

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P.No.1508 of 2021

M/s Sieyuan-NEIE-Naeem & Company

Versus

The Federation of Pakistan through Secretary, Ministry of Water
and Power and others

Dates of Hearing: 23.09.2021 & 13.10.2021

Petitioner by: M/s Ali Rana, Asad Raza and Zahid Umar,
Advocates

Respondents by: Sardar Adam Khan, Advocate for respondents
No.2 to 5/IESCO,
M/s Ahmad Nawaz Bhatti and Sagheer Ahmad
Bhatti, Advocates for respondent No.6,
Mr. Arshid Mehmood Kiani, learned Deputy
Attorney-General.

MIANGUL HASSAN AURANGZEB, J:- Through the instant writ petition, the petitioner, M/s Sieyuan-NEIE-Naeem & Company Joint Venture, seeks a declaration to the effect that respondent No.2 (Islamabad Electric Supply Company Limited) is bound to pay an amount of US Dollars 553,426 plus an amount of Rs.2,000,000/- to the petitioner in fulfillment of its obligations under the contract dated 09.04.2013 for the “Design, Manufacturing, Supply, Erection, Testing and Commissioning of 132KV (Indoor) Gas Insulated Switchgear (G.I.S.) Grid Station for the New Benazir Bhutto International Airport Project” (“the Contract”). Furthermore, the petitioner seeks a direction to respondent No.2 to pay the said amount to the petitioner along with compensation in the form of mark up at the rate of 8% per annum in terms of clause 33.6 of the Contract.

2. The record shows that respondent No.1 awarded the Contract to the petitioner after the latter successfully participated in a competitive tender bidding process. It had a foreign currency component of US Dollars 2,268,261 and a local currency component of Rs.190,431,581/-.

3. Clause 33.1 of the Contract provided the manner in which the contract price was to be paid. The petitioner claims to have completed all its obligations under the Contract on 08.08.2015. The operational acceptance certificate has been issued by respondent

No.2 to the petitioner on 08.08.2015. The said certificate is an endorsement of the fact that the Contract has been completed and the project has been energized. After completion of the defects liability period of 365 days, respondent No.2 issued a completion certificate to the petitioner on 22.01.2018.

4. The petitioner asserts that at the time of the completion of the Contract, US Dollars 553,426 and Rs.2,000,000/- were yet to be paid by respondent No.2. Vide letter dated 17.01.2018, the petitioner requested respondent No.2 to pay the said outstanding amount. Since respondent No.2 did not respond to the several reminders given by the petitioner for the payment of the said amount, the petitioner agitated the said matter in its letter dated 13.02.2019 to the Prime Minister of Pakistan.

5. Respondent No.2, in its letters dated 01.01.2020 and 18.03.2021, acknowledged that the amount of US Dollars 553,426 and Rs.2,000,000/- was payable to the petitioner and that the same would be paid in due course of time. Apparently, respondent No.2 was waiting for payment from the Civil Aviation Authority ("C.A.A.") and had made its liability to pay the said amount to the petitioner contingent on receiving payment from the C.A.A. Aggrieved by the inaction on the part of respondent No.2 to pay the said amount, the petitioner has filed the instant petition under Article 199 of the Constitution seeking *inter alia* a direction to respondent No.2 to pay the said amount to the petitioner along with compensation.

6. Learned counsel for the petitioner submitted that the instant petition has been filed for the recovery of an admitted liability of respondent No.2; that respondent No.2 has, at no material stage, denied the petitioner's entitlement to be paid US Dollars 553,426 and Rs.2,000,000/- but asserts that the said amount would be paid on receipt of funds from the C.A.A.; that the petitioner has no privity of contract with the C.A.A. and is not concerned with any dispute between respondent No.2 and the C.A.A.; that respondent No.2 has also not invoked the dispute resolution mechanism enshrined in the Contract to contest the petitioner's claim for the payment of the said amount; and that since the instant petition does not involve any disputed questions of fact, the resolution of which would require the

recording of evidence, this Court ought to direct respondent No.2 to pay the said amount to the petitioner along with compensation.

7. On the other hand, learned counsel for respondents No.2 to 5 submitted that this Court, in exercise of its Constitutional jurisdiction, ought not to interfere in a matter that pertains to a contract between the petitioner and respondent No.2; that the Contract provides a mechanism for the settlement of disputes between the parties through arbitration; that respondent No.2 does not deny the petitioner's claim but the amount would be paid to the petitioner as and when payment is received by respondent No.2 from the C.A.A.; that respondent No.2 has sent several letters to the C.A.A. seeking the payment of the said amount but to no avail; and that as soon as respondent No.2 receives the said amount from the C.A.A., the same shall be paid to the petitioner. Learned counsel for respondents No.2 to 5 prayed for the writ petition to be dismissed.

8. I have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance. The facts leading to the filing of the instant petition have been set out in sufficient detail in paragraphs 2 to 5 above and need not be recapitulated.

9. It first needs to be determined whether this Court can issue a writ of *mandamus* directing respondent No.2 to pay US Dollars 553,426 and Rs.2,000,000/- to the petitioner. It was not denied by the learned counsel for respondent No.2 that the dominant control over respondent No.2 is with the Federal Government and is therefore amenable to the Constitutional jurisdiction of this Court. In the case of Huffaz Seamless Pipe Industries Limited Vs. Sui Northern Gas Pipelines Limited (1998 CLC 1890), the Division Bench of the Hon'ble Lahore High Court, after ascertaining that the majority shareholding in the respondent / company vested in the Federal Government which has dominant control over it, held as follows:-

“Although this Company is registered under the Companies Ordinance, 1984 yet it carries gases from one place to another and makes it available to the citizens of this State. Seen from the above angle, we are clear in our mind that this Company possesses all the attributes of State instrumentality / agency of the State and so is subject to Constitutional limitations as other functionaries of Federal and Provincial Government, while performing their functions in connection with affairs of Federation or a Province. We are,

therefore, in complete agreement with the findings of the learned Single Judge that this company is subject to judicial review under Article 199 of the Constitution.”

10. The said judgment was upheld by the Hon'ble Supreme Court in the case of Ramna Pipe and General Mills (Pvt.) Limited Vs. Sui Northern Gas Pipe Lines (2004 SCMR 1274).

11. The Hon'ble Lahore High Court has held that electricity supply companies like Faisalabad Electric Supply Company and Gujranwala Electric Power Company which are similar to respondent No.2 are performing functions in connection with the affairs of the Federation and their actions other than in service matters can be subjected to judicial review under Article 199 of the Constitution. Reference in this regard may be made to the cases of Imran Hussain Vs. Water and Power Development Authority (2011 PLC (C.S.) 116, Tahir Abbas Vs. FESCO, Jhang (2011 PLC (C.S.) and Kamran Ahmad Vs. Water and Power Development Authority (2014 PLC (C.S.) 332). In the latter case, it was held as follows:-

“16. Though GEPCO is not a statutory authority as it is not established under a statute but incorporated as a company under the Companies Ordinance 1984, however, when applied the aforesaid “functional test”, it squarely applies to GEPCO. It is an entity wholly owned and controlled by the Government and for all intents and purposes, it follows the policies laid down by the Government of Pakistan regarding supply of electricity under its controlled area. Indeed it is a “public utility company” providing basic amenities to the public at large. Therefore, I have no hesitation to hold that GEPCO is a body corporate performing function in connection with the affairs of the State and therefore, amenable to the constitutional jurisdiction of this Court under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973.”

12. In view of the above, it is safe to hold that respondent No.2 is a 'person' performing functions in connection with the affairs of the Federation to whom a writ can be issued by this Court. It may be clarified that this view does not hold good for disputes between respondent No.2 and its employees since it does not have any statutory service rules.

13. The petitioner has claimed the said amount for works performed under the Contract. When a writ petition raises questions of fact of a complex nature, which may for their determination require oral evidence to be taken, the High Court may decline to try a petition. In the case of United International Associates Vs. Province of the Punjab

(1999 MLD 2745), it was held that ordinarily a writ for the enforcement of a contractual obligation is not maintainable because enforcement of a contract entails factual inquiry into disputed questions of fact which is primarily the function of a Court of plenary jurisdiction. However, where the resolution of a disputed fact does not require the recording of evidence and where the law does not provide a remedy equally adequate and efficacious as a writ petition, the High Court may in appropriate cases exercise jurisdiction under Article 199 of the Constitution. In the case of Saad Muhammad Shaheen Al-Soofi Vs. Principal & Chairman, Academic Council, Sindh Medical College, Karachi (1982 CLC 805), the Hon'ble Mr. Justice Saleem Akhtar speaking for the Hon'ble High Court of Sindh held as follows:-

“There is no cavil to the proposition that the disputed questions of fact cannot be gone into by the High Court in exercise of the Constitutional jurisdiction under Article 199 of the Constitution. However, each case has to be considered on its merits and before this principle is applied it has to be considered whether disputed questions of facts are involved in it. Merely because a certain assertion has been made and denied by the other party does not ipso facto make it a disputed fact. In order to establish that a fact is a disputed question of fact, the party making such allegation has to make out a prima facie case or place on record certain material from which it may be possible for the Court to determine that the dispute involves controversial question of fact or that the controversy will require evidence and investigation.”

14. In my opinion, the question whether a writ petition under Article 199 of the Constitution is maintainable to enforce a contractual obligation of the State or its instrumentality, is no more *res integra*. In the case of Airport Support Services Vs. The Airport Manager, Quaid-e-Azam International Airport, Karachi (1998 SCMR 2268), the Hon'ble Supreme Court made reference to a catena of case law and held as follows:-

“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.

(Emphasis added)

15. It now needs to be determined whether this case entails any dispute or disputed questions of fact which cannot be resolved without recording of evidence, and whether the instant petition is capable of being decided by making reference to the documents on the record in which the petitioner's claim is unequivocally admitted.

16. Disputed questions or rival claims of the parties with regard to breach of contract are to be investigated and determined on the basis of evidence which may be led by the parties in a properly instituted suit or in arbitration proceedings rather than by a Court exercising writ jurisdiction. This is not an absolute rule. Where the relationship between the petitioner and the State or its instrumentality is based in a contract, a direction for the payment of money in exercise of writ jurisdiction must be in highly exceptional circumstances and that too only where the case does not entail any disputed questions of fact which require the recording of evidence and where the documents on the record show that the liability of the State or its instrumentality is expressly or impliedly admitted. Where the State or its instrumentality disputes the petitioner's claim the parties must be left to resolve their disputes in accordance with the dispute resolution mechanism in the contract or through a suit before a Court of plenary jurisdiction.

17. Indeed, contractual disputes between the petitioner and respondent No.2 have been agreed to be resolved in accordance with the dispute resolution mechanism provided in the Contract. An elaborate mechanism to this effect is provided in clause 50 of the Contract. Clause 50.1 of the Contract provides that if "*a dispute of any kind whatsoever*" arises between respondent No.2 and the petitioner in connection with or arising out of the Contract, the same shall be referred in the first instance to the Engineer, who is to give his decision on the dispute within fifty-six days. Clause 50.2 provides that if respondent No.2 or the petitioner is dissatisfied with the

decision of the Engineer or if the Engineer fails to give a notice of its decision within fifty-six days, then the aggrieved party may within twenty-eight days of the Engineer's decision or the expiry of fifty-six days within which the Engineer is to give his decision, give notice to the other party of the commencement of the arbitration.

18. In the case at hand, neither the petitioner nor respondent No.2 has referred the matter to the Engineer in terms of clause 50.1 of the Contract since a "*dispute*" arising from and related to the Contract has not arisen between the parties thereto. A *sine qua non* for a reference to the Engineer under clause 50.1 or to an Arbitrator under clause 50.2 is the existence of a "*dispute*" between the parties arising from and related to the Contract. The very object of arbitration is to settle disputes between the contesting parties. In the case of Azizullah Vs. Qismat Khan (PLD 1996 SC 831), it has been held *inter alia* that the existence of the dispute is a precondition for referring a matter to arbitration, whereas in the case of Muhammad Nawaz Vs. Ghulam Fatima (2001 MLD 382), it has been held that there must exist a "*dispute*" before a matter can be referred to arbitration. A dispute implies an assertion of a right by one party and repudiation thereof by the other. Reference in this regard may be made to the law laid down in the cases of Lithuanian Airlines Vs. Bhoja Airlines (Pvt.) Limited (2004 CLC 544), and Chandmull Ganeshmull Vs. Nippon Munkwa Kabushiki Kaisha (AIR 1921 Calcutta 342).

19. At no material stage has respondent No.2 denied or repudiated the petitioner's claim for the payment of US Dollars 553,426 and Rs.2,000,000/-. Respondent No.2 has in fact explicitly acknowledged its liability to pay the said amount to the petitioner. Respondent No.2, in its letter dated 01.01.2020 to the petitioner, took the following position:-

"A meeting was held in the office of Manager Procurement on 10, 26 & 31.12.2019 regarding subject matter. Mr. Lin and Mr. Arif from your firm attended the meeting. The invoices of both US\$ and PKR was reconciled and a difference of US\$ 553,426 was outstanding against 02 No. invoices yet to be paid by IESCO. Moreover, invoice of duty and taxes against Testing equipment amounting to Rs.2,000,000/- will be paid after payment of material invoice of US\$ in due course of time. As per new Policy and GOP all new & balance amounts against contracts with Chinese Contractors will be paid in Chinese currency instead of US\$. After arrangement of payment an addendum will be signed with your firm for the same."

20. Furthermore, vide letter dated 18.03.2021, respondent No.2 informed the petitioner that it had already taken up the matter of the balance payment with the Secretary, C.A.A., and hopes that the payment will be made soon. The petitioner was also assured in explicit terms that *“[a]s and when the payment will be received the same will be paid against your invoices as per departmental procedure.”*

21. The said two letters from respondent No.2 to the petitioner are a patent admission of respondent No.2's liability to pay the said amount to the petitioner. Respondent No.2 along with its written comments has filed copies of its letters dated 11.06.2020, 17.09.2020 and 29.06.2021 wherein reference is made to several other letters from respondent No.2 to the C.A.A., calling upon the latter to make payment against the demand note sent to it. In the letter dated 29.06.2021, IESCO also made reference to the instant writ petition and in no uncertain terms called upon the C.A.A. to pay the outstanding amount of Rs.64.04 million so that the instant petition could be defended. For the purposes of clarity, the operative part of the said letter is reproduced herein below:-

“It is intimated that IESCO on the request of Pakistan Civil Aviation Authority (PCAA) has constructed 132K GIS Grid Station at New Islamabad International Airport (NIIA) and the sponsorship of this project lies with PCAA as per their request/applied load demand.

Considering it a project of National importance IESCO completed the said 132KV GIS Grid Station and kept on making the promises to the contractor with the notion that PCAA being a National Organization will make the balance payment to IESCO for this expenditure incurred, being a cost deposit work. The matter had already been taken up with your office many time and all the queries/observations raised by your office were properly attended and replied but still PCAA adopted the policy of lingering on the matter with delaying tactics, which resulted in a court case against IESCO by the contractor, to whom the remaining payment is yet to be made.

It is worth mentioning here that instead of halting this project for getting the balance payment from PCAA, IESCO requested contractor in anticipation of balance payment to complete Grid project and the same was completed on 08.08.2015, nearly 03 years prior to official inauguration of the new Airport. Later on PCAA instead of appreciating the initiative taken by IESCO for early completion of the project, stopped the payment of balance amount of Rs.64.04 Million for the unknown reasons.

As a result of mysterious attitude of PCAA, IESCO has to suffer a lot, by facing contractor's complaints at Prime Minister's Delivery Unit (PMDU), in the shape of the draft Para with Public Accounts

Committee and a bad reputation being employer in the Turn Key Contracts. As mentioned earlier, the contractor has filed a Writ Petition in Islamabad High Court (No.1508/2021) for his outstanding payment against the Secretary Ministry of Energy (Power Division), which is another hard nut to crack.

Foregoing above, it is once again requested to make the payment of outstanding balance amount of Rs.64.04 Million, so that the instant Writ Petition could be defended in Islamabad High Court and in case the balance payment is not made instantly than the IESCO has the right to adopt the other legal ways for recovering the balance amount.”

22. Respondent No.2, in its written comments, has pleaded *inter alia* that the “*answering respondents had not denied the claim of the petitioner but it was intimated that the pending payment would be paid as and when the Pakistan Civil Aviation Authority (sponsor) will pay to the respondents.*” Furthermore, it was pleaded that the petitioner had completed the works and that the “*respondents have never denied the claim of balance amount of petitioner however, respondents is public organization and deals with supply of electricity...*”

23. Now, the C.A.A. has no privity of contract with the petitioner. The petitioner is not privy to any arrangement between respondent No.2 and the C.A.A. Learned counsel for respondent No.2 did not deny the fact that there is no provision in the Contract which would make the discharge of respondent No.2’s obligation to make payment to the petitioner contingent on the receipt of payment from the C.A.A. Therefore, it is wholly unjustified for respondent No.2 to make the discharge of its admitted contractual liability to the petitioner subject to the payment of an amount due from the C.A.A.

24. If respondent No.2 had denied the petitioner’s claim for the payment of the said amount, the question of the adjudication of this dispute by this Court in exercise of its Constitutional jurisdiction would not have arisen. However, in the instant case, respondent No.2 does not deny the petitioner’s claim but in fact admits it. Lack of funds with respondent No.2 cannot be a plausible excuse for not making payment against the petitioner’s admitted claim. In the case of Usmani Associates Vs. Pakistan Housing Authority (2005 MLD 233), the Hon’ble Lahore High Court allowed a petition seeking a writ of *mandamus* for payment of an amount that had been adjudged in the petitioner’s favour by the Engineer whose decision had not been

challenged any further by the respondent. The amount so adjudged in the petitioner's favour had not been paid by the respondent due to the unavailability of funds. The respondent's objection to the maintainability of the writ petition on the ground that a writ does not lie in the contractual matters was spurned by the Hon'ble Lahore High Court in the following terms:-

"11. In reply to the petition, contents of Para No.10 of the petition have not been denied by the respondent but it is stated that the claim of the petitioner arising out of termination under sub-clause 75.1 was verified by the respondent No.2 and payment of verified amount recommended by respondent No.2 is pending due to non-availability of funds from the Government. It is the principle of law contained in Order XII, C.P.C. rule 6, C.P.C. that any party may, at any stage of a suit, where admissions of fact have been made either in the pleadings or otherwise, apply to the Court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the Court may upon such application make such order, or given such judgment, as the Court may think just. I am fortified for this view by the cases reported as Macdonald Layton and Company Pakistan Ltd. v. Uzin Export-Import Foreign Trade Co. and others (1996 SCMR 696) and Lal Muhammad v. Additional District Judge, Gujranwala and others (1983 CLC 770). Non availability of funds from the Government to respondent No.1, to my mind, is no ground not to make the payment for the work done by the petitioner for no fault of his, when he has been knocking the door of the respondent by writing continuously.

For what has been discussed above, this writ petition is allowed. The respondent No.2 is directed to make payment of Rs.1,09,94,756 minus Rs.2,745,500, with interest to the petitioner within one month of the passing of this order. The petition is disposed of."

25. In the said judgment, the Hon'ble Lahore High Court referred to a number of judicial precedents where writ petitions had been allowed and directions had been issued for the payment of an admitted liability. The Hon'ble Lahore High Court, while spurning the objection to the maintainability of the writ petition, held as follows:-

"Ordinarily a writ for enforcement of the contract is not maintainable for the reason that the enforcement of the contract requires factual inquiry into the disputed questions, which is the function of the Court having jurisdiction. For this view, I am supported by the case reported as Messrs Ittehad Cargo Service and 2 others v. Messrs Syed Tasneem Hussain Naqvi and others (PLD 2001 SC 116), wherein while interpreting the provisions of Article 199 of the Constitution and the question that a concluded contract whether open to judicial review it was held by the Hon'ble Supreme Court that, High Court in exercise of its Constitutional jurisdiction was possessed of power to examine the validity of order in regard to grant of a concluded contract and strike down the same on the grounds of mala fide, arbitrary exercise of discretionary power, lack of transparency, discrimination and unfairness etc. provided the challenge was made

promptly and contentious questions of facts were not involved". In the case of Messrs Airport Support Services v. The Airport Manager, Quaid-e-Azam International Airport, Karachi and others (1998 SCMR 2268) it was 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 derelictions of obligations, flowing froth a statute, rules or instructions can adequately be addressed to for relief under the jurisdiction". In the case reported as Messrs Wak Orient Power and Light Limited through Chief Executive, Lahore v. Government of Pakistan, Ministry of Water and Power through Secretary, Islamabad and 2 others (1998 CLC 1178 Lahore DB) it was held that. "Remedy of Constitutional petition would be permitted to be resorted to in cases involving contract between private persons and State Statutory functionary for such remedy was considered to be more efficacious and speedy remedy as compared to civil suit or arbitration proceedings". In the case reported as Muhammad Tufail Tarar v. Government of Punjab and others (1999 CLC 1937), where the contractor completed the work for the Provincial Government, who did not clear his dues, cheque issued by the Government was bounced by the Bank for lack of funds, it was held that. "...civil suit was the proper remedy for recovery of money but where the amount was admitted and even the amount was paid through the cheques, which were bounced by the Bank and there was no factual controversy involved. Constitutional petition was maintainable, and the petition was allowed in circumstances"."

26. In order to leave no doubt on the question of whether respondent No.2 admits its liability to pay US Dollars 553,426 and Rs.2,000,000/- to the petitioner, this Court, vide order dated 16.08.2021, directed the Manager Finance of respondent No.2 to tender appearance before this Court. On 02.09.2021, the Manager Finance of respondent No.2 tendered appearance and admitted that Rs.64.303 million was due and payable to the petitioner. He further submitted that respondent No.2, vide letter dated 27.08.2021, had, in strongest terms, required the C.A.A. to pay the said amount to respondent No.2 so that the latter could discharge its liabilities to the petitioner.

27. Since this case does not entail any disputed or controversial questions of fact which require the recording of evidence, and since respondent No.2 has admitted its contractual liability to pay US Dollars 553,426 and Rs.2,000,000/- to the petitioner, the instant writ petition is allowed in that respondent No.2 is directed to pay the said amount to the petitioner within a period of two months from the date of the receipt of this judgment. As regards the petitioner's claim for

compensation for the delay in the payment of the said amount, this claim cannot be considered in the Constitutional jurisdiction of this Court since the quantum of the loss suffered by the petitioner due to the delay in payment is to be proved by producing evidence. For this purpose, the petitioner may consider invoking the dispute resolution mechanism provided in the Contract or to approach the Court of plenary jurisdiction. Respondent No.2 is to bear the petitioner's costs.

**(MIANGUL HASSAN AURANGZEB)
JUDGE**

ANNOUNCED IN OPEN COURT ON 30/11/2021

(JUDGE)

APPROVED FOR REPORTING

Qamar Khan