

P L D 2012 Islamabad 50

Before Shaukat Aziz Siddiqui, J

PAKISTAN STATE OIL COMPANY LTD.

through General Attorney---Petitioner

versus

NATIONAL HIGHWAY AUTHORITY

through Chairman and another---Respondents .

Writ Petition No.1581 of 2007, decided on 6th February, 2012.

Contract Act (IX of 1872)--

----Ss. 37, 39 & 2(h)---Constitution of Pakistan, Art.199---Constitutional petition---Contract--
-Refusal to perform---Petitioner company, offered to respondent its Retail Fuel Stations and
respondent vide letter approved said lease---Petitioner, in response, complied with the requisite
conditions laid down in the approval letter---Respondent vide impugned letter abruptly informed
the petitioner that they had decided to withdraw the letter of approval---Agreement between the
parties had been completed as the offer, acceptance and payment of consideration had been
completed about 15 months ago---After acceptance of the consideration amount, the petitioner
was fully justified to make the claim that it was a concluded agreement for all intent and
purposes---Respondent was not vested with any power to withdraw from the contract on
the feeble and flimsy ground---After lapse of 15 months, respondent was estopped by its words
and conduct to resile from the commitment reflected through acceptance letter---Binding and
valid agreement was reached between the parties thereby bringing reasonable expectancy and
valuable right in favour of the petitioner---Valuable right accrued in favour of the petitioner had
been taken away even without providing him an opportunity of hearing which was against the
principles of natural justice "audi alteram partem"---Impugned decision of the respondent for
withdrawal of contract, was declared as tainted with mala fide, ulterior motives, arbitrary, sham,
offending to the settled law and an infringement to valuable right accrued to the petitioner, which

was not sustainable---Same was set aside and respondent was directed to complete the required formalities and allow the petitioner to complete its project and operate accordingly.

2001 CLC 104; 1988 MLD 1175; 2001 MLD 1925 and Federation of Pakistan and others v. Ch. Muhammad Aslam and others 1986 SCMR 916 rel.

Syed Ehsan Raza for Petitioner.

Mrs. Rehana Rahi for Respondent.

Date of hearing: 6th February, 2012.

JUDGMENT

SHAUKAT AZIZ SIDDIQUI, J.---The briefly stated facts giving rise to filing of the instant writ petition are that respondent No. 1 is a body corporate having perpetual successions and a common seal with power to acquire, hold and dispose off property and may by its name sue and to be sued. The petitioner being largest Oil Marketing Company in Pakistan, offered to respondent No.1, its services to establish Retail Fuel Stations on south and north bounds of Islamabad-Peshawar Motorway (M-1) at start of M-1 (from M-2) and at the end of M-1 (Peshawar) vide its letter TAA/5000/NHA dated 18-5-2004, at the following major terms:

(a) PSO will pay land rent of Rs. 320, 000/- p.m with one year advance for above sites.

(b) PSO will develop all sites 100 x 350 each site dimension.

(c) PSO will pay rent enhancement at the rate of 7% after every three years.

(d) Lease period will be 30 years.

Respondent No.1 vide letter No.8(1)/NHA/GM(Ops)/2005/1415 dated 9-4-2005 approved lease of NHA land measuring 350 feet by 150 feet (9 Kanals 13 marlas) for establishment of filling/CNG outlets located at (A) between km.000-005 and (B) between km 146-155 (North and South bound carriageways on Islamabad-Peshawar Motorway (M-1) for a period of 30 years on the terms and conditions stipulated in letter dated 9-4-2005. In response, petitioner complied with the requisite conditions laid down in the approval letter dated 9-4-2005 in letter and spirit and informed respondent No.1 vide letter dated 11-5-2005 along with bank draft to the tune of Rs.4,090 bank guarantee and its extended validity of PKR 250,000 for each site and undertaking etc. The petitioner reminded respondent No.1 that petitioner has completed all formalities and has deposited Rs.4.09 Millions on account of one year advance rent, NOCs, Rs.1.00 Million bank guarantee blank judicial stamp paper worth Rs.153,600 etc. vide its letter dated 7-4-2006. Respondent No.1 vide impugned letter No.8(1)/NHA/Director (OMU)/2673 dated 5-9-2006 abruptly informed the petitioner that respondent No.1 has decided to withdraw the letter of intent/approval and also returned the original bank draft, bank guarantees, judicial stamp papers, undertakings and site plans, without specifying the cogent reasons and legal substance. Petitioner reminded and explained respondent No. 1 that agreement has been completed between the parties as the offer, acceptance and payment of consideration has- been completed about 15 months ago, therefore respondent No.1 is not entitled to take any step prejudicial to the rights of petitioner and also requested to allow him to proceed in accordance with the approval of development of PSO New Vision Retail Outlets, on the described locations, but respondents remained unmoved and now started negotiations with other companies to lease out service areas.

2. The learned counsel for the petitioner further contended that, respondent No.1 approved the lease of more than hundred (100) persons or companies on the same term and conditions, as granted to the petitioner and out of more than hundred { 100) approvals only petitioner's approval of lease has been withdrawn, therefore, petitioner has been discriminated and under the law, the functionaries are not entitled to exercise the discretion at their own sweet will rather they are bound to act fairly and justly. That, since respondent No.1 approved the lease of 30 years on payment of amount described in the approval letter and parties also entered into a concluded contract and the petitioners fulfilled all the codal and legal formalities, therefore, after lapse of almost 15months, the decision of respondent No.1 regarding withdrawal of approval without assigning any reasons illegal and without lawful authority, therefore, it is prayed that writ petition may be accepted and impugned notice No. 8(1)/NHA/Director/(OMU)/2006/2673 dated 5-9-2006 may be declared as without lawful authority and of no legal effect.

3. On the other hand, respondent No.1 filed reply and parawise comments and contended that respondent issued a letter of intent only and never signed the lease agreement for establishment of filling/CNG station at the, Peshawar Motorway. All the payments as stated by the petitioner were returned vide Letter No.8(1)/NHA/Director (OMU) 2006/2673, Islamabad dated 5-9-2006. That the site plan was not approved/verified by the respondent, therefore, it has not got final approval for implementation. The acquisition of the service area land was under process and exact khasranumbers were not known, therefore, the lease agreement could not be signed. In the meantime the answering respondent imposed a BAN on PSO on account of rental default on operational retail outlets, throughout the NHA network. The Economic Coordination Committee

of the cabinet in its meeting held on 27th of September, 2006 decided that all fresh leases under process/allocation be frozen until approval of the new leasing policy therein, it was categorically decided that the Ministry in consultation with respondent No.1 prepare a transparent policy for leasing the Right of Way (ROW). Thereafter, the answering respondent in its 149th Executive Board Meeting in consideration of policies of ECC and chronic default situation of petitioner decided not to process case of petitioner where LOI were issued and, therefore, the lease agreement was not signed. That, the petitioner is defaulter of the respondent as not paying the annual rentals of the retail outlet, established throughout the network; therefore respondent withdrew letter of intent till the outstanding dues are cleared by petitioner. Furthermore, it is the policy of NHA being the attached department of Federal Government, Ministry of Communication that no lease/contract is signed with any company who is defaulter of answer respondent.

I have heard the learned counsel for the parties and perused the documents annexed with the petition.

4. In order to appreciate whether proposal, acceptance and performance of obligations by the petitioner, it was a concluded agreement or not? Reproduction of letter of intent dated 9th of April, 2005 is appropriate which reads as under:

This is to inform you that the Member (Operations), NHA , Islamabad has approved the lease of NHA land measuring 350feet by 150 feet (9 Kanals and 13 Marlas) each outlet with exclusive rights (excluding service areas to be established at River Indus) for establishment of Filing/CNG Outlets (underlining is mine) located at (A) between km.000-005 and (B) between KM 146-155 (North and South Bound Carriageways) on Islamabad - Peshawar Motorway (M-1), for a period of thirty (30) years.

Kindly submit the following documents and deposit the dues through Demand Draft in favour of NHA Road Maintenance Account, Islamabad" in order to conclude the formal Lease Agreement: (underlining is mine).

(a) Four Bank Guarantees of Rs.250,000 on Rs.100 Judicial Stamp paper for all sites, for the construction of cutoff drain and other facilities, as per Clause 4.3 of the Conditions of Lease Agreement.

(b) Undertaking by the lessee on Rs.100/Judicial Stamp Paper for both sites, as per Clause 4.9 of the Conditions of Lease Agreement.

(c) Bank Draft of Rs. 3, 840, 000 being one year advance on account of Annual Ground Rental Charges for all sites, as per Clause 4.2.1 of the conditions of Lease Agreement.

(d) Bank Draft of Rs. 80, 000 on account of Approach Rental Charges for four sites, as per Clause 4.2.3 of the Conditions of Lease Agreement.

(e) Demand Draft for Rs.160, 000 on account of NOC/Registration Fees for four Retail Outlets, as per clause 4.2.2 of the conditions of Lease Agreement.

(f) Blank Judicial Stamp Papers worth Rs.153, 600 value equivalent to 4% of Annual Ground Rent, for Signing of Lease Agreement.

(g) Bank Draft of Rs.10,000 on account of processing fees in favour of "NHA Revenue Account".

(h) Ten copies of Site Plan duly verified by the Project Director (M-1).

Please complete the above mentioned formalities latest by Monday, the 13th June, 2005."

Plain reading of above acceptance clearly suggests that Member (Operations NHA) approved the lease of NHA land in favour of petitioner. As is evident from above, petitioner was called upon to submit documents and deposit the dues through demand draft mentioned against item Nos. a to h. It is an admitted fact that petitioner complied with the direction issued vide above mentioned letter and in this regard letter dated 11th May, 2005 was addressed to the Assistant Director R/F which was received in his office on 13-5-2005. To appreciate the controversy, I find it appropriate to provide the contents of this letter also which are as under:--

"Thank you for giving us an opportunity for establishing captioned outlets (M) on Islamabad, Peshawar Motorway (M-1)

We are pleased to provide you the following requisite payments as per the proposed offer given by you.

R.k	Description	Payments	Payment Instrument	Date	Amount	Bank
1	Advance Annual Ground Rent for one year for four sites	3,840,000	D 0850645 12-5-2005	4,090,00	MCB	
2.	Approach Road Rent @ 20,000 per Site	80,000				
3.	NOC/registration Fees @ Rs.40,00 per site	160,000				
4.	Processing Fees @ Rs.10,000	10,000				
	Total Payments1+ 2 + 3 + 4		Rs.4,090,000			

* The Demand Draft includes all the payments as per item 1, 2, 3 & 4.

(5) Blank Judicial Stamp Papers worth Rs.153,600 for signing lease agreement.

(6) Undertaking.

(7) We also enclose hereto, the required ten copies of the site plan duly verified by the Project Director (M-1) and the Bank Guarantees with serial numbers as follows:--

Sr.No.	Bank Guarantee	Serial No.	Amount
1.	0-5 KM, North Bound	15050018	Rs.250,000
2.	0-5 KM, South Bound	15050017	Rs.250,000
3.	146-155 KM, North Bound	15050016	Rs.250,000

4.	1146-155 KM, South Bound 115050015	15050015	Rs.250,000
----	---------------------------------------	----------	------------

Further, we- would like to draw your attention towards the following two points,

(1) Article-15 of the said draft agreement and propose the NHA authorities to incorporate the provision of joint arbitrators instead of General Manager (Operations) of NHA, to decide the dispute of the parties related to the lease agreements.

(2) The issue of jurisdiction has also not be addressed in the said agreement and we suggest that if you could consider the place of arbitration shall be with the Courts in Karachi.

We appreciate your kind consideration' or selecting Pakistan State Oil Company Limited, as your business partner and look forward to your continued support, as always.

With best regards."

Section 2(h) of contract Act, 1872 provides the definition of contract which is as under:

"Contract". An agreement enforceable by law is a contract."

Since basic ingredients of any contract i.e. offer/proposal, acceptance against consideration were completed on 13th May, 2005, therefore, respondent authority was not vested with any power to withdraw from the same on the feable and flimsy grounds. It is worth to mention here that after keeping the money for about 16 months, respondent awoke up suddenly and vide impugned letter dated 5-9-2006 informed the petitioner about the decision of withdrawal of letter of intent in the following words:--

"This is to inform you that your proposal referred above has not B been acceded and NHA has decided to withdraw the Letter of intent (LOI)."

After acceptance of the consideration amount, the petitioner was fully justified to make the Claim that it was a concluded agreement for all intent and purposes. After lapse of such a period, the respondents were estopped by their words and conduct to resile from their commitment reflected through acceptance letter dated 9-4-2005. It is well settled law with the mandate of the dictums of the superior courts of the country that in action slackness and dubious acts of executive functionaries cannot be accorded approval by the superior courts more particularly when such like actions on face of it are besides the law, mandate of the constitution and principle of natural justice. In the instant matter, valuable right accrued in favour of the petitioner has been taken away even without providing him an opportunity of hearing, which is against the global principle of natural justice "Audi Alterm Palterm". The events took place from 18-5-2004 to 13-5-2005, left no other interpretation except that for all practical intent and purposes a binding and a valid agreement was reached between the parties, thereby bringing reasonable expectancy and valuable rights infavour of the petitioner and only secretarial formalities were to be completed by the respondent. But instead of that, petitioner has been confronted with disgusting conduct of respondent.

I sought guidance from case-law reported as 2001 CLC 104, 1988 MLD 1175 and 2001 MLD 1925. Dictum laid down in the case of Federation of Pakistan and others v. Ch. Muhammad Aslamand others (1986 SCMR 916) is lightship on the issue brought before this Court, which commands as under:--

"An executive agency must be rigorously held to the standards by which it professes its action to be judged. Accordingly, if dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed. This judicially evolved rule of administrative law is now firmly established and rightly so. He that takes the procedural sword shall perish with that sword.

Acts performed and orders made by public authorities deserve due regard by courts and every possible explanation for their validity should be explored and the whole field of powers in pursuance to which the public authorities act or perform their function examined and only then if it is found that the act done, order made or proceeding undertaken is without lawful authority should the courts declare them to be of no legal effect."

In this view of the matter, instant writ petition is allowed and the impugned decision conveyed vide letter dated 5-9-2006 of withdrawal is declared as tainted with mala tide, ulterior motives, arbitrary, sham, besides the law, offending to the dictums of the superior courts of the country and an infringement to valuable accrued rights to the petitioner, which is not sustainable, therefore, same is hereby 'set aside. The respondent No.1 is directed to complete the required secretarial formalities and allow the petitioner, State enterprise to complete its project and operate accordingly.

H.B.T./55/IsI

Petition allowed.