

JUDGMENT SHEET.

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

Writ Petition No. 3915/2017.

Atif Rais Khan

Versus

The State, etc.

Petitioner by: Mr. M. Shoaib Razzaq, Advocate

**Respondents by: Mr. M. Aftab Ahmed, AAG.
Mr. Ghulam Shabbir Akbar, Advocate.
Shakeel Ahmed Durrani, Director FIA, Islamabad Zone.
Qaiser Masood, Additional Director (Law) FIA.
Malik Khizar Hayat, Dy. Director (Law) FIA.
Ahmed Ali, Dy. Director, FIA/ACC.
Tahir Khan, Inspector, FIA.
Muhammad Jameel Mushtaq, PD (E-office), NITB.
Rifat Ali Khan, Dy. Director I.T., CDA.**

Date of Hearing: 20.12.2018.

MOHSIN AKHTAR KAYANI, J:- Through this writ petition, the petitioner has prayed for quashment of FIR No.22, dated 11.10.2017, U/S 409, 109 PPC read with Section 5(2)47 of PCA, P.S. FIA Anti-Corruption Circle, Islamabad.

2. Brief facts referred in the instant case are that respondent No.2 got lodged the FIR with the following allegations:-

“Dr. Jamal Yousaf, Joint Secretary (Admin) Ministry of Information & Technology, Islamabad, alleging therein that huge financial loss has been occurred to the Govt. exchequer in 13 different PSDP funded projects E, Services at CDA was one of the projects. Electronic Government Directorate (EGD)/now NITB was responsible for execution of the project E Services at CDA at a cost of Rs.175.618 million under the sponsoring Ministry of Information & Technology. During the course of enquiry and technical inspection and physical verification of all hardware and software

conducted by FIA computer forensic experts at the premises of CDA, it revealed that all hardware/equipment supplied by vendors namely M/S Inbox Business Technology (Pvt.) Ltd., Infotech (Pvt.) Ltd., Gerrys Softlogic (Pvt.) Ltd. and Voxel Communication (Pvt) Ltd were delivered to CDA. The main lacuna was found that M/S LMKR (Pvt.) Ltd which had to deliver the application software consists of number of modules as per agreement dated 27.12.2006 worth Rs.57575106/- out of which Rs.43171327/- were made to the vendor M/s LMKR (Pvt.) Ltd. w.e.f. 2007 to 2009. These payments were made to M/s LMKR (Pvt.) Ltd. by Project Director Faisal Kamran, Executive Director Syed Raza Abbas Shah and Dr. Athar Manzoor, I.T Consultant, CDA without observance of TORs of the agreement in the absence of project view committee there was no criteria left to act upon regarding payments to the vendor (Faisal Kamran) and Executive Director (Syed Raza Abbas Shah EGD/NITB). During the course of enquiry and technical inspection and physical verification of M/s LMKR application software conducted by FIA Computer Forensic Experts at the premises of CDA revealed that M/s LMKR (Pvt.) Ltd. did not get final acceptance certificate from CDA till date after lapse of ten years approx. Thus M/s LMKR (Pvt.) Ltd. caused loss to the tune of Rs.43171327/- to the National Exchequer without providing complete application software to CDA thus committed criminal breach of trust. During enquiry, it also come on record that certain hardware equipments including computer systems, printers, servers, etc. were found missing and misappropriated by CDA officers and officials. Prima Facie case is registered U/S 409 & 109 PPC R/W 5(2) 1947 PCA against accused persons/s (i) Syed Raza Abbas Shah, Executive Director EGD/NITB (E Services at CDA), (ii) Faisal Kamran Project Director EGD/NITB (E Services at CDA) & Project Director at CDA, (iii) Dr. Athar Manzoor, Consultant IT & Management Division, CDA and (iv) Atif Raees, CEO, M/s LMKR Pvt. Ltd with the permission of competent authority. The role of others alongwith officials/officers of executing agency CDA Ministry of IT would be thrashed out during the course of investigation."

3. Learned counsel for the petitioner contends that allegations leveled in the FIR are dependent upon the contract, which has to be scrutinize prior to registration of said FIR as CDA is responsible for the non-compliance of the

terms of the agreement dated 11.12.2006 and the agreement provides the process of settlement of dispute in Section 3 through alternate dispute resolution mechanism and petitioner has already filed Arbitration Petition U/S 20 of the Arbitration Act, 1940, which was decided *ex-parte* vide order dated 02.03.2018 in favour of petitioner and matter was referred to Secretary, I.T for settlement of the claim under arbitration clause; that the petitioner is not a public servant, nor banker, merchant, factory, broker, attorney or agent, therefore, ingredient of Section 409 PPC are not applicable to the extent of petitioner and petitioner is only supplier of services under the terms of agreement and any service or amount has to be settled through arbitration mechanism and as such provision of Section 5(2) 47 PCA is also not applicable as petitioner is not a public servant and High Court in terms of Section 561-A Cr.P.C. has inherent powers to make any order to prevent the abuse of process of law and the FIR is liable to be quashed especially when there is case of no offence or case is proved to be malafide and based upon facts, which are purely of civil nature and of serious defect, which are apparent in this case; that during the proceedings of this Court, the petitioner has demonstrated the application of software under the terms of agreement in the office of CDA and as such number of functional tests and performance evaluation as well as software activities were conducted and project was successfully completed with the implementation phase test and as such no offence has been committed by the petitioner; that number of project review committee meetings were held that CDA to conclude the software completeness test process.

4. Conversely, learned counsel for the CDA as well as FIA officials and Director, I.T contend that petitioner/company has not provided the due service as required under the terms of agreement and as such caused huge financial loss to the public exchequer; that initially case was registered due to criminal

misconduct of the public servant of I.T department of CDA as well as NITB, who are responsible for the implementation of E-services project of CDA, which was to be provided by the petitioner's company M/s LMKR (Pvt.) Ltd. and despite clear direction of this Court on number of occasions the performance evaluation test of E-services software could not succeed; that all the functional tests and verification process although were performed but the complete satisfaction has not been achieved and 10 years old software resulted into complete failure due to negligence of CDA officials and NITB and loss of million rupees was caused to the public exchequer. The Director, NITB present before the Court has stated that more than 95% of function tests have been performed successfully by M/s LMKR (Pvt.) Ltd. in the CDA office except few rectifications which were required for the complete implementation of E-services project.

5. Arguments heard, record perused.

6. From the perusal of record, it has been observed that petitioner has been charged in case FIR No.22, dated 11.10.2017, U/S 409, 109 PPC read with 5(2) 47 PCA, P.S. FIA Anti-Corruption, Islamabad, which was registered consequent upon the inquiry No.97/2015 initiated upon the complaint of Dr. Jamal Yousaf, Joint Secretary (Admin), Ministry of Information & Technology alleging huge loss caused to the public exchequer in different projects of E-services at CDA whereas, NITB was responsible for the execution of project of E-services and during the process of verification M/s LMKR (Pvt.) Ltd. has not delivered the application software consist of number of modules as per agreement dated 27.12.2006 of total worth of Rs.57575106/- out of which Rs.43171327/- were already paid to the M/s LMKR (Pvt.) Ltd., which was cleared by the Project Director Faisal Kamran, Executive Director Syed Raza Abbas Shah, Dr. Athar Manzoor, Executive Consultant and caused financial loss to the public exchequer.

7. The petitioner is the Chief Executive Officer of M/s LMKR (Pvt.) Ltd., who filed quashment petition against the above mentioned FIR on the grounds that no offence U/S 409 PPC read with Section 5(2)47 PCA were attracted in case as petitioner is not a public servant, nor is responsible in this regard and the relationship of petitioner with the Electronic Government Directorate, Ministry of Technology is based upon the agreement dated 11.12.2006 and in case of any dispute matter could only be resolved through alternate dispute resolution mechanism.

8. I have gone through the agreement dated 11.12.2006, which was executed by the President of Pakistan and M/s LMKR (Pvt.) Ltd. vendor, which is meant for implementation of provision of E-services at CDA, Islamabad. The project includes gap analysis, licensed software, data entry/scanning & data migration and development of software applications at CDA, Islamabad. The terms referred in the agreement were duly defined in the definition clause 1 and as per clause 1.9 contract price was fixed at Rs.57,575,106/-, which is payable by the vendee to the vendor for the successful implementation, test of project by vendor and performance of all its obligations in accordance with terms & conditions of this agreement. The agreement also contains the term and effective date as per clause 4, which is as under:-

This Agreement shall become effective on the date of acceptance by the Vendee of the Bank Guarantee furnished by the Vendor in accordance with Schedule-A and shall continue in full force and effect for a period of forty eight (48) weeks (the "Term") unless terminated earlier or extended further in accordance with the terms and conditions hereof.

9. Similarly, the Vendor i.e. M/s LMKR (Pvt.) Ltd. shares the responsibility in the following manner:-

The Vendor shall provide, deliver, render, perform, test, commission and transfer, as applicable, the services relating to the Project in accordance with:

- (i) *This Agreement along with the Schedules and its Technical Proposal in response to the RFP;*
- (ii) *All applicable Laws of Pakistan; and*
- (iii) *Sound, internationally recognized and acceptable standards and practices as modified, amended or recommended from time to time by the relevant Pakistani or international agency, as the case may be;*

The Vendor shall ensure that each milestone in the Project Plan is achieved on or before its schedule date. The Vendor covenants that the Scope of Services shall be delivered, supplied, provided, completed, performed, commissioned, tested, and/or rendered, as the case may be, in accordance with the applicable specifications contained in this Agreement and the Schedules, and in a good, workmanlike manner, and in accordance with sound practices that are internationally recognized and acceptable.

10. The agreement further provided the supply, inspection, test and acceptance of the project in terms of clause 12.1 & 12.2 and Project Director is responsible for the approval of every submissions even the concept of accepting and testing includes the integration test and system integration and software development authority who is responsible for security acceptance test, performance and capacity test, Penetration and vulnerability test as well as operational acceptance test in terms of clause 14.1. The agreement also provide the defect liability period of two years from the date of issuance of final certificate by the vendee alongwith the concept of termination in terms of clause 24, which includes the notice of termination, however, remedy portion provides dispute resolution mechanism provided in terms of clause 26.3 as well as resolution by parties in terms of clause 3.1 and referral of the matter to the standing committee.

11. This entire concept and terms of the agreement were agitated by the M/s LMKR (Pvt.) Ltd. through application/petition U/S 20 of the Arbitration Act, 1940 before the Civil Court at Islamabad on 08.09.2017 and the learned Civil

Judge seized with the matter has passed *ex-parte* order dated 02.03.2018 and referred the matter to Secretary I.T in terms of clause 26.3.2 under arbitration mechanism and at present arbitration proceedings have not yet been concluded.

12. Besides the above referred background, the CDA authorities have submitted their written report as well as Director NITB has also submitted their point of view before this Court and as such the Director NITB states that 95% of the implementation test of E-services software was conducted which is satisfactory, however, FIA authorities states that M/s LMKR (Pvt.) Ltd. has failed to demonstrate the implementation of software in presence of CDA officials in the CDA premises, even the Cyber Crime Circle FIA has also assisted the technical aspect of the matter and two computer technical experts have verified the in question software but the modules of the software have not been completed till date despite the fact that all servers, hardware are in working condition which could be used for demonstration purposes as CDA has provided congenial environment, even sufficient time was given to the petitioner's company who has failed to demonstrate the software in three previous audit conducted by the NITB and Ministry of Technology and as such the terms of the agreement were violated.

13. At this stage, petitioner's company has received Rs.43 million out of Rs.57 million w.e.f. 2007 to 2009 under the terms of agreement but no final acceptance certificate from CDA was issued in the last ten years. At this stage this Court has to observe as to whether the role of petitioner could be segregated in any manner from the other co-accused who are public servants and directly responsible for the criminal misconduct of non-compliance of their official duties, which resulted into causing loss to the public exchequer especially when the deliverable of M/s LMKR (Pvt.) Ltd. have not been received within the time frame, neither the same were supplied and as such citizens of Pakistan are suffering in the office

of CDA due to their orthodox working environment, which could have been transposed by way of implementation of E-services project, if concluded, submitted in time and as such at this stage the petitioner has initiated the process of alternate dispute resolution and arbitration is under way through which the responsibility could be fixed to the extent of loss and recoveries but the criminality in such type of cases is different from the civil dispute and the public officials involved in this case could have been thrashed out by the FIA authorities under FIA Act, 1974 being the competent authority, although the FIR was registered but the matter is under investigation and as such the technical reports were submitted with the NITB for their final conclusion where-after, FIA authorities will be able to conclude the investigation.

14. I have considered the each and every aspect of the case including the exercise of remedy by the petitioner's side by invoking the arbitration clause but under the garb of arbitration proceedings the public officials of CDA and Ministry of NITB could not be excluded or exempted in any manner, therefore, criminal misconduct in terms of Section 5(2)47 PCA has to be thrashed out whether M/s LMKR (Pvt.) Ltd. could be held responsible or otherwise, as it is the duty of public servant on behalf of government of Pakistan to protect public money used in such projects although the case of the petitioner *prima-facie* comes under the civil dispute but at this stage, I have gone through the judgments referred as 2007 MLD 1535 (Muhammad Afzal Vs. Muhammad Bashir), 2005 CLC 1673 (Rehmat Ali Vs. Dilawar Shah), 2006 CLC 289 (Nazim Ali Vs. Rashid Qamar), 2006 MDL 491 (Haji Muhammad Ashiq Vs. State), PLD 1968 SC 281 (Muhammad Akbar Vs. State), 2006 SCMR 1192 (Haji Sardar Khalid Saleem Vs. Muhammad Ashraf), 2008 YLR 2505 (Rehan Nasir Vs. SHO P.S. Rail Bazar, Faisalabad), PLD 2009 Karachi 65 (Maqsood Ahmed Qureshi Vs. Muhammad Azam Ali Siddiqui), 2015 SCMR 1575 (Rafiq Haji Usman Vs. Chairman, NAB),

therefore, while relying upon these case laws it is settled that criminal and civil proceedings can go side by side and they have their own sphere to conclude the contractual liability under the terms of breach of agreement as well as *mens rea* in criminal cases, whether the same is emanating from same dispute of contractual nature, which *prima-facie* falls within the civil dispute but the role of public servant is separate, which does not fall under any mandate of arbitration clause referred in the agreement, which was invoked by M/s LMKR (Pvt.) Ltd., even if the Arbitrator gives an award against the government of Pakistan in this case, even then the role of public servant could not be excluded and FIA authorities are well within the powers to identify the role of public servants who committed misconduct, which caused loss to the public exchequer and the authority given to those public servants on behalf of Federation of Pakistan has been exercised in capacity of agent/servants of federation and as such any loss caused to the Federation due to the criminal negligence and in their official working is liable U/S 409 PPC.

15. I have also gone through the judgment reported as 2015 P.Cr.L.J 1592 [Lahore] (Naeem Abbas Vs. D.G. FIA, Islamabad), 2018 P.Cr.L.J 565 [Lahore] (Syed Nayab Hussain Sherazi Vs. SHO P.S. Sabzazar, Lahore), wherein it was held that FIR could not be quashed in piecemeal manner and it will affect the entire case even otherwise, the investigation has not yet been concluded and FIA authorities have to conclude the investigation and if they reach to the conclusion that no offence has been committed in terms of Section 409 PPC read with 5(2) 47 PCA to the extent of M/s LMKR (Pvt.) Ltd. or its Chief Executive Officer/present petitioner they may exclude the petitioner from criminal prosecution under the law, therefore, while considering all these aspects, I am not inclined to quash this FIR as the minimum requirement for quashment of FIR could not be established by the petitioner with reference to 2011 SCMR 1937 (Rana Shahid Ahmad Khan

Vs. Tanveer Ahmed, 2016 P.Cr.L.J 67 (*Sher Afzal Khan Vs. State*), 2008 SCMR 76 (*Dr. Ghulam Mustafa Vs. State*), 2014 YLR 429 (*Bashir Ahmed Vs. VIIIth Family Judge, District West, Karachi*), 2014 MLD 795 (*Aftab Ahmed Vs. State*), 2014 P.Cr.L.J 1361 (*Haji Zeri Gul Vs. Ahmad Jan Khan*), 2015 P.Cr.L.J 576 (*Muhammad Zubair Vs. SSP*), PLD 2016 SC 55 (*Muhammad Farooq Vs. Ahmed Nawaz Jagirani*), 2010 SCMR 1835 (*Akhlaq Hussain Kayani Vs. Zafar Iqbal Kiyani*), PLD 2007 SC 48 (*The State through Prosecutor General Punjab, Lahore Vs. Sultan Ahmed*).

16. Keeping in view the above principles laid down by the superior Courts, I am not inclined to accept this writ petition at this stage, therefore, the same is hereby dismissed.

17. Before parting with the said judgment, FIA authorities are directed to conclude the investigation and formulate their final opinion qua the role of petitioner in this case within a period of three (03) months, failing which, Director General, FIA shall initiate inquiry against the FIA officials for non-compliance of mandatory provisions of law regarding submission of challan within the stipulated time period and render explanation in writing before this Court.

(MOHSIN AKHTAR KAYANI)
JUDGE

Announced in open Court on 2.1.2019.

JUDGE