50,000/- on 26.05.2011; that in May 2011, the petitioner paid an amount of Rs.8,30,000/- to the NHA as transfer fee for the transfer of the lease for the said property in the petitioner's favour; and that since the NHA did not transfer the lease in the petitioner's favour, he, on 26.08.2016, invoked clause 15 of the conditions of the lease agreement for the settlement of the dispute in accordance with the dispute resolution mechanism enshrined in the lease agreement dated 26.03.2004. Learned counsel for the petitioner submitted that the default in the payment of rent was due to the fact that the petitioner had moved to Doha, Qatar. Learned counsel for the petitioner prayed for the writ petition to be allowed and the impugned letter dated 15.01.2016 to be set aside.

6. Learned counsel for the petitioner in writ petition No.252/2017 adopted the arguments advanced by the learned counsel for the petitioner in writ petition No.3850/2016. Additionally, it was submitted that the petitioner was not permitted by NHA to deposit the accumulated rent under the lease agreement dated 08.12.2003.

7. On the other hand, Messrs Yasir Aman Khan, and Raja Junaid Ahmad, learned counsel for the NHA submitted that the writ petitions instituted by the petitioners were not maintainable; that the writ petitions entailed several disputed and controversial questions of fact which could not be resolved without recording

of evidence; that it is well settled that a writ petition is not maintainable where the petitioner seeks the enforcement of contractual obligations; that if the petitioners' felt that the termination of the lease agreements were unlawful, their only remedy was to institute a suit for the recovery of damages; that the lease agreements contain an arbitration clause, therefore, the writ petitions are not maintainable; and that the setting aside of the termination letters would amount to specifically enforcing the lease agreements, which is not permissible in the constitutional jurisdiction of this Court.

8. Furthermore, the learned counsel for the NHA submitted that the termination of the lease agreements is strictly in accordance with the law; that the NHA terminated the lease agreement pursuant to clause 4.10.2 (b) of the lease agreements; that none of the petitioners utilized the land for the purpose for which it was leased; that the learned counsel for the petitioners in writ petitions Nos.3850/2016 and 4547/2016 had admitted that the petitioners defaulted in the payment of rent, because they had proceeded abroad; that the undated letter annexed to writ petition No.252/2017 shows an admission of default on the petitioner's part in paying the rent; that the petitioners were at liberty to invoke the dispute resolution clause contained in the lease agreements; and that as regards writ petition No.4547/2016, the NHA did not, at any material stage, approve the transfer of the lease from the name of the original lessee to that of the petitioner. Learned counsel prayed for the writ petitions to be dismissed.

9. I have heard the contentions of the learned counsel for the contesting parties and perused the record with their able assistance.

10. The terms and conditions of the three lease agreements in question are almost identical. The lease agreements between the NHA and the petitioners make the "Conditions of Lease Agreement" (hereinafter referred to as "the Conditions") an integral part of the lease agreements. As per clause 4.1 of the Conditions, the leases were for a period of thirty years,

extendable with the mutual consent of the parties thereto. Under clause 4.2 of the Conditions, the lessees were under an obligation to pay (1) ground rental charges at the rate mentioned in the Conditions, (2) NOC and registration fee, which is non-refundable, and (3) access passage rent. The lease agreements in question were terminated by the NHA on 15.01.2016 on the ground that the lessees had not deposited ground rental charges and approach rental charges. The termination of the lease agreements was stated to be pursuant to clause 4.10.2 of the lease agreements.

11. The learned counsel for the petitioners, during their arguments, candidly admitted that the petitioners had committed default in the payment of annual ground rent but were of the view that prior to the termination of the lease agreements, the NHA should have given an opportunity to the petitioners to cure the default by paying the accumulated rent. Perusal of the undated letter (Annexure-C) from the petitioner in writ petition No.3850/2016 to the NHA shows that the petitioner could not deposit the annual ground rent because he had remained out of country. Another undated letter annexed at page-21 of W.P. No.252/2017, contains the petitioner's unequivocal admission of default in the payment of annual ground rent. Learned counsel for the petitioner in W.P. No.4547/2016 submitted that the petitioner could not pay the annual ground rent because he had proceeded to Doha, Qatar. The learned counsel for the petitioners were also unable to dispute the learned counsel for the NHA's contention that the lessees were not utilizing the land for the purpose for which the lease agreements were executed.

12. Clause 4.10.2 (a) of the Conditions entitles NHA to terminate the lease agreement upon occurrence of a default or non-observance or violation of any of the terms and conditions of the lease agreement after the issuance of a ninety-day prior notice to the lessee. The said clause also entitles NHA to direct the lessee to stop carrying out any trade and to remove all the articles, structures, things, materials etc. from the leased premises within sixty days of the termination of the agreement.

Learned counsel for the petitioners questioned the termination letters dated 15.01.2016 on the ground that a ninety-day notice as contemplated by clause 4.10.2 (a) of the Conditions had not been given to the petitioners by NHA. The said clause does not give a ninety-day period to the lessees to cure the default on its part in showing compliance with the Conditions.

13. Clause 4.10.2 (b) entitles the NHA to forthwith terminate the lease agreement where the lessee fails to pay the ground rental charges for a period more than ninety days of the due dates. According to the learned counsel for the NHA the termination letters dated 15.01.2016 were issued to the lessees pursuant to clause 4.10.2 (b) of the Conditions. As mentioned above, the learned counsel for the petitioners, in their arguments did not deny default in the payment of the advance ground rental charges. They were also unable to satisfy this Court by producing deposit receipts to show that the advance ground rental charges had been paid without a delay beyond ninety days of the due dates. On account of a clear default in the payment of ground rental charges by the petitioners, the petitioners cannot be granted any relief in the constitutional jurisdiction of this Court. In W.P. Nos.4547/2016 and 252/2017, the NHA has filed applications under Section 34 of the Arbitration Act, 1940, ("the 1940 Act") praying for the stay of the proceedings before this Court. The filing of such applications demonstrate the NHA's willingness and readiness to have the dispute arising from and related to the lease agreements to be decided in accordance with the dispute resolution mechanism enshrined in clause 15 thereof. The petitioner in W.P. No.4547/2016 has already invoked clause 15 of the lease agreement by addressing letter dated 26.08.2016 and issuing a legal notice dated 24.10.2016. I am not inclined to stay the proceedings in these writ petitions due to the existence of a clause in the contract which provides for a precondition of a reference to the General Manager (Operations), NHA for his decision before the matter can be referred to arbitration under the provisions of the 1940 Act. Clause 15 of the lease agreement also envisages the resolution

of the disputes between the parties to the lease agreement even after the termination of the lease agreement. Therefore, in the event a reference is made by any of the lessees under clause 15.1 of the agreement to the General Manager (Operations), NHA, it is expected that the latter will decide the dispute within a period of twenty eight days as provided in the said clause. If, however the General Manager (Operations), NHA does not decide the dispute within the said period, or a further period of twenty eight days as envisaged by clause 15.2, the lessees have a right (under clause 15.3 of the lease agreement) to commence arbitration in accordance with the provisions of the 1940 Act.

14. Ordinarily, the High Court in exercise of its jurisdiction under Article 199 of the Constitution, does not entertain a writ petition filed by a petitioner against an instrumentality of the State with whom such a petitioner has executed a contract. However, the State or its instrumentality when engaged in contracts has a duty to act fairly, reasonably and in the public interest, and an infraction of that duty would be amenable to examination in writ jurisdiction.

15. Although sub-constitutional legislation cannot curtail the jurisdiction of this Court under Article 199 of the Constitution, and there are numerous precedents where this Court has exercised its Constitutional jurisdiction in contractual matters where the executive acts in an irrational, illegal or procedurally irregular manner, or in excess of jurisdiction, the facts of the case at hand are not such where this Court ought to exercise its Constitutional jurisdiction. On the basis of the admitted default on the part of the petitioners in paying the advance ground rent, the petitioners cannot make grouse against the NHA for terminating the lease agreements. The learned counsel for the petitioners could not point out any error of law, or abuse or excess of powers in NHA's decision to terminate the lease agreements. Having heard the arguments of the learned counsel for the petitioners to their hearts' content, I did not find any unreasonableness, illegality, irrationality arbitrariness or

procedural impropriety in NHA's decision to terminate the lease agreements.

16. It is well-settled that when an alternative and equally efficacious remedy is open to a litigant, he should be required to pursue that remedy and not invoke the constitutional jurisdiction of the High Court for the issuance of a writ. It is also well settled that where there exists an arbitration agreement, the parties are required to get their disputes arising out of the contract adjudicated by the domestic forum created by them. The respondents have correctly asserted that the existence of an arbitration clause in the contract between the NHA and the petitioners leaves no option to the Writ Court but to point to the parties in the direction of arbitration. There is a catena of case law in support of proposition that where there is an arbitration clause in the contract between the parties, a writ petition cannot be instituted to question the termination of the contract and or to seek specific performance of the contract. In the case of Mumtaz Ahmad Vs. Zila Council, Sahiwal (1999 SCMR 117), it has been held as follows:-

*"7. The petitioners had voluntarily executed the lease agreements without any duress, compulsion or threat and had not only agreed to pay instalments for the months of July, August and September, 1997 alongwith other dues, but had actually deposited the same at the time of assuming work under the lease agreements. They were, therefore, not justified to take exception to those payments at the fag-end of the lease period. Anyhow, if they had any grievance, they could have invoked the Arbitration clause and referred the matter to the Arbitrator or file appeal under the relevant rules, but in view of the availability of these remedies, they could not have invoked the writ jurisdiction. Hence, the Intra-Court Appeals filed by the petitioners were rightly dismissed and in consequence these petitions are dismissed."*  
(Emphasis added)

17. Law to the said effect has also been laid down by the Superior Courts in the cases of Abdul Qayyum Khan Vs. District Officer, Passenger and Freight (2003 MLD 670), Messrs Frontier Construction Company Vs. Bahauddin Zakariya University (2006 MLD 978), Muhammad Hayat Khan Vs. Tehsil Municipal Administration (2009 YLR 2259), Signage Security System Vs. CDA and others (2010 CLC 567), Mst. Zahida Maqbool Vs.



Member (Colonies) Board of Revenue (2010 YLR 1734), Messrs Muhammad Siddiq Chaudhry Vs. Higher Education Commission (2011 CLC 863), Wajahat Ali Vs. Government of Khyber Pakhtunkhwa (2013 YLR 2132), N.A.A. Consulting Engineers Vs. Metropolitan Corporation (2014 MLD 1795), Gandapur Construction Company Vs. Government of Khyber Pakhtunkhwa (2014 CLD 400), Uch Power (Pvt.) Ltd. Vs. Government of Pakistan, Federal Board of Revenue (2017 PTD 1215), and M/s Bisra Stone Lime Company Limited Vs. Orissa State Electricity Board (AIR 1976 SC 127).

18. In the instant case, the dispute resolution clause in the lease agreements is of wide amplitude. I am of the view that all contentions raised by the petitioners in their writ petitions can also be raised before the arbitrator. The lessees/petitioners are at liberty to have the disputes and differences arising from and related to the lease agreements resolved in accordance with the dispute resolution mechanism set out in clause 15 of the lease agreements. In the event, the lessees/petitioners invoke clause 15 of the lease agreements, the General Manager (Operations), NHA and/or the arbitrator, in adjudicating upon the disputes shall be uninfluenced by the observations contained herein.

19. In view of the above, these writ petitions are dismissed with no order as to costs.

**(MIANGUL HASSAN AURANGZEB)  
JUDGE**

**ANNOUNCED IN AN OPEN COURT ON \_\_\_\_\_/2017**

**(JUDGE)**

**APPROVED FOR REPORTING**

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