

ORDER SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P.No.4347 of 2019
M/s Al-Bhakri Operator
Versus
National Highway Authority and others

S. No. of order / proceedings	Date of order/ Proceedings	Order with signature of Judge and that of parties or counsel where necessary.
	09.07.2020	Syed Iqbal Hussain Shah Gillani, Advocate for the petitioner, M/s Tayyaba Abbasi and Waqas Malik, Advocates for the N.H.A.

Through the instant writ petition, the petitioner, M/s Al-Bhakri Operator, impugns the show cause notice dated 19.11.2019, issued by the National Highway Authority (“N.H.A.”) (respondent No.1), whereby the petitioner has been called upon to show cause as to why a penalty of Rs.30,000/- per day may not be imposed on it in accordance with clause 3.7(i) of the Conditions of Contract Agreement. In the said show cause notice, it has also been stated that an amount of Rs.15,054,600/- is still outstanding against the petitioner.

2. Learned counsel for the petitioner submitted that a contract was executed between the petitioner and the N.H.A. for the operation, management and maintenance of Toll Plaza at Amri Qazi Ahmed (Bridge) N-5/N-55 (“the Toll Plaza”); that after the execution of the said contract, the Deputy Commissioner, Jamshoro, had imposed a ban on the movement of the vehicles and diverted the traffic due to the *Urs* of Hazrat Lal Shahbaz Qalandar; that the Toll Plaza was also attacked by the transporters due to which, the collection of toll was suspended from 07.05.2019 to 24.05.2019; that thereafter the petitioner requested the N.H.A. to conduct a joint recount of the traffic with respect to the Toll Plaza;

that the joint traffic recount for the period between 03.07.2019 and 30.07.2019 resulted in a report which shows that only an amount of Rs.2,176,071/- could be collected from the Toll Plaza; that this amount is 33% less than the guaranteed revenue of Rs.3,281,000/- per month; that the petitioner requested the N.H.A. to revise the rescheduling of the toll payment, but despite the same, the N.H.A. has issued a show cause notice to the petitioner; and that the petitioner has already submitted its reply to the show cause notice, but till date, no response has been received. Learned counsel for the petitioner prayed for the writ petition to be allowed in terms of the relief sought therein.

3. On the other hand, learned counsel for the N.H.A. submitted that the duration of the contract awarded to the petitioner has already expired on 30.06.2020; that the Toll Plaza in question is due to be re-auctioned, but the petitioner is refusing to part with its possession; that the petitioner had failed to pay the N.H.A. the guaranteed amount of Rs.3,281,000/- per month; that the reduction in the traffic was not in any manner attributable to the N.H.A.; that the heavy traffic on N-55 (Indus Highway) was stopped with effect from 17.09.2018 pursuant to the orders passed by the Hon'ble Supreme Court; and that instead of submitting a reply to the impugned show cause notice, the petitioner approached this Court and obtained an interim order so as to avoid its obligations under the contract. Learned counsel for the N.H.A. prayed for the writ petition to be dismissed.

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

5. It is an admitted position that the process for the award of the operation, management and

maintenance of the Toll Plaza for the period between 23.04.2019 and 30.06.2020 was initiated on 07.02.2019. The petitioner had guaranteed a monthly revenue of Rs.3,281,000/-. The contract for the operation etc. of the Toll Plaza was awarded to the petitioner on 23.04.2019.

6. The petitioner has not been able to deposit the guaranteed revenue from the Toll Plaza with the N.H.A. This default on the petitioner's part caused the N.H.A. to issue show cause notice dated 19.11.2019 to the petitioner. Vide interim order dated 13.12.2019, this Court restrained the N.H.A. from passing a final order.

7. The excuse put forth by the petitioner for not paying the guaranteed revenue to the N.H.A. in the reply dated 21.11.2019 to the said show cause notice was that the local transporters had created hurdles in the toll collection, and that on 04.05.2019, transporters and locals attacked the Toll Plaza and injured the petitioner's staff. The said incident was said to have suspended toll collection between 07.05.2019 to 24.05.2019. The toll collection is said to have been resumed on 25.05.2019 on the intervention of the law enforcement agencies. Since the toll collection was reduced by 30% than the amount guaranteed in the petitioner's bid, the petitioner had deposited an installment of Rs.2,200,000/- per month.

8. The subject matter of the instant petition are disputes arising and related to the terms of the contract between the petitioner and the N.H.A. for the operation etc. of the Toll Plaza. Clause 9.4 of the said Contract provides a mechanism for the resolution of such disputes. For the purposes of clarity, the said clause is reproduced in Schedule-A to this judgment.

9. In essence, it provides that disputes or differences of any kind between the petitioner and the N.H.A. arising from the contract, during the progress of the work or after its completion etc. to be resolved in accordance with the provisions of the Arbitration Act, 1940 after the stipulated pre-conditions are satisfied. Admittedly, the dispute agitated by the petitioner in the instant petition arises from and is related to the terms of the contract between the petitioner and the N.H.A. for the operation etc. of the Toll Plaza.

10. 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. 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 installments 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), M/s 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).

11. 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 9.4 of the contract.

12. 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*

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Schedule-A**Clause 9.4: RESOLUTION OF DISPUTES**

If any dispute or difference of any kind whatsoever arises between the OMC and the NHA in connection with or arising out of the Agreement or performance of the job whether during the progress of the job or after its completion or after its termination abandonment or breach of the Agreement, the following steps to be followed;

- a. At first place the dispute will be referred to Employer representatives (for official communication), the said notice/reference shall contain the cause of action, mentioning facts of the case and relief sought. The Employer representatives (for official communication) shall decide the dispute within twenty eight (28) days of the receipt of such notice.
- b. If the OMC is dissatisfied with the decision of the Employer representative (for official communication) or if the decision of the Employer representatives (for official communication) is not forthcoming within the stipulated period, the OMC may within two (2) weeks from the receipt of the decision of the Employer representative (for official communication) or expiry of twenty eight days' time refer the matter to the Employer Representative along with the cause of action mentioning facts of the case and relief sought, who will forward the dispute alongwith supporting documents to the standing dispute resolution committee, the dispute resolution committee will act as a Sole Adjudicator and shall decide the matter within twenty eight (28) days from the date of submission.
- c. The OMC, if dissatisfied with the decision of the Adjudicator shall have the right to serve Notice for Intention to commence arbitration within twenty eight (28) days of receipt of the Adjudicators' decision or within twenty eight (28) days after the expiry of the period stipulated herein above for decision of the Adjudicator in case he fails to give decision. The Arbitration shall take place at Islamabad

under the Pakistan Arbitration Act of 1940 as amended from time to time. The arbitration proceedings shall take place at Islamabad and shall be conducted in the English language. For selection of Arbitrator, the Employer will provide the list of approved Arbitrators on its panel for selection by the OMC and acceptability of same (Arbitrator) thereon by the Employer.

- d. Provided however, that the parties shall have the right at resolution of disputes amicably within fifty six (56) days of service of Notice for Intention to commence Arbitration and the Arbitration shall commence in case of failure of amicable settlement.
