

JUDGMENT SHEET.
ISLAMABAD HIGH COURT, ISLAMABAD,
JUDICIAL DEPARTMENT.

W.P No.1193/2014.

Naureen Azhar etc. Vs. Federation of Pakistan etc.

Petitioners by: Mr. Sikandar Bashir Mohmand &
Syed Zulqernain Safdar, Advocates.

Respondents by: Barrister Muhammad Mumtaz Ali,
AAG.

W.P No.1194/2014.

Aerotron (Private) Limited Vs. Federation of Pakistan etc.

Petitioner by: Mr. Sikandar Bashir Mohmand &
Syed Zulqernain Safdar, Advocates.

Respondents by: Barrister Muhammad Mumtaz Ali,
AAG.

Date of Hearing: 06.02.2020.

MOHSIN AKHTAR KAYANI, J:- Through this single judgment, I intend to decide above mentioned two writ petitions having similar question of law and facts arising out of the impugned order dated 24.01.2014.

2. Brief facts referred in writ petition No.1193/14 are that the petitioners have assailed the order dated 24.01.2014, whereby both the petitioners being Directors of Aerotron (Private) Limited have been blacklisted by the Director General, Defence Purchase, M/o Defence Production, Government of Pakistan. The petitioners are former Directors of Aerotron (Private) Limited, who were acting as independent representatives for Bell Helicopter Textron Inc. of USA in Pakistan, Azad Kashmir and Afghanistan. Both the petitioners resigned from Directorship of Aerotron (Private) Limited on 06.03.2012 and they are neither shareholders nor directors and not even the employees or holding any other position, whereas the entire management has been vested with two other directors/shareholders Wali Muhammad and Muhammad Fahad Ali Azhar.

3. In writ petition No.1194/2014, Aerotron (Private) Limited alongwith its Directors petitioner/Azhar Wali Mohammad and petitioner No.3/Fahd Ali Azhar have also challenged the order dated 24.01.2014 for blacklisting Aerotron (Private) Limited by the Director General, Defence Purchase, M/o Defence Production, Government of Pakistan.

4. Learned counsel for the petitioners contends that the petitioners and their predecessor in interest have been representing Bell Helicopter Textron Inc. of USA in Pakistan, Azad Kashmir and Afghanistan since 1974 till 14.08.2012 and during 38 years of their representation the Bell Company has provided different kind of helicopters to Pakistan Army and Civil Armed Forces namely Bell 206B Jetranger II/III, Bell AH-If Cobra helicopters, Bell 412 helicopters, Bell 206L-IV helicopters, Bell Ah-IF helicopters, Bell UH-IH II helicopters, Bell 412 EP helicopters and Bell 412 EP helicopters; that on 09.05.2012 Commandant Central Aviation Spares Depot (EME) Dhamial/respondent No.10 wrote an email to the company informing that all type of business interaction with Aerotron (Private) Limited have been limited due to security concerns since 14.10.2011 and the Bell company was also requested to stop communication with Aerotron (Private) Limited and its representative pertaining to all business deals; that on 26.05.2012 another email and letter were issued by DG Procurement/respondent No.9 to Bell company informing that legal agent APL and its directors (present petitioners) Security Wise permanently barred/not cleared for any business interaction with Army and defence organizations and they have been asked to change their local representatives in Pakistan with immediate effect; that this entire issue gave rise to the filing of the writ petitions; that the petitioners have not been provided with opportunity of hearing by the competent authority under DGDP Rules, whereas the petitioners have been blacklisted and barred from any future representation and business transactions and as such action of the respondents authority is contrary to Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973; that the petitioners have been deprived of any formal written order containing detailed reasons, which is necessary under PPRA Rules, 2004 read with section 24-A of the General Clauses Act, 1897; that the respondents authorities have not taken into account

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relevant information that petitioners Naureen Azhar and Farnaz Raheel were not directors or shareholders of the APL company but despite that they have been blacklisted without giving opportunity of hearing; that the petitioners have been knocked out on the basis of impugned letter dated 24.01.2014 without considering the fact that the petitioner Aerotron (Private) Limited is under its representative agreement and its consultant agreement with Bell Helicopter Textron, which is in field, as such, the petitioners have suffered irreparable loss and damage by the act of the respondents authority; that in result of issuance of letter dated 09.05.2012 by the Commandant of the Central Aviation Depot (EME) Dhamial, the Bell Helicopter Textron issued termination notice on 15.08.2012, therefore, the petitioners approached this Court through writ petition No.2858/2012, however, during pendency of the said writ petition a show cause notice was issued on 28.06.2013 without any lawful authority, therefore, the petitioners filed another writ petition No.2927/2013, which was clubbed with earlier writ petition No.2858/2012, wherein this Court passed order dated 12.07.2013 that no adverse action shall be taken against the petitioners till next date of hearing, however, both the writ petitions were dismissed vide consolidated judgment dated 27.11.2013; that the said consolidated judgment was assailed in ICAs No.1106 and 1107 of 2013, which are pending adjudication before Hon'ble Division Bench of this Court; that the petitioners were given personal hearing on 22.01.2014 during the pendency of the ICAs and after that impugned order dated 24.01.2014 was passed by Director General Defence Purchase/respondent No.8 mainly on the ground that the petitioners are blacklisted for passing of highly sensitive National Security Data to the foreigners; that respondent No.8 was not competent to issue any such order nor even opportunity of fair trial has been granted to the petitioners in terms of Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973, even the respondents authority did not share any information on which the petitioners were debarred from doing their lawful business.

5. Conversely, learned AAG contends that M/o Defence Production, Government of Pakistan is competent authority to deal with the affairs of the petitioners as defence purchase procedure and instructions have been issued, which

deal with the affairs of contractors with M/o Defence and Pakistan Army and as such the writ petitions are not competent mainly on the ground that alternate remedy of appeal is provided in Defence Purchase Procedure and Instructions-35 (Revised 2017); that the petitioners have not yet filed any appeal before the competent authority as such their writ petitions are not maintainable; that when alternate remedy is in field, which has not been exercised, it is appropriate that the matter be referred to the appellate authority for determination qua the allegations in proper manner.

6. I have heard learned counsel for the parties and gone through the record.

7. Perusal of record reveals that petitioner No.1/Naureen Azhar and petitioner No.2/Farnaz Raheel in writ petition No.1193/2014 are the local representative of Bell Helicopter Textron Inc. of the USA in Pakistan under the consultant agreement, independent representative agreement and they are performing their representative dues for the last 38 years, however, Director General Defence Purchase/respondent No.8 issue an email dated 09.05.2012 informing the Bell Helicopter Textron, Aerotron (Private) Limited, Azhar Wali Mohammad and Fahd Ali Azhar (petitioners No.1 to 3 in writ petition No.1194/2014) and permanently barred and not cleared for any business with Pakistan Army and defence organizations, this aspect has surprised to the petitioners, who felt aggrieved with the same as they have not been extended any right of hearing, however, on the basis of said communication the Bell Helicopter Textron Inc. terminated both independent representative agreement and consultation agreement of petitioner Aerotron (Private) Limited. Legal notice dated 24.08.2012 was issued by the petitioners side to the respondents but the same was not replied and as a result whereof writ petition No.2858/12 was filed before this Court by claiming suspension of correspondence dated 09.05.2012 and 26.05.2012. The para-wise comments were filed by the respondents authority, who expressed his intention for blacklisting all the petitioners permanently and it was referred that formal show cause notice was issued, therefore, another writ petition No.2927/2013 was filed against the notice dated 28.06.2013 and even restraining order was issued. The writ petitions were dismissed vide consolidated judgment dated 6.11.2013, where-after

the petitioners assailed the said judgment in ICAs No.1106 and 1107 of 2013, which are pending adjudication before Division Bench of this Court. The petitioners were served with two different notices by the respondents authority, whereas time has been fixed for hearing on 22.01.2014, however, respondent No.8 issued final letter on 24.01.2014 in the following manner:-

“To

*M/s Aerotron (Pvt) Ltd,
House No.6-A, Street No.16, F-6/3,
Islamabad.
Tel No.051-2273413*

*Subject: Blacklisting of Firm – M/s Aerotron (Pvt) Ltd.
Islamabad.*

1. With immediate effect, your firm alongwith following management is hereby Blacklisted by the competent authority as your firm is involved in passing highly sensitive National Security Data to the foreigners:-

| <i>Ser</i> | <i>Name</i> | <i>CNIC No.</i> | <i>Designation</i> |
|------------|--|------------------------|--------------------------|
| | <i>Mr Azhar Wali Mohammad</i> | <i>42301-2788584-9</i> | <i>Managing Director</i> |
| | <i>Mr Fahd Ali Azhar</i> | <i>42301-5780642-9</i> | <i>Director</i> |
| | <i>Mrs Naureen Azhar Wali Muhammad</i> | <i>42301-5637950-6</i> | <i>Director</i> |
| | <i>Mrs Farnaz Raheel</i> | <i>42301-5648305</i> | <i>Director</i> |

2. Implication on Contracts/ITs: The contracts already placed or for which the necessary approval of the competent purchase authorities have already been obtained in favour of your firm will not be effected. Your firm in accordance with the terms and conditions will execute these contracts. However, no more Its will be issued to your firm from all the DPs/Defence Organizations.

*Lieutenant Colonel
for Director General Defence Purchase
(Syed Kamran Mehmood)”*

8. The above referred letter proves malafide of the respondents, who have not even blacklisted the firm Aerotron (Pvt) Ltd. but also made allegations upon the Managing Director and other directors that they have passed on highly sensitive National Security Data to the foreigners and due to the said reason, they all have been blacklisted.

9. While considering the proposition in hand, it is necessary to consider the two separate elements in detail. Firstly, the reasons of blacklisting as to whether the

petitioners were afforded proper opportunity of hearing as required under Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973 and what are minimum requirements for any authority before proceedings for recommendations of blacklisting as the state owned organization and the departments are exercising its executive powers and they are under legal obligation to give the reasons, however, there are certain guidelines, which have been recognized around the globe in foreign jurisdiction as held in 2014 SCMR 1748 (Messrs Kulja Industries Limited vs. Chief General Manager, W.T. Project, BSNL and others). Following guidelines have been highlighted to deal with the issue of blacklisting:-

“The legal position governing black listing of suppliers in USA and UK is no different. In USA instead of using the expression 'Blacklisting' the term "debar ring" is used by the Statutes and the Courts. The Federal Government considers 'suspension and debarment' as a powerful tool for protecting taxpayer resources and maintaining integrity of the processes for federal acquisitions. Comprehensive guide lines are, therefore, issued by the government for protecting public interest from those contractors and recipients who are non-responsible, lack business integrity or engage in dishonest or illegal conduct or are otherwise unable to perform satisfactorily. These guidelines prescribe the following among other grounds for debarment:--

(a) Conviction of or civil judgment for--

(1) Commission of fraud or a criminal offence in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction;

(2) Violation of Federal or State antitrust statutes, including those proscribing price fixing between competitors, allocation of customers between competitors, and bid rigging;

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, receiving stolen property, making false claims, or obstruction of justice; or

(4) Commission of any other offence indicating a lack of business integrity or business honesty that seriously and directly affects your present responsibility;

(b) Violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program, such as--

(1) A willful failure to perform in accordance with the terms of one or more public agreements or transactions;

(2) A history of failure to perform or of unsatisfactory performance of one or more public agreements or transactions; or

(3) A willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction;

(c) xxxx

(d) Any other cause of so serious or compelling a nature that it affects your present responsibility.

21. *The guidelines also stipulate the factors that may influence the debarring official's decision which include the following:--*

(a) The actual or potential harm or impact that results or may result from the wrongdoing.

(b) The frequency of incidents and/or duration of the wrongdoing.

(c) Whether there is a pattern or prior history of wrongdoing.

(d) Whether contractor has been excluded or disqualified by an agency of the Federal Government or have not been allowed to participate in State or local contracts or assistance agreements on a basis of conduct similar to one or -amore of the causes for debarment specified in this part.

(e) Whether and to what extent did the contractor plan, initiate or carry out the wrongdoing.

(f) Whether the contractor has accepted responsibility for the wrongdoing and recognized the seriousness of the misconduct.

(g) Whether the contractor has paid or agreed to pay all criminal, civil and administrative liabilities for the improper activity, including any investigative or administrative costs incurred by the government, and have made or agreed to make full restitution.

(h) Whether contractor has cooperated fully with the government agencies during the investigation and any court or administrative action.

(i) Whether the wrongdoing was pervasive within the contractor's organization.

(j) The kind of positions held by the individuals involved in the wrongdoing.

(k) Whether the contractor has taken appropriate corrective action or remedial measures, such as establishing ethics training and implementing programs to prevent recurrence.

(l) Whether the contractor fully investigated the circumstances surrounding the cause for debarment and, if so, made the result of the investigation available to the debarring official."

10. The other important aspect, which requires interpretation is the reasons referred in the impugned letter dated 24.01.2014 of blacklisting is that the company and other petitioners are involved in passing highly Sensitive National Data to the

foreigners, such like allegations can be justified if such material has been confronted to the petitioners and their replies ought to have been taken. Concept of intelligence based reports or for that matter security clearance and sensitive information factors require thorough probe, which is lacking in this case. The authority cannot exercise its power in unbridled manner without disclosing the reasons and factors under the term **“Sensitive National Security Data”** as Constitution of Islamic Republic of Pakistan, 1973 guarantees equal protection of law, elimination of exploitation and safe guard against such kind of actions. Even otherwise, U/S 24-A of General Clauses Act, 1897, every public functionary is duty bound to decide the case after application of mind. Reliance is placed upon **2010 SCMR 1475 (United Woolen Ltd. Workers’ Union vs. United Woolen Mills Ltd.)**. Similarly, principle in terms of Article 4 of the Constitution of Islamic Republic of Pakistan, 1973 has to be applied where one cannot be judged in his own case and breach of such principle is violative of right of access to justice to all, which is part and parcel of due process of law. Reliance is placed upon **PLD 1999 SC 1126 (New Jubilee Insurance Co. Ltd. Karachi vs. National Bank of Pakistan Karachi)**. It is required that action of blacklisting had to be processed through speaking order, which should be based on sound and justified grounds, even the authorities have to demonstrate that adequate show cause notice and hearing resulted into impugned action. Reliance is placed upon **2005 CLC 366 (Messrs Nizami Construction Company through sole proprietor vs. Chief Executive Officer, Gujranwala Electricity Supply Company (GEPCO))**.

11. In such type of circumstances, the entire order on the basis of which blacklisting has been conferred upon the petitioner is silent or based upon vague reason **“passing of highly Sensitive National Security Data to the foreigners”** will not serve the purpose, in these circumstances High Court in process of judicial review is not equipped to dig out these facts, whereas it is duty of the respondents authority to provide such information. At this stage, the respondents authority has heavily placed reliance upon ***Chapter-X of Defence Purchase Procedure and Instructions -35 (Revised 2017)***, which provides grievance redressal system to

examine those reasons and factors to be confronted to the petitioners. Relevant extract of DPP1-35 of 2017, which deals with the powers of appeal are as under:-

“Appeal by the Suppliers

10. Firm can make appeal against any penalty/disciplinary action, rejection of store or any problem area towards the execution of the contracts to the CPO with a copy to DGDP/DPs concerned. Appeal will be forwarded with full grounds and justification to concerned DPs/DGDP or Secy (DP).

11. Appeal if made to Secy (DP) for hearing before JAC shall be subject to payment of appeal fee of Rs.5000/- in favor of state; other wise appeal will not be entertained. There is no fee for appeals made to other authorities in the chain of procurement as mentioned above. Such appeals will however be responded in normal manner by appellant authority and will not be placed before JAC.

12. Appeal can be made to Secy (DP) by the firm within 12 months of imposition of LD/RE against the firm. However appeal against rejection of stores can be lodged within 30 days of signing of rejection note by the Inspector. Appeal made after stipulated period shall not be entertained being time barred. Period of 12 months for preferring appeal will take effect as follow:-

- a. **Appeal against LD.** The date of issuance of formal amendment letter regarding imposition of LD should be considered as the reference date for the purpose of determining/calculating the time frame of 12 months for appeal.*
- b. **Appeal against RE.** The appeal received for waiver of RE amount should be within 12 months with effect from the date of letter issued by the concerned procurement agency asking the defaulted firm to deposit the RE amount so calculated.”*

12. While considering the above background, the petitioners have challenged the impugned order dated 24.01.2014 through the instant writ petition on 15.03.2014 within the stipulated period as such no appeal has been filed, however, when confronted learned counsel for the petitioners contends that the petitioners could not be pushed back to the same authority, which has passed the impugned order and now become the appellate authority as such appeal provided under DPPI-35 (Revised 2017) is not adequate remedy and he has relied upon **1999 SCMR 467 (Nizamuddin and another vs. Civil Aviation Authority and 2 others)** & **PLD 2006 SC 697(Wattan Party through President vs. Federation of Pakistan through Cabinet Committee of Privatization, Islamabad)** but the proposition in hand is altogether different and the judgments referred by learned counsel for the

petitioners are not relevant as the allegations referred in the impugned letter dated 24.01.2014 would not be scrutinized in judicial review in terms of Article 199 of the Constitution of Islamic Republic of Pakistan 1973 as it relates to question of fact whether sensitive national security data was submitted by the petitioners to the foreigners or otherwise, as such this question relates to highly sensitive information, which might be mere allegation, therefore, when no material is available on record to consider the allegations justified or otherwise, it would be appropriate that matter be referred back to the authority provided in DPPI-35 (Revised 2017) in appeal. The reason which prevails with the respondents authority for blacklisting the petitioners is “*sensitive national security data referred to the forefingers*” has not been confronted to the petitioners nor any such information has been disclosed before this Court by the respondents, therefore, it is not possible for this court to see through the sensitivity of the matter as claimed by the respondents, whether the blacklisting is justified in those prevailing circumstances or otherwise is a question of fact, however, when such results were covered due to vile placed under the garb of national security data or the reports of the intelligence agencies requires scrutiny, which could only be done by the authority concerned, however, the concept the allegations against the petitioners, which are sensitive in nature or *prima facie* based upon the intelligence agencies’ reports, requires reappraisal, hence the status of such information has to be seen from the judicial prism based upon the judgment of the Superior court reported as **2018 PLC(C.S) 519 (Muhammad Zubair Vs.**

National Command Authority and others), wherein it has been held that:-

---Concept of security clearance based upon intelligence reports could be used in the cases of promotion of the officers but principles of fairness and reasonableness was foundation of all the system of Government---Constitution guaranteed the equal protection of law, elimination of exploitation and safeguards against any kind of discrimination---National Command Authority Act, 2010 could not supersede the concept of Fundamental Right---Any material which came in the way of promotion of petitioners/employees collected by the intelligence agencies had to be confronted through some internal mechanism if same was not confidential in its nature---If such material was confidential and it would affect the working of such kind of strategic organization then Authority should follow a procedure to dis-engage the services of such officials---Authority could not exercise its powers in an unbridled manner without disclosing the reasons and factors under the garb of term 'security clearance'---Nothing was on record which could be used against the petitioners/employees while denying the right of promotion---

Reason put forward by the authority under the garb of term 'security clearance' was not sustainable in the eye of law."

Similar concept has also been highlighted in 2006 PLC (C.S) 619 Lahore (Muhammad Akbar Khan Hoti v. Federation of Pakistan), 2015 SCMR 1006 (Secretary, Establishment Division, GOP, Islamabad v. Aftab Ahmed Manika), 2009 PLC (C.S) 348 Islamabad (Abdul Wadood Khan v. Secretary, Establishment Division, GOP), PLD 2015 Lahore 317 (High Court Bar Association, Bahawalpur v. Federation of Pakistan) and PLD 1999 SC 1126 (New Jubilee Insurance Co. Ltd. v. National Bank of Pakistan).

13. Keeping in view the above background, it is clear that the very purpose of the agencies' reports is only meant to access the information but to decide the question of integrity, relations and loss to National Ideology in terms of secret information requires certain yardstick for holding an opinion that the information, if any, were given to the foreigners by the petitioners are against the national security. Is a question of fact which requires scrutiny and is to be settled by the respondent department, therefore, in the light of power conferred under section 24-A of the General Clauses Act, 1897, the respondents authority has to exercise its powers reasonably, fairly, justly and for the advancement of the purposes of the said matter and it is necessary or appropriate to give reasons for making the order or the case may be, to provide the details reasons in writing to the person effected prejudicially, hence by applying the concept of 2016 CLD 134 Babar Sattar Vs. Federation of Pakistan, wherein it has been settled that "*the concept of absolute, unfettered, or unguided exercise of discretion by public authority is treated is alien to the essence of rule of law*".

14. The above referred discussion leads to an irresistible conclusion that the petitioners have been stigmatized due to the blacklisting order of the respondent authority and they have not been confronted with any such material to justify the allegations, even such kind of decision is unreasonable on the touchstone of Article 10-A of the Constitution of the Islamic Republic of Pakistan, 1973.

15. The status of Naureen Azhar and Mrs. Farah Naz Raheel i.e. petitioners in captioned W.P. No.1193/2014, has not been considered by the respondent

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authorities before issuing the order of blacklisting dated 24.01.2014, as both the petitioners have no nexus or association with Aerotron (Pvt.) Ltd. since 06.03.2012 and this aspect has been justified from the record of SECP by the petitioners, which discloses that the petitioners have resigned from Aeroton (Pvt.) Ltd. as they were neither shareholders, nor Directors or having enjoyed any position of an employee or officer of APL, rather they do not have any direct nexus or association with the said Company, even otherwise, this aspect has been verified from Form-29 of the SECP dated 28.03.2012.

16. In view of above discussion, both the captioned W.P. No. 1193/2014 (Naureen Azhar etc vs. Federation of Pakistan etc) and W.P. No.1194/2014 (Aerotron (Pvt.) Ltd. vs. Federation of Pakistan etc) are **DISPOSED OF** by converting the same into appeals. Office is directed to transmit copies of both the writ petitions alongwith annexure to Director General Defence Purchase/Respondent No.8, who shall place the same before the appellate authority under DPPI-35 (Revised 2017), where-after the petitioners would be afforded proper opportunity of hearing and a speaking order shall be passed in this regard within a period of 02 months under intimation to this Court.

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(MOHSIN AKHTAR KAYANI/
JUDGE

Announced in open Court on 24.02.2020.

JUDGE

R Anjam