

HCJD/C-121
JUDGMENT SHEET

ISLAMABAD HIGH COURT
ISLAMABAD

W.P. No.3755/2014

BNP (PVT) LTD.

VERSUS

CAPITAL DEVELOPMENT AUTHORITY, ETC.

Petitioner by : **Barrister Aitzaz Ahsan & Barrister Gohar Ali Khan.**

Respondents by : **Mr. Attaullah Hakim Kundi & Raja Adnan Aslam, Advocates.**
Malik Zahoor Awan, Standing Counsel.

Date of Hearing : **20-01-2016.**

ATHAR MINALLAH J: The petitioner has invoked the jurisdiction of this Court under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 (hereinafter referred to as the "*Constitution*"), assailing order dated 05-08-2014 passed by the Capital Development Authority and the directives issued by the Public Accounts Committee dated 29-05-2014 and 21-07-2014. Moreover, a writ has also been sought to declare the Audit Para as without jurisdiction and lawful authority.

2. The facts, in brief, are that the petitioner is a private limited company incorporated under the *Companies Ordinance, 1984*, inter-alia, engaged in the business of the construction and operation of a Five Star Hotel including service apartments. Pursuant to the objects for which the petitioner has been incorporated, the latter participated in the tendering process in response to an advertisement dated 13-04-2004, whereby the Capital Development Authority (hereinafter referred to as the "*Authority*") had invited applications for pre

qualification in respect of a plot offered for the construction of a Five Star Hotel. The petitioner, having been declared as a successful bidder, was allotted a plot measuring 13.45 acres for the construction of a Five Star Hotel, namely the 'Grand Hyatt' (hereinafter referred to as the "**Plot**"). The terms of the contract are alleged to have subsequently been materially altered. During the audit of the Capital Development Authority for the year 2011-2012, an Audit Para reported as "Audit Para No.2.4.8" relating to the Plot was included in the Auditor General's report for the relevant year. It was alleged that Rule 19(iv) of the General Financial Rules (Vol-1) had been violated and that;-

"the terms of the Agreement (Lease Deed) had been materially varied (by way of re-scheduling payment) without approval of the competent authority which resulted in non-recovery of Rs.1199.25 Million from the Petitioner by the CDA."

3. Pursuant to the prescribed procedure, the Audit Para was placed before the Departmental Accounts Committee but the same could not be settled. It was ultimately included in the Report of the Auditor General and submitted to the President, as required under Article 171 of the Constitution, so that the latter may cause the same to be laid before the Parliament. The Report was, therefore, referred to the Public Accounts Committee (hereinafter referred to as the "**PA Committee**") as prescribed under Rule 177(2) of the Rules of Procedure and Conduct of Business of the National Assembly 2007 (hereinafter referred to as the "**Rules of 2007**"). The respondent No.2 i.e. the PA Committee, in its meeting held on 28th & 29th May 2014, considered the audit reports/special audit reports for the years 2010-2011, 2011-12 & 2012-2013 pertaining to the Capital Development Authority and as a consequence issued directions, inter alia, relating

to the under construction project of the petitioner i.e. 1-Constitution Avenue (hereinafter referred to as the "**Project**"). The directives are contained under Clause-a of the document titled 'PAC Directives'. Through office memorandum dated 21-07-2014, a further directive was communicated to the Secretary Cabinet Division, Islamabad which is as follows:-

"To stop the construction work at the site of this project till finalization of inquiry/recovery of dues in accordance of initial Schedule/Agreement."

4. Pursuant to the above Directive of the PA Committee the Capital Development Authority vide letter dated 05-08-2014, directed the petitioner to immediately stop the construction work on the site till the finalization of the inquiry/payment of dues in accordance with the initial schedule/agreement. The petitioner has, therefore, assailed the directives of the PA Committee dated 29-05-2014 and 21-07-2014, as well as the order dated 05-08-2014, passed by the Capital Development Authority in pursuance thereof.

5. Barrister Aitzaz Ahsan, Sr. ASC has contended that; the objections raised through the Audit Para by the Auditor General are due to misreading and non-reading of the record; the Capital Development Authority is established under the Capital Development Authority Ordinance, 1960 (hereinafter referred to as the "**Ordinance**") and its management and general administration vests in the Board established under Section 5 *ibid*; the Board of the Authority, being the competent authority, had approved the re-scheduling of payment and thus the PA Committee had no jurisdiction to alter the same, or to interfere in the decision taken by the Board; the Authority has issued the impugned order dated 05-08-2014 without application of mind and on the dictation of the Committee; the impugned

order has been passed without affording an opportunity of hearing to the petitioner; the observations and recommendations contained in the Audit Para are without jurisdiction or in excess of the jurisdiction vested in the Auditor General of Pakistan; the Committee has to apply its independent mind by inviting comments from the concerned Department, as well as the private party, before considering and issuing directions relating to an Audit Para submitted for settlement; neither had the Committee summoned any record in the case of the petitioner nor was the latter was afforded an opportunity of hearing; the Committee had acted in a mechanical manner; in a single meeting held on 29-05-2014 directions were issued; instead of making recommendations the Committee passed directives, which are in the nature of executive orders; the directive, dated 21-07-2014, is not mentioned in the Committees deliberations in the meeting held on 29-05-2014; the impugned orders are in violation of due process of law and thus have been passed in violation of the fundamental rights guaranteed under Articles 10-A, 4, 9, 18, 23, 24 & 25 of the Constitution; the Committee and the Auditor General could not have given findings; the Committee directive expressly mentions that audit reports for the years 2011-2012 and 2012-2013 had not been discussed in the meeting; the impugned orders have obstructed ongoing construction of the Project; the Committee directives are amenable to judicial review under Article 199 of the Constitution, as Article 69 of the Constitution debars the validity of any proceedings on the ground of any irregularity of procedure; any matter beyond the scope of irregularity of procedure would not fall within the ambit of the bar contained under Article 69 of the Constitution; the court, under Article 199 of the Constitution, has the power to examine the validity of the directives issued by the Committee.


6. Attaullah Hakim Kundi, Advocate, appeared alongwith Raja Adnan Aslam, Advocate and they have argued that; the CDA has acted pursuant to the directives of the Committee; Article 69 of the Constitution, read with Rule

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280 of the Rules of Procedure and Conduct of Business in the National Assembly 2007, bars the jurisdiction of this Court to proceed in this matter; the Committee has the authority to take cognizance of any financial indiscipline and to issue directives; considerable loss has been caused by the petitioner. However, in reply to a query it was admitted that the directives were not placed before the Board nor has the latter passed any orders after consideration thereof.

7. The learned counsels have been heard and the record perused with their able assistance.

8. The proceedings against the petitioner stem from the audit observation, which was later converted into an Audit Para, and its settlement at present is pending before the PA Committee pursuant to its inclusion in the Report of the Auditor General. The Audit Para alleges violation of Rule 19 (iv) of the General Financial Rules (Volume-1) resulting in non recovery of an amount of Rs. 1199.25 million from the petitioner. In a nut shell, the PA Committee has directed the recovery of the said amount on the ground that the Board of the Authority was not competent to revise the payment schedule or to have changed the criteria or terms and conditions after completion of the bidding/tendering process. The Committee took up the matter for discussion and settlement on 29-05-2011 and consequently issued the directives dated 28-05-2014, followed by the directive dated 21-07-2014. Pursuant to the directive dated 21-07-2014, the Authority restrained the petitioner from further construction. Two questions arise for consideration by this Court, firstly, whether the proceedings of the PA Committee are barred or immune from judicial review in the light of Article 69 of the Constitution and, secondly, whether the authority could have acted without application of mind and in a mechanical manner pursuant to the directives of the PA Committee.



9. In order to appreciate the proceedings of the PA Committee in the context of Article 69 of the Constitution, it would be essential to examine the status, functions and procedure thereof. Article 171 of the Constitution mandates that the Auditor General shall submit a report to the President relating to the accounts of the Federation. The President has a Constitutional obligation to cause the said reports to be laid before both Houses of the Parliament. The Rules of 2007 prescribe the procedure and the forum in respect of the reports of the Auditor General. Rule 177(2) provides that the report of the Auditor General, laid on the Table by the Minister under sub rule (1), shall be referred to the PA Committee. Rule 2 defines a 'Committee' as meaning a Committee constituted under the Rules of 2007. Chapter XX relates to the 'Committees' and Rule 198 describes the various Committees, including the Standing Committee on Public Accounts. Rule 202 provides for the composition of the PA Committee while Rule 203 describes its functions. The other relevant rule in the context of adjudication of the instant petition is Rule 201(4), which contemplates that the Committee, after examining the expenditure, administration, delegated legislation, public petitions and policies of the Ministry concerned and its associated public bodies, may forward its report of findings and recommendations to the Ministry, and the latter is under an obligation to submit its reply to the Committee. Rule 203(4) empowers the PA Committee to make recommendations as it may deem fit in the context of the matters specified *ibid*. It is, therefore, obvious that the PA Committee has been constituted under the Rules of 2007, which have been passed by the National Assembly, pursuant to the powers vested under Article 67(1) of the Constitution.

10. Article 69 of the Constitution bars the jurisdiction of a Court to inquire into the proceedings of the Majlis-e-Shoora (Parliament). Sub Article 1

provides that the validity of any proceedings in the Majlis-e-Shoora (Parliament) shall not be called in question on the ground of any irregularity of procedure, while sub Article 2 bars the jurisdiction of any Court regarding any matter relating to an officer or member of the Majlis-e-Shoora in whom powers are vested by or under the Constitution for regulating procedure for the conduct of business, or for maintaining order in the Majlis-e-Shoora. Sub Article (3) of Article 69 explicitly explains that in the context of the said Article, Majlis-e-Shoora (Parliament) has the same meaning as in article 66. Article 66(5) expressly defines Majlis-e-Shoora as meaning either House or a joint sitting or a Committee thereof. When Article 69 and Article 66 are read together, it unambiguously shows that a Committee constituted under the Rules of 2007 and its proceedings definitely fall within the ambit of the expression 'proceedings of the Majlis-e-Shoora (Parliament)' in the context of Article 69. The Constitution of the Islamic Republic of Pakistan, 1956 and the Constitution of the Islamic Republic of Pakistan, 1962 contained similar provisions. It would, therefore, be beneficial to examine the precedent law so as to answer the question regarding the extent of the bar of jurisdiction under Article 69. The question of internal proceedings was examined by the august Supreme Court in the case of "Lt. Col. Farzand Ali and others vs. Province of West Pakistan through the Secretary, Department of Agriculture, Government of West Pakistan, Lahore" **PLD 1970 Supreme Court 98**. The august Supreme Court affirmed the earlier view taken in the cases of "Pakistan vs. (1) Ahmad Saeed Kirmani (2) Ch. Fazal Elahi, (3) Secretary, West Pakistan Legislative Assembly, (4) Mumtaz Hassan Qizalbash" **PLD 1958 Supreme Court (Pak) 397** and "Badru Haque Khan vs. (1) The Election Tribunal, Dacca, (2) The Chief Election Commissioner and (3) Jamalus Sattar Rahman" **PLD 1963 SC 704**. While referring to the former judgments the august Supreme Court observed in the context of Article 89 sub article (1) of the Constitution of 1956 as follows:-

“This Court was of the opinion that the principle was too broadly stated by the High Court and was apt to lead to dangerous misconceptions. But this Court itself did not attempt to lay down in what particular circumstances proceedings within an Assembly could possibly fall within the jurisdiction of the Courts, except to point out that matters which fell squarely within the definition of internal proceedings of the House would not be subject to scrutiny by the Courts. It was said that whatever can be “fairly described as internal proceedings relating to the proper business of the House would be wholly outside the corrective jurisdiction of the High Court.”

11. After examining the precedent law from other jurisdictions and quoting with approval the test indicated by Sir Erskine May in his treatise titled ‘Parliamentary Practice’ the apex Court observed and held as follows:-

“It will be observed that in none of these cases had any attempt been made to define as to what constitute “internal proceedings” but this much is clear that they do not extend to anything and everything done within the House. Thus as a general rule a criminal act done in the House would perhaps not be outside the course of criminal justice (vide observations of Stephen, J. In Bradlaugh v. Gossett). The test indicated by Sir Erskine May in

his book on Parliamentary Practice is as to whether what is said or done "forms part of a proceeding of the House in its technical sense, i.e. the formal transaction of business with the Speaker in the Chair or in a properly constituted committee". It would be neither possible nor desirable to attempt any exhaustive classification of the matters that may be comprised within the term "internal proceedings" but it will be sufficient for my purpose to indicate that whatever is not related to any "formal transaction of business" in the House cannot be said to be a part of its "internal proceedings".

12. The Hon'ble Hamoodur Rahman, C.J, as he was then, concluded as follows:-

"In this view of the matter, while I am prepared to concede that all that fairly concerns the internal proceedings of the House relating to its proper business is immune from challenge in Courts, I am not in a position to agree that a question relating to the title of a person to be a Member of the House or to continue to sit therein is a question pertaining to the internal proceedings of the House."

13. In the case of "Muhammad Azhar Siddiqui and others vs. Federation of Pakistan and others", PLD 2012 Supreme Court 774, the provisions

of Article 69 of the Constitution were elaborately examined by the august Supreme Court in the context of a ruling of the Speaker under Article 62 (2) *ibid*. To the extent of the ruling of the Speaker given under Article 62(2) it was held that the same was not part of the parliamentary process as the Speaker was performing an administrative task of determining whether a question of disqualification had arisen or not, and thus it was held that the bar under Article 69 did not cover such an act of the Speaker. However, the apex Court reaffirmed the earlier laid down principles and law relating to the bar in respect of 'internal proceedings' of the Parliament. It is, therefore, obvious that the proceedings of a formally constituted Committee of either House falls within the ambit of internal proceedings of the Majlis-e-Shoora (Parliament) and consequently are immune from challenge in Courts in the light of the bar contained in Article 69 of the Constitution. The proceedings of the Public Accounts Committee are, therefore, the internal proceedings of the Parliament and as such immune from being inquired into by this Court.

14. Next, is the question of the statutory duty and obligations of the Capital Development Authority relating to directives/recommendations issued or made by the Public Accounts Committee. In the context of the instant petition, the question that has to be answered is whether the Authority was justified in issuing the impugned letter dated 05-08-2014 without application of mind and in a mechanical manner. It would, therefore, be relevant to examine the scheme of the Ordinance to appreciate the status and functions of the Authority. The Authority has been established under Section 4 of the Ordinance. The Board has been defined in clause (c) of Section 2 of the Ordinance as meaning the Board constituted under Section 6 *ibid*. Section 5 provides that the general direction and administration of the Authority and its affairs shall vest in the Board. The Board is empowered to exercise all powers and do all acts and things which may be exercised or done by the Authority. The legislature, in subsection 2 of Section 5,

has expressly declared that while discharging its functions, the Board shall act on sound principles of development, town planning and housing, and shall be guided in questions of policy by such directions as the Federal Government may from time to time give in this regard. The powers and duties of the Authority are described in Chapter-III of the Ordinance. Section 49 vests the power in the Authority to retain, lease, sell, exchange, rent or otherwise dispose of any land vested in it. Section 32 declares that on making of an award under Section 28, the land shall vest in the Authority free from all encumbrances. Section 50 empowers the Federal Government to make rules to carry out the purpose of the Ordinance, while the Authority has the power to make the regulations under Section 51. Pursuant to powers vested under Section 50 and 51, the Federal Government or the Authority, as the case may be, have made various rules/regulations. The regulations made by the Authority pursuant to powers vested under Section 51 of the Ordinance, inter-alia, includes the Islamabad Capital Territory (Zoning) Regulations 1992, the Islamabad Land Disposal Regulations, 2005, the Islamabad Residential Sectors (Building Control) Regulations, 2005, the Capital Development Authority (Environmental Protection) Regulations, 2008 etc.

15. The Ordinance, when read as a whole, makes it obvious that it is a self-contained comprehensive statute, which provides for the planning and development of the Islamabad Capital Territory, and has prescribed a statutory framework for regulating all matters relating to development, planning and all activities relating thereto. It is the statutory obligation of the Authority to ensure that the provisions of the Ordinance and the rules/regulations made there under are complied with in letter and spirit. The Authority exercises its powers and functions through the Board. The Authority, through the Board, is the custodian of land entrusted to it under the Ordinance and, therefore, the latter is saddled with the duty to implement the laws/rules/regulations. The Board, therefore, has a pivotal role as an independent statutory authority. It is not only a regulator, but is

vested with the powers of enforcement as well. There is no cavil to the proposition that the Public Accounts Committee, being an integral part and its proceedings falling within the ambit of 'internal proceedings' of the Parliament, has to be given utmost respect and treated with deference. Its findings and recommendations carry immense sanctity and, therefore, have to be considered and acted upon with great care and diligence. However, as already pointed above, Rule 201(4) of the Rules of 2007 expressly provides that after the Public Accounts Committee has forwarded its report of findings and recommendations to a Ministry or its associated public body, then the latter is under an obligation to submit its reply to the Committee. It is implicit in Rule 201(4) that after receiving the report of findings or recommendations of the Public Accounts Committee, the Ministry or its associated public body, as the case may be, shall consider the same and, if required, afford an opportunity of hearing to the person being adversely affected, and then submit its reply to the PA Committee. The requirement of submitting a reply contemplated in Rule 201(4) essentially involves a process of considering the relevant factors, deliberations and taking appropriate decisions and actions. The recommendations, therefore, if acted upon in a mechanical manner, would not be in consonance with the law, particularly the Rules of 2007.

16. In the context of the instant petition it would be beneficial to refer to two passages from the celebrated *treaties* by De Smith, as quoted with approval by the august Supreme Court of Pakistan in the case of "*M.A.Rahman Versus Federation of Pakistan and others*" [1988 SCMR 691]. The said two passages are as follows:

"The relevant principles formulated by the Courts may be broadly summarized as follows. The authority in which a discretion is vested can be compelled to

exercise that discretion, but not to exercise it in any particular manner. In general, a discretion must be exercised only by the authority to which it is committed. That authority must genuinely address itself to the matter before it: it must not act under the dictation of another body or disable itself from exercising a discretion in each individual case. In the purported exercise of its discretion it must not do what it has been forbidden to do, nor must it do what it has not been authorized to do. It must act in good faith, must have regard to all relevant considerations and must not be swayed by irrelevant considerations, must not seek to promote purposes alien to the letter or to the spirit of the legislation that gives it power to act, and must not act arbitrarily or capriciously."


And:--

"An authority entrusted with a discretion must not, in the purported exercise of its discretion, act under the dictation of another body or person. In at least two modern Commonwealth cases licensing bodies were found to have taken decisions on the instructions of the heads of Government who were prompted by extraneous motives. But, as less colourful cases illustrate, it is enough to show that a decision which ought to have been based on the exercise of independent judgment was dictated by those not entrusted with the power to decide, although it remains a question of fact

whether the repository of discretion abdicated it in the face of external pressure. An it is immaterial that the external authority has not sought to impose its policy."

17. The august Supreme Court observed and held in the case of M.A Rehman supra that a discretion must be exercised only by the authority to which it is committed, and that in exercising the same the authority must genuinely address itself to the matter before it and must act in good faith and have regard to all relevant considerations. It was further held that in exercising discretion, the authority must not be swayed by irrelevant considerations nor must it seek to promote purposes alien to the letter and/ or to the spirit of the legislation that gives it power to act and, therefore, must not act arbitrarily or capriciously. As a corollary it is the statutory duty of the Board not to act in a mechanical manner. The Board, in the instant case, was required to have considered the recommendations/directives of the Public Accounts Committee and ought to have taken decisions based on the exercise of independent judgment, and thereafter to have submitted a reply to the latter. However, admittedly, as conceded by the learned counsel and also apparent from the record, the Board, instead of considering the directions/recommendations of the Public Accounts Committee, issued the impugned letter in a mechanical manner.

18. In the instant case the Audit Para relates to the alleged violation of Rule 9 (iv) of the General Financial Rules (Volume-1). The directives/recommendations issued by the Public Accounts Committee raise concerns which are within the powers and functions of the Authority to consider, and then to take necessary decisions and appropriate actions. The directives also



involve recommendations regarding the recovery of a substantial amount from the petitioner. The Audit Para has to be settled in the manner as prescribed, particularly under the Rules of 2007.

19. In the light of the above discussion, the letter dated 05-08-2014 is set aside as the same was issued in a mechanical manner and in violation of the principles highlighted above. It is, however, directed as follows;

(i) The Board of the Capital Development Authority shall cause a meeting to be called not later than fifteen days from the receipt of this judgment to consider the recommendations/directives of the Public Accounts Committee relating to the Project of the petitioner.

(ii) The Board may either afford an opportunity of hearing to the petitioner or seek a written explanation from the latter in respect of the directives/recommendations of the Public Accounts Committee.

(iii) The Board shall take decisions based on the exercise of independent judgment, having regard to all relevant considerations, and thereafter shall submit a reply to the Committee as prescribed in Rule 201(4) of the Rules of 2007.

(iv) The Board may pass or take such interim orders or actions as may be necessary or required in the circumstances.

(v) This judgment shall not prejudice or in any manner influence, impede or otherwise affect any proceedings or inquiry which may be pending under any law other than the Ordinance.

(vi) The Board shall complete the proceedings and submit its reply to the Public Accounts Committee not later than thirty days from the date of receiving this judgment.

20. The petition is, therefore, *disposed of* in the above terms.

(ATHAR MINALLAH)
JUDGE

Announced in the open Court on 03-03-2016

JUDGE

Approved for reporting.