

ORDER SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P. No.2509 of 2019
M/s Builders Associates (Pvt.) Limited
Versus
Federation of Pakistan through Secretary, Ministry of Overseas
Pakistanis and Human Resource Development and others

S. No. of order / proceedings	Date of order/ Proceedings	Order with signature of Judge and that of parties or counsel where necessary.
	11.03.2020	Barrister Bilal Akbar Tarar, for the petitioner Mr. Muhammad Nadeem Khan Khakwani, learned Assistant Attorney-General. Mr. Ummar Zia-ud-Din, Advocate for respondent No.3.

Through the instant writ petition, the petitioner, M/s Builders Associates (Pvt.) Limited, impugns the advertisement dated 20.05.2019 issued by respondent No.3 (M/s Pakistan Real Estate Investment & Management Company (Pvt.) Ltd.) inviting offers for renting out OEC tower building for a period of twenty years.

2. Learned counsel for the petitioner submitted that the contract for the construction of the OEC tower building had been awarded to the petitioner on 04.01.2012; that several disputes between the petitioner and respondent No.3 had arisen which are presently the subject matter of arbitration proceedings; that till date, the petitioner's final bill has not been cleared by respondent No.3; that the formal handing and taking over of the said building has not taken place; that when the instant petition was filed, the joint measurement of the works carried out by the petitioner had not taken place; that one of the conditions in the impugned advertisement is that the remaining works are to be completed by the tenant; and that if the remaining works are to be carried out by the tenant, it would be difficult to

ascertain the quantum of works already carried out by the petitioner.

3. Learned counsel for the petitioner further submitted that after April 2015, no payments have been made to the petitioner by respondent No.3; that in January 2016, the works on the project were suspended; that respondent No.3's stance is that no amount is due and payable to the petitioner; that the joint measurement of the works carried out during the pendency of the instant petition shows that an amount of Rs.129 million is due to be paid to the petitioner for the works carried out; that respondent No.3 has adjusted the amount paid as mobilization advance to the petitioner against the amount which is due and payable by respondent No.3 to the petitioner; and that despite the said adjustment, respondent No.3 is claiming further amounts from the petitioner; and that on 27.05.2015, respondent No.3 terminated the consultancy agreement with the consultant/engineer.

4. Furthermore, it was submitted that the impugned advertisement has been issued in violation of the requirements of the Public Procurement Rules, 2004; that respondent No.3 has not issued any tender documents; that the scope of the remaining works which the tenant is required to perform was not mentioned in the said advertisement; that the said advertisement does not even specify the standard and the quality of the works that are required to be performed by the tenant; that till date, the petitioner has not been expelled from the site in accordance with the procedure provided in the contract dated 04.01.2012; that on 29.05.2019, respondent No.3 simply informed the petitioner that it had been decided to close the project; and that the

impugned advertisement as well as the process pursuant thereto is in violation of the law laid down by the Hon'ble Supreme Court in the judgment reported as PLD 2019 SC 602. Learned counsel for the petitioner prayed for the writ petition to be allowed in terms of the relief sought therein. In making his submissions, learned counsel for the petitioner placed reliance on the judgments reported as 2013 SCMR 1707, 2007 PTD 1195 and PLD 2017 Islamabad 29.

5. On the other hand, learned counsel for respondent No.3 submitted that the instant petition was not maintainable since the petitioner had the alternative remedy of seeking the resolution of the disputes through arbitration; that in the arbitration proceedings between the petitioner and respondent No.3, the latter has already filed its claim; that the question whether the petitioner's expulsion from the site was in accordance with the terms of the contract dated 04.01.2012 can also be resolved by the learned Arbitrator; that the question as to whether any amount is due and payable to the petitioner can also be decided by the learned Arbitrator; that the petitioner was at liberty to participate in the competitive process pursuant to the said advertisement; and that since the petitioner did not participate in such a process, it did not have the *locus standi* to file the instant petition. Learned counsel for respondent No.3 prayed for the writ petition to be dismissed. In making his submissions, learned counsel for respondent No.3 placed reliance on the judgments reported as PLD 2017 Islamabad 115, 2014 CLC 174 and 2005 CLC 939.

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

7. On 04.01.2012, the petitioner and respondent No.2 (Employees Old-Age Benefits Institution) entered into a contract for the construction of OEC tower at Plot No.10, Sector G-9/4, Mauve Area, Islamabad. On 28.01.2013, respondent No.2 assigned its rights and obligations under the said contract to respondent No.3, which is a wholly owned subsidiary of respondent No.2. The works under the said contract were required to be completed within twenty two months. The contract price was Rs.1,539,976,379/-. The works under the contract are said to have commenced on 23.01.2012. The contract was required to be completed by 23.11.2013. The extension of time sanctioned by the consultant cause the contract completion date to be 15.07.2016.

8. The said contract contains an arbitration clause (clause 67) providing for the disputes arising from and related to the contract to be settled through arbitration in accordance with the provisions of the Arbitration Act, 1940 ("the 1940"). The disputes and differences between the parties to the said contract cause the petitioner to file an application under Section 20 of the 1940 Act seeking the reference of such disputes to arbitration. It is an admitted position that the said application was allowed vide order dated 05.03.2019 passed by the learned Civil Court. Vide order dated 13.05.2019, the learned Civil Court appointed Syed Qalb-e-Hassan Shah, learned Advocate Supreme Court (former Judge of this Court) as the sole Arbitrator. I am told that

the petitioner has already filed a claim against respondent No.3 in the arbitration proceedings.

9. This Court, vide order dated 19.07.2019, recorded the petitioner's primary concern that the measurement of the works carried out by the petitioner in pursuance of the contract had not taken place, and that respondent No.3 had expressed its intention through the impugned advertisement that the remaining works were to be carried out by the tenant selected through a competitive process pursuant to the impugned advertisement dated 20.05.2019. It was also recorded that respondent No.3 had addressed letters to the petitioner requiring the latter to participate in the joint measurement of the works. Vide the said order dated 19.07.2019, a period of two weeks was given for the joint measurement of the works to be carried out. On 10.10.2019, learned counsel for the petitioner confirmed that the joint measurement of the works had been completed.

10. It is apt to mention that as a result of the competitive process pursuant to the said advertisement, respondent No.3, in September 2019 has already executed a contract with the tenant.

11. With the joint measurement of the works having already been carried out, the quantum of the works already carried out by the petitioner has been ascertained. The question as to whether the petitioner is entitled to be paid for such works, and the question whether respondent No.3 could have adjusted the mobilization advance paid to the petitioner against the amount that it claims against the petitioner are for the learned Arbitrator to determine. It would also be for the Arbitrator to determine whether the petitioner's

expulsion from the site was in accordance with the provisions of the contract.

12. The petitioner's grievance regarding respondent No.3's decision to give the OEC tower building on rent to a tenant, who is to complete the remaining works on the building is based on its stance that the petitioner's pending bills have not been cleared and that the petitioner could not be expelled from the site in violation of the provisions of the contract. This grievance, in my view, is in the nature of a contractual dispute which could be agitated before the learned Arbitrator.

13. 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. Learned counsel for respondent No.3 has correctly asserted that the existence of an arbitration clause in the contract between the petitioner and respondent No.3 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)

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).

14. In the instant case, the dispute resolution clause in the contract is of wide amplitude. I am of the view that all contentions raised by the petitioner in the instant petition can also be raised

before the learned Arbitrator. The petitioner is at liberty to have the disputes and differences arising from and related to the contract resolved in accordance with the dispute resolution mechanism set out in clause 67 of the contract.

15. In view of the above, the instant petition is dismissed as not maintainable. There shall be no order as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

Sultan*