P L D 2012 Lahore 52

Before Muhammad Ameer Bhatti, J

Messrs SYED BHAIS (PVT.) LTD. through Director---Petitioner

Versus

GOVERNMENT OF PUNJAB through Secretary Local Government and 3 others---Respondents

Writ Petitions Nos. 10703, 10823 and 10945 of 2011, decided on 7th July, 2011.

(a) Constitution of Pakistan---

----Art. 199---Companies Ordinance (XLVII of 1984), S.196--- Constitutional petition---Company---Only competent person can file and initiate legal proceedings---Act of ratification of petition can only be availed, if Directors were empowered in the Articles of Association.

2005 CLD 1208 **ref**

(b) Constitution of Pakistan---

----Art. 199---Constitutional petition---Scope---Contractual obligation---Unclean hands of petitioner---Effect---Petitioners having failed to perform their obligations within the stipulated period, had no right to seek any remedy before the High Court with unclean hands.

PLD 2009 SC 28 and 2007 SCMR 1318 **ref**

(c) Constitution of Pakistan---

----Art. 199---Constitutional jurisdiction of High Court---Scope---Contractual obligation---Arbitration clause mentioned in the contract---Disputed questions of fact---Controversy between the parties hinged upon the pivotal point as to whether the physical work (construction) executed by the petitioners was in accordance with the contract or not---Such question, held, could not be resolved by High Court in exercise of constitutional jurisdiction under Art.199 of the Constitution, as the court had no mechanism to resolve the question involved---Where the disputed questions of facts had been raised, particularly when floating as the surface of the record and arbitration clause was provided in the contract, constitutional petition was not maintainable, however each case had to be decided on its own peculiar facts and circumstances.

(d) General Clauses Act (X of 1897)---

----S. 24-A---Constitution of Pakistan, Art. 199---constitutional petition---Contractual obligations not covered by any statute---Benefit of S.24-A of General Clauses Act, 1897 could not be extended to the petitioners---Principles.

(e) Constitution of Pakistan---

----Art. 199---Companies Ordinance (XLVII of 1984), S.196---Constitutional petition---Maintainability---Company---Constitutional petition, in the present case, had not been filed by the petitioner on the basis of the resolution of the company---Effect---When law required a thing to be done in a particular manner, the same must be done accordingly and if prescribed procedure was not followed, presumption would be that the same had not been legally done---Subsequent resolution of the company authorizing the petitioner to ratify would not resolve the issue as for that matter there should have been some powers vesting in the Directors to ratify the wrong and no such power had been provided in the Memorandum and Articles of the company---Constitutional petition, on such score, was not maintainable.

2005 CLD 1208 **ref**

(f) Contract Act (IX of 1872)---

----S. 126---Bank guarantee---Default---Written demand---Notice of default before encashment---Words of guarantee made it clear that the very first written demand constituted the notice of default, meaning thereby that the "notice of default" and "on such written demand" had been amalgamated into one and there was no need to serve notice separately---Guarantee must follow its terms and conditions---Guarantee was an independent and self governing document and only words of the same could be considered for its decision without considering agreement or contract for making any decision on it---Principles.

(g) Interpretation of statutes---

----Any condition cum provision of law which has no consequence is considered advisory and directory but not having any mandatory consequence---Provision which has no mandatory effect, if not complied with, does not vitiate the effect of the act/order for that matter.

(h) Contract Act (IX of 1872)---

----S. 126---Bank guarantee---Encashment---Scope---Bank guarantee shall be considered for its encashment along with its conditions---Encashment by Bank in violation of the terms of the guarantee---Effect.

PLD 2003 SC 191 **ref**

(i) Contract Act (IX of 1872)---

----S.126---Constitution of Pakistan, Art.199---Constitutional petition---Bank guarantee---No terms attached to the guarantee and no form of default asserted therein---Once guarantee placed for encashment cannot be stayed and Bank is bound to encash it and courts are refrained to interfere in such like matters.

(j) Contract Act (IX of 1872)---

----S.126---Constitution of Pakistan, Art.199---Constitutional petition---Bank guarantee---Arbitration clause provided in the contract---Effect---Once such guarantee put for encashment cannot be stayed and has to be encashed and aggrieved person may challenge the encashment in the ordinary course of law or avail the remedy of arbitration as provided under the contract.

(k) Constitution of Pakistan---

----Art. 199---Constitutional jurisdiction of High Court---Scope---While sitting in writ jurisdiction, High Court cannot delve upon factual depth to resolve the whole dispute in a slipshod manner---Questions which involve factual controversies cannot be resolved by High Court through summary procedure under Article 199 of the Constitution---Where the matter needs evidence which exercise cannot be undertaken by High Court for which the petitioners have to approach the proper forum.

Kh. Saeed-uz-Zafar, Asjad Saeed and Ch. Muhammad Naseer for Petitioner

Shakil-ur-Rehman, Additional Advocate-General along with Shehryar Sultan DG, LG and CD Department and Ch. Abrar Ahmad, Director Legal, LG and CD Department.

Khurram Mushtaq for Respondents Nos. 1 to 3.

Syed Shadab H. Jafferi and Pervaiz Akhtar Tahir for Respondent No.4

Dates of hearing: 16th, 17th, 20th, 21st, 23rd and 24th June, 2011.

JUDGMENT

MUHAMMAD AMEER BHATTI, J.---By this single judgment I propose to dispose of W.Ps. Nos.10703 of 2011, 10823 of 2011 and W.P. No.10945 of 2011 all of whom involve common issues of law and fact.

2. Through this writ petition the petitioner has challenged the letter dated 14-5-2011 issued to respondent No.4 by respondent No.3 whereby he has made the request for the encashment of bank guarantee and subsequent letter dated 16-5-2011 issued by respondent No.4 to the present petitioners through which he has asked the present petitioners to make the arrangement of the funds for the payment in accordance with the encashment letters/notices of respondent No.3.

3. The brief facts necessary for the disposal of these writ petitions are that the petitioners were awarded a contract for design, supply, installation, operation and management of water filtration plants in the area specified as packet given 3-A Central Punjab-I. There is no dispute between the parties about the terms and conditions of the said contract. Likewise, there exists no controversy that the petitioners received the advance amount. (W.P. No.10703 of 2011) of Rs.314,483,355 (W.P. No.10945 of 2011) Rs.692,441,694 (W.P. No.10823 of 2011) Rs.200,200,069 and according to the settlement of the parties the petitioners were to provide the bank guarantees equal to the advance money for the use of said advance to be solely used for the purposes of the contracts.

4. It is the case of the petitioners that according to the ,contract, they have utilized this advance for the purpose of establishment of infrastructure, mobilization of personnel and installation of equipment along with other necessary facilities and services. Besides they have installed 24 (W.P. No.10703), 60 (W.P. No.10945), 29 (W.P. No.10823 of 2011) water filtration plants till May 2010 and for that matter, they have placed on record the copies of the contract, terms and conditions, copies of the guarantee and many other documents/letters issued on behalf of the respondent and the petitioners. However, the respondents decided for the encashment of the guarantee probably being dissatisfied with the work of the petitioners and the letters of

encashment have been impugned on many grounds, inter alia, the letters have not been issued by the competent authority as the language of letters show "in view of the decision of the competent authority" meaning thereby that the condition/requirement of the guarantee has not been fulfilled before placing it for encashment.

5. However, this court vide order dated 18-5-2011 directed the respondents to file report and parawise comments and in response thereto, the petitioners also filed rejoinder. The case was fixed for arguments and learned counsel of all the parties have addressed this court on dates mentioned in the order sheets. The case has been heard at length to the satisfaction of the learned counsel. According to the arguments advanced by the learned counsel for the petitioners, the impugned letters have not been issued by the competent authority as the words of this letter plainly show that it has been issued on the direction of the competent authority. Since no document/order/letter issued by the competent authority has been placed on record by the respondents, the letters impugned are unsustainable in the eye of law.

6. It is further contended that no officer except the competent authority is vested with the power to issue these letters, who can issue these letters/orders for the encashment, hence the bank is not bound to comply with such orders/letters which have not been issued by the competent authority. As such, the letters issued by the incompetent person or officer has no validity in the eye of law as these are void orders/letters. Reliance has been placed on 2007 SCMR 1328, PLD 2010 SC 759 and PLD 1997 SC 351. On the basis of these judgments, the learned counsel contends that the Hon'ble Supreme Court has laid down the dictum that the order which has been issued by an incompetent person is void and need not to be implemented and consequently there will be no violation of those orders/letters. As a matter of fact, the letters have been issued by the incompetent person as it is ostensibly evident from its text that the competent person is someone else, but the letters impugned neither disclosed any order of the competent authority nor the competent personality has been made known, hence there is no justification for its issuance. Further contends that these letters also do not fulfil the requirements/conditions mentioned in the guarantee as it is the pre-requisite of the guarantee that notice for default be issued. However, neither any notice of default was issued nor any reason has been assigned in the letters impugned, thus it is violation of section 24-A of General Clauses Act as well as the violation of section 129-A of the Contract Act

7. Learned counsel keeping in view the objection raised in the report and parawise comments by the respondents also contends that the objection of the respondents that the writ petitions are not competent against the encashment of guarantee, is untenable in the light of judgments PLD 2004 SC 935, PLD 2003 SC 191 and PLD 1976 Kar. 644, asserts that the writ petitions are very much maintainable where the conditions mentioned in the guarantee have not been followed or complied with. Being a conditional guarantee, if the conditions have not been fulfilled, fundamental right accrues to the petitioners to agitate the matter through constitutional petitions

when their rights safeguarded through the conditions have been jeopardized by the government functionaries not by the private persons. Contends that inviolable rights of the citizens cannot be allowed to be usurped by the government functionaries Further contends that there is an arbitration clause provided in the contract. Since the present dispute is too ticklish to be referred to the arbitrator, the objections raised by the respondents through their report and parawise comments are not defensible Further contends that the arbitration is not an expeditious remedy after seeking the encashment of guarantee while relying on 1998 CLC 1178, 2004 SCMR 1587 and 1998 SCMR 2268 and 2278. Referring to the clause of the contracts wherein both the parties have been bound down for some obligations which have been extended to each other prior to contract, so notice of default was a sine qua non before issuing the impugned letters while referring to clause 45.1 of the Contract which is as under:--

45.1. If the contractor is not executing the works in accordance with the contract or is neglecting to perform his performance his obligation thereunder so as seriously to effect the carrying out of the works the Engineer may give notice to the contractor requiring him to make good such failure or neglect.

8. The contention of the learned counsel that since the notice of default has been defined and clarified in the contract so it can be safely gathered from that clause that the notice must have been issued about any default committed by the petitioners about the contract before issuing the impugned letter, hence the letter impugned is illegal and unlawful. The learned counsel for the petitioners contends that the document/guarantee can only be encashed if it has been presented according to the requirement of the guarantee.

9. He has referred to the book, Documentary Credits and Related Transactions:--

Chapter 6 of representation of documents

The UCP contains detailed rules relating to the documents which are presented under the credit. Those rules are technical and detailed and it is not possible to accord specific treatment to them here. This section is therefore concerned with the strict compliance principle and the duties of the banks which process the documents.

(1). Strict compliance. The only real difficulty which arises in the otherwise enviable position of

a beneficiary under a confirmed irrevocable letter of credit is that he must take great care in presentation of documents under the credit. The doctrine of strict compliance has been referred to above. Article 13(a) of the UCP sets out the standard for examination of documents by banks. Strict compliance is a requirement of along with a provision that "documents which appear on their face to be inconsistent with one another will be considered as not appearing on their face to be in compliance with the terms and conditions of credit".

10. Referring to this cardinal principle contends that the bank has every right to refuse the guarantee if the letter of encashment does not tally with the guarantee. Learned counsel for the petitioners further referred to:--

Uniform Rules for demands guarantees ICC published No.458.

Article 10: a. A Guarantor shall have a reasonable time within which to examine a demand under a guarantee and to decide whether to pay or to refuse the demand.

b. If the guarantor decides to refuse a demand, he shall immediately give notice thereof to the Beneficiary by teletransmission, or, if that is not possible, by other expeditious means. Any documents presented under the Guarantee shall be held at the disposal of the Beneficiary.

Article 11: Guarantors and Instructing Parties assume no liability or responsibility for the form, sufficiency, accuracy, genuineness, falsification, or legal effect of any document presented to them or for the general and/or particular statements made therein, nor for the good faith' or acts or omissions of any person whomsoever.

11. He further refers to the Articles 10 and 11 of The ICC Uniform Rules for demands guarantees ICC publication No.458 and to establish his arguments that the law requires the fulfilment of all the obligations mentioned in the guarantee whereas the fulfilment of conditions is lacking as mentioned in the guarantee, so the bank is not bound to encash the guarantee and obligated to refuse it till fulfillment of the terms of the guarantee. He adds that the document/guarantee is tripartite agreement between the banker, the beneficiary and the persons at whose instance it is issued by the bank and if any of the other two parties perform any act without the knowledge of the petitioner, it will be prejudicial to the rights of the petitioners and in that case, they are aggrieved persons as they will suffer an irreparable loss. He further relying

on judgment 2000 CLC 451 and 1995 CLC 105, drew the attention of this court as to how to interpret the agreements.

12. On the other hand learned counsel for the respondents Mr. Shakil-ur-Rehman Khan Additional Advocate-General raised preliminary objections that the writ petitions have been filed by unauthorized persons, hence are not competent while referring to about Annexure-A. The authorization given by the Board of Directors to Masroor Ahmad Khan (W.P.No.10703 of 2011) and Tauseef Anjum (W.P.No.10945 of 2011) who have filed these writ petitions and challenged the order dated 14-5-2011 but the letter of authority attached with these writ petitions transpires that it has been issued to challenge the order dated 11-3-2011, so this petition has been filed by incompetent person without the permission to assail the order/letter dated 14-5-2011 and is not maintainable and liable to be dismissed on this solitary ground. He has placed reliance on PLD 1966 SC 684:--

(b) Company-suit on behalf of Company by a person (Director-in-Incharge of Company)-Not competent unless he is so authorized by a resolution passed by Company's Board of Directors-Meeting of Directors not duly convened unless due notice of it given to all Directors.

2008 CLD 239:

Civil Procedure Code (V of 1908)---Suit on behalf of private limited company was to be filed by an authorized person who was duly authorized in accordance with Memorandum and Articles of Association of the company---In order to determine whether suit was instituted by a person duly authorized to do so, reference would have to be made to Articles of the Company---Burden to show that suit had been filed by authorized person was upon plaintiff who failed to discharge the burden by not producing Boards' Resolution and Memorandum and Articles of Association of Company---If there was a defect in institution of proceedings, such defect was incurable---Suit was instituted by unauthorized persons and plaint was rejected by the court---Application was allowed accordingly.

2006 CLD 85:

Companies Ordinance (XLVII of 1984), S.29---Civil Procedure Code (V of 1908), O.XXIX, R.1---Institution of a suit by a company---Authorization of a person, requirement of---Business

of a corporation or company was to be carried on under its Articles of Association---Under the law the suit on behalf of a corporation or company was to be filed by an officer authorized under the Articles of Association or through a resolution passed by the Board of Directors---Where the plaintiffs, in order to prove that the authorized officer had instituted the suit, had not filed such documents, it was established beyond doubt that an unauthorized person had filed the suit on behalf of the plaintiffs, who also could not have signed or verified the plaint as required under O.XXIX, R.1 of the Civil Procedure Code, 1908.

PLD 1999 Karachi 260:

Civil Procedure Code (V of 1908)---O.XXIX, R.1---Person authorized to file suit on behalf of a body corporate---Burden to prove maintainability of such suit---Suits were filed by authorized officers on behalf of plaintiff Banks---Authorized attorneys were not examined as witnesses---Burden to show that the suits had been filed by authorized attorneys was upon the plaintiffs---Mere existence of clause in the powers of attorneys empowering the attorneys was to initiate proceedings in the absence of Articles of Association and exercise of authority in terms thereof was not sufficient---Suits instituted by the plaintiffs were not maintainable in circumstances.

Administration of justice---Proceedings found to be not maintainable---Effect---Judgment or decree, even on admission of defendant, cannot be granted in the proceedings which are found not maintainable---Position of Court, in relation to proceedings, found not maintainable is synonymous with action taken without jurisdiction and, therefore, no effective relief could be granted.

1993 CLC 66

Constitutional petition filed on behalf of a company/ companies---Essentials---Constitutional petition filed on behalf of company/companies should be accompanied by the Memorandum/Articles of Association and the resolution of the Board of Directors containing names of Directors who had participated in the meeting and such meeting should also authorize a specific person for filing Constitutional petition---Constitutional petition not accompanied by such essential documents would be incompetent and deemed to have been filed without any authority of law---Petitions were dismissed in circumstances:

PLD 1991 Lah. 381:

When a company institutes a suit, it has to establish that the suit has been competently and authorisedly instituted on its behalf--Even person incharge of the affairs of the company unless specifically authorized in this regard is not considered competent to institute proceedings on behalf of the corporate entity.

PLD 1997 Kar 276:

Pre-emption suit---Such suit filed on behalf of corporation/ company without reference to any resolution authorizing any of the plaintiffs to file suit for pre-emption---Cause of action for filing such suit arose in favour of plaintiffs on 23-4-1994 when they received information about sale of property in question---Resolution of Company passed earlier on 1980, could not be treated as special resolution authorizing plaintiffs to file suit for pre-emption on behalf of company in 1994---Suit being incompetent, plaint was barred by provisions of O.VII, R.11, C.P.C. plaint was rejected in circumstances.

2005 CLD 1208:

(a) Companies Ordinance (XLVII of 1984), S.196---Contract Act (IX of 1872), Ss. 196, 197, 198 & 199---Civil Procedure Code (V of 1908), O.XXIX, R.I---Constitution of Pakistan (1973), Art.199---Constitutional petition---powers of Directors of company to conduct proceedings---Scope---Powers of ratification of wrong and illegal act---Board of Directors of a company could confer authority/power on Director or officer or Secretary of a private limited company in pursuance of resolution of Board of Directors in a meeting duly convened with prospective effect, but such power/authority could not be conferred retrospectively nor there was any provision in law which could enable the Board of Directors to confer such authority/power retrospectively and also to ratify the acts, wrongfully or illegally done, by Director/Principal Officer/Secretary of a private limited company---Provision of ratification as envisaged in the Contract Act, 1872, were not attracted in the present case as in Contract Act, 1872, the power of ratification had to be specifically conferred on a principal by---Virtue of which he could ratify act of his duly authorized agent which at the time of performance the agent was not empowered or authorized to undertake or perform---Ratification essentially presupposed the existence of relationship of principal and agent and no such relationship existed between petitioner-Company and its Director---Action of ratification of Board of Directors in ratifying the acts of its Director in filing Constitutional petition without authority/ power would have no basis unless it would be established that Director had been empowered or authorized by Articles of Association of Company to ratify illegal or unauthorized act of Director, Secretary or Principal Officer.

(b) Administration of justice---When law required the doing of a thing in a particular manner then it could be done in that manner only and no other manner of doing such an act could be resorted.

(c) Companies Ordinance (Companies Ordinance (XLVII) of 1984, S.196 Civil Procedure Code (V of 1908), O.XXIX, R.1.---Constitution of Pakistan (1973), Art.199---Constitutional petition---Maintainability---Constitutional petition was filed by a person who was not authorized/empowered to file same on behalf of petitioner Company as he was not duly authorized/ empowered by means of a Resolution of the Board of Directors passed in a proper meeting of Board of Directors---Illegal/unauthorized act of Director of petitioner-Company in filing/instituting petition without authority or power, could not be ratified or clothed with legality by a subsequent Resolution by the Board of Directors conferring on him the authority to file/institute, defend, compound or abandon the legal proceedings.

In the present case after the objection, the petitioner filed a C.M. No.2301 in W.P. No.10703 and C.M. No. 2 of 2011 in W.P. No.10823 of 2011 on 23-6-2011 through which the petitioners have placed on record other Resolutions of the Board of Directors passed in meetings of Board of their Directors and through these Resolutions conferring the authority to file/continue with petitions which are pending adjudication in this court. These C.Ms. were opposed on the ground that according to the Memorandum and Articles of Association of the Company, the power is not available with the Directors to ratify illegal or unauthorized act. So powers are not available with the Director under Articles of Association. Subsequent resolution is nullity in the eye of law.

13. I have considered the arguments of the parties it is correct and admitted position that these writ petitions have been filed on the basis of the resolutions which were issued for challenging some order dated 11-3-2011 issued by the authority/respondent. Filing of present C.M. No.2301 of 2011 in W.P. No.10703 of 2011, C.M. No. 2302 of 2011 in W.P.No.10823 of 2011 are admissions on behalf of the petitioners as they tried to rectify the illegal act of the petitioners. Since it is settled law that only competent person can file and initiate the legal proceedings and it is also settled law that act of ratification can only be availed if it empowers the Directors in the Articles of Association as Law is clear by reported in 2005 CLD 1208. Hence, neither this application can be allowed nor the document/Subsequent Resolution can be considered to be issued legitimately and writ petition is liable to be dismissed on this lone score.

14. The second preliminary objection of the respondents is that the petitioner has approached this court with soiled hands and he is not entitled to seek the extraordinary constitutional jurisdiction of this court. To reinforce his arguments in his behalf, he contends that the commencement date for the contract was 24-9-2009 and according to contract it was to be completed within the

period of 3 years and 9 months, nine months were for the completion of the entire work and 3 years for its operational maintenance. The total plants which were to be installed were 768 but the petitioner has installed 24 (in W.P. No.10703) and (in W.P. No.10945 of 2011) 611 required but installed 13(3 only commissioned), (W.P. No.10823 of 2011) 540 required but installed 29 uptil now and these figures are not disputed. Viewed in this perspective, the petitioners have not completed/performed their obligations within the stipulated period, hence they have no right to seek any remedy before this court for getting any relief against the encashment letter issued by the respondents as it was exclusively their own amount which was paid in advance for the completion of the work and the writ petitioners admittedly failed to do so, thus disentitled to any relief from this court. Reliance has been placed on

PLD 2009 SC 28:

Art.199---Constitutional jurisdiction of High Court---Scope---Constitutional jurisdiction is discretionary in character, and therefore, cannot be invoked by a person who had come to the court with unclean hands and likewise no one can be allowed to take advantage of his wrong.

2007 SCMR 1318:

No one can be allowed to take advantage of his wrong act or fraud played by him.

Arts.185(3) & 199---Party not approaching High Court and Supreme Court with clean hands---Effect Such party would not be entitled to discretionary and equitable relief---Party seeking equity must have equities in his favour.

15. Learned counsel for the respondent contends that there is no document attached by the petitioners with the writ petitions according to the sub clause 33.1(ii) of the Contract which was to be issued by the Engineer of Employer in support of their case. Further contends that disputed questions of facts have been raised which cannot be resolved while exercising constitutional jurisdiction, rendering these writ petitions not maintainable. Further contends that the arbitration clause is provided in the contract in the presence of that clause, the writ petitioners have no right to invoke constitutional jurisdiction of this court and writ petitions are liable to be dismissed in the presence of alternate remedy provided with the consent of the parties.

16. The learned counsel contends the petitioners cannot get the benefit of section 24-A of General Clauses Act as this provision does not provide any opportunity of hearing for the violation of any provision of a contract. The General Clauses Act will be applicable where the statute confers a power to make any order or to give any direction to any authority, officer or person". He has relied on

PLD 2010 SC 676

Pakistan International Airlines Corporation Act (XIX of 1956), Ss.4, 5, 6, 8, 10 & 30---Constitution of Pakistan (1973), Art.199---Constitutional petition---Maintainability---Terms and conditions of service of employees of Pakistan International Airlines Corporation---Plea raised by Corporation was that constitutional petition before High Court was not maintainable and principle laid down by Supreme Court in Muhammad Mubeen-us-Salam's case reported as

PLD 2007 SC 681

was applicable---validity---Although the Corporation was discharging functions in connection with the affairs of Federation, yet aggrieved persons could not approach High Court by invoking its constitutional jurisdiction---If any adverse action was taken by employer in violation of statutory rules, only when such action should be amenable to constitutional jurisdiction but if such action had no backing of statutory rules then principle of "Master and servant" would be applicable and such employees had to seek remedy permissible before the court of competent jurisdiction---Rules laid down in the judgments of Supreme Court in Muhammad Mubeen-us-Salam's case, reported as

PLD 2007 SC 681,

would be applicable to ordinary person filing petition by invoking jurisdiction of High Court under Art.199 of the Constitution and he had to approach the court within a reasonable time---Although no definition of the expression "reasonable time" was available in any instrument of law, however, the courts had interpreted it to be ninety days---Pakistan International Airlines Corporation was performing functions in connection with the affairs of the Federation but since

services of employees were governed by the contract executed between both the parties and not by statutory rules framed under S.30 of Pakistan International Airlines Corporation Act, 1956, with prior approval of Federal Government therefore, they would be governed by the principle of "Master and Servant"---Appeal was disposed of accordingly.

1998 SCMR 2268:

The doctrine has further been recognized and augmented by a recent insertion of section 24-A in the General Clauses Act, 1897, which declares that where a statutes confers a power to make any order or to give any direction to any Authority, office or person, such would be exercised reasonably, fairly, justly and for the advancement of the purpose of the enactment. What is more the order or direction, so far as necessary or appropriate would reflect reasons for its making or issuance and, where the same is lacking, an affectee may demand the necessary reasons, which, in response, would be furnished.

17. Learned counsel for the respondent further contends that the guarantee, letter impugned issued for encashment of guarantee is not an order issued under any statutory provision of law and has been issued under the contract and it is the amount which was advanced by the respondents to the petitioner. In this scenario, there was no question for issuing any reasons as required under section 24-A of General Clauses Act and the letter/order is in accordance with the contract and fully applicable on the respondent Bank to make the payment as it has been undertaken through the guarantees by the banks as well as the petitioners and no objection can be raised to that effect at this stage. The learned counsel for the respondent further contends that the judgment referred to by the petitioner has no relevancy as he made all efforts to distinguish the same from the facts as well as law laid down in all the judgments referred to by the learned counsel for the petitioner. Further contends that neither any statutory rights of hearing or issuing a notice have been violated by issuing the letter impugned for encashment guarantee nor any vested right of petitioner has been infringed on and such like situation, he has placed reliance on 2001 MLD 1591 and 1998 PLC (CS) 1368. Contends that in the given situation, equitable relief by way of constitutional jurisdiction cannot be granted

18. In response to the preliminary objections raised by the learned counsel for the respondent, the learned counsel for the petitioner filed C.M. No.2301 of 2011 and C.M. No.2302 of 2011, an application for the ratification by placing on record a resolution issued by the company wherein the members of the Board have admitted that the present writ petition filed by Masroor Ahmad Khan is according to the wishes of the company and his act has been endorsed by the company and he has been authorized to proceed with the writ petition in the same way as he has been authorized by the company. He has also appended the Memorandum and Article of Association

by relying on judgment 2010 SCMR 973 and 1992 SCMR 1907.

19. Contends that through this application, the petitioner has ratified and it is permissible as laid down by the honourable Supreme Court in the above noted judgments.

20. The learned counsel for the respondent conversely by relying on judgment 2005 CLD 1208 and PLD 1991 Lah. 381 maintained that this application at this stage is not maintainable and the rectification cannot be allowed. He has seriously opposed this petition and contends that the petition along with this application may be dismissed and the letter of encashment be allowed to be implemented.

21. By relying on judgments contends that the guarantee has been executed in favour of the respondent on its declaration as a sole judge for its encashment and it does not lie in the mouth of the writ petitioners that the respondent has no authority to ask for the encashment of the guarantee. The respondent is the sole judge for the determination of the encashment of the guarantee so no person can raise any objection whenever this prerogative will be exercised by the sole Judge for its encashment. Further contends that against encashment of guarantee, the writ petitioner has no right to file this writ petition and the present constitutional petition is not maintainable as through mutual obligation of the parties, the respondents have been declared sole judge for its encashment on the basis of reciprocity, In this view of the matter he has relied upon PLD 1994 SC 311, 1989 SCMR 379,PLD 2003 SC 191, 1999 SCMR 2376, 2008 CLC 726 and 2010 SCMR 524.

22. Learned counsel for the respondent further contends that the writ petition is not maintainable in the contractual matters and for that matter he has referred to the following judgments PLD 2011 SC 44, 2011 SCMR 279, 2010 SCMR 1097, PLD 2003 Lah. 714, PLD 2002 SC 1068, 2002 SCMR 1269, PLD 2001 Lah. 426, 2000 MLD 1745 and 2000 CLC 628. While relying on the judgments to elaborate his arguments, it has been asserted that from both the sides allegation have been levelled about the violation of the terms and conditions of the contract and arbitration clause has been provided in the agreement of contract, requiring factual investigation to determine the dispute and the same cannot be possibly determined without holding the investigation and recording the evidence and in exercise of constitutional jurisdiction, the factual controversy cannot be resolved effectively and effectually, hence this petition is not maintainable. He has referred to other judgments where in the similar circumstances writ petitions have been dismissed at limine stage. He also referred to PLD 2010 Kar. 218, 2001 MLD 1891, 1998 PLC (CS) 1368, 2007 CLD 1324 and AIR 1997 SC 3450

23. I have considered the arguments advanced by both the learned counsel and dilated upon the elaborate contentions put forth by them. So far as the disputed questions of facts are concerned, the learned counsel for the petitioner has not disputed any part of the contract. However, the controversy between the parties hinges on the pivotal point whether the physical work executed by the petitioners is in accordance with the contract or not? This question cannot be resolved by this court in exercise of constitutional jurisdiction as it is apparently an admitted fact that only 24 plants have been installed by the petitioner and it cannot be surmised that the amount which has been advanced may constitute 15 % of the total contract but could not make up the cost of 24 plants. But this court cannot be oblivious of the fact that only 24 plants have been installed which does not justify the act of the writ petitioner. So far as the learned counsel for the petitioner alleged that this amount was not for the completion of the total work but was only meant , for the use of infrastructure, mobilization of personal and installation of equipment with allied facilities and services and for that matter he submitted the details to the respondent which has been categorically disputed by the respondents and this court has no mechanism to resolve this dispute.

24. However, this is one perspective of this case and on the basis of objection, no adverse inference can be drawn against any party unless the other questions raised by both the parties are not properly dealt with. It is settled law and there is no departure from this law that the disputed questions of facts cannot be settled through this constitutional petition. The judgments referred to by the learned counsel for the respondents and mentioned in the preceding paras are sufficient to hold this fact that this court shall not exercise such jurisdiction where disputed questions of facts have been raised particularly when floating on the surface of the record. For that resolution- of such disputes, the arbitration clause provided under the contract is also available for both the parties. Even otherwise, in the presence of arbitration clause the writ petition is not maintainable. However, this fundamental canon of administration of justice cannot be overlooked that each case has to be decided on its own peculiar facts and circumstances.

25. So far as the second point about the non-mentioning of reasons in the impugned letter as required by section 24-A of the General Clauses Act is concerned, it will be appropriate to first reproduce section 24-A of the General Clauses Act, which is as under"

24-A. Exercise of power under enactments.---(1) Where, by or under any enactment, a power to make any order or give any direction is conferred on any authority, office or person such power shall be exercised reasonably, fairly, justly and for the advancement of the purposes of the enactment.

(2) The authority, office or person making any order or issuing any direction under the powers

conferred by or under any enactment shall, so far as necessary or appropriate, give reasons for making the order or, as the case may be for issuing the direction and shall provide a copy of the order or as the case may be, the direction to the person affected prejudicially.

26. Bare reading of this section dispels doubt in the mind of any person of prudent mind that this provision relates where the statute confers a power to make any order or to give any direction to any authority officer or person. Such power is to be exercised reasonably, fairly, justly and for the advancement of purpose of enactment. So, the benefit for violation of this section can only be helpful to challenge those orders which have been passed under any statute but not those which entail contractual obligations. Learned counsel for the respondent is rightful to assert that it was a contractual obligation and not covered by any statute, hence the benefit of section 24-A of General Clauses Act cannot be extended to the petitioners.

27. So far as the question of filing of those petitions by the incompetent persons and the ratification made by the petitioners by filing another resolution through C.M. No.2301 of 2011 and C.M. No.2302 of 2011 is concerned.

28. I have given anxious consideration to the arguments and the precedents cited in this behalf and my opinion is that since petition has not been filed on the basis of resolution as the attached resolution is not for filing of this petition against the impugned letter in the petition and Mansoor Ahmad Khan has no authority to file this petition. There is no cavil to the proposition that when law requires a thing to be done in a particular manner, the same must be done accordingly and if prescribed procedure is not followed, it is presumed that the same has not been legally done. As regards the subsequent resolution, that will not resolve the issue as for that matter there should have been some powers vesting in the Directors to ratify the wrong. Since no power has been provided in the Memorandum and Articles of Association attached with the C.M. No.2301 of 2011 the Directors had no authority to issue this subsequent resolution. The judgment on that point referred to by the learned counsel for the respondent 2005 CLD 1208 is fully applicable in this case and I see eye to eye with the view already taken by this court, hence the petition on this score is also not maintainable.

29. As regards the guarantee, it is expedient to reproduce the relevant portion of the guarantee:--

Now therefore the Guarantor hereby guarantees that the Contractor shall use the advance for the purpose of above mentioned Contract and if he fails, and commits default in fulfilment of any of his obligations for which the advance payment is made, the Guarantor shall be liable to the

Employer for payment not exceeding the aforementioned amount.

Notice in writing of any default, of which the employer shall be the sole and final Judge, as aforesaid, on the part of the Contractor, shall be given by the Employer to the Guarantor and on such first written demand payment shall be made by the Guarantor of all sums then due under this Guarantee without any reference to the Contractor and without any objection.

30. The learned counsel for the petitioner has been throughout focusing his arguments that notice of default has not been issued before placing the guarantee for encashment. The substance of his arguments is that a notice in writing of any default about any terms of the contract has to be issued before exercising the sole power of encashment and unless it has not been issued by the competent authority, the Bank has no authorization to make the payment. His further argument is that a condition precedent has been specifically incorporated in the guarantee, it may be given its contextual meaning and for that purpose he has made reference to many clauses of the original contract where notice to default has been explained and it has been stressed that these clauses have to be considered for the purpose of understand the meaning and intent thereof.

But question arises whether bank has any authority to refuse it even if employer has not fulfilled the condition provided in the guarantee?

31. To my mind no independent notice of default is required inasmuch as if the words of the guarantee are read with care, it makes it crystal clear that the very first written demand constitutes the notice of default, meaning thereby that the "notice of default" and "on such written demand" have been amalgamated into one and need not to be served separately by the respondents.

32. From plain perusal of the above noted clause, it can be ultimately inferred that notice of default in writing and written demand denote a single (one and the same) letter issued by the employer for the encashment as it amounts to not only notice of default but also demand of encashment because no separate notice is required for after issuance of that notice the guarantee for encashment is liable to be placed. So the contention of the learned counsel that first notice of default in writing with reasons had to be issued, then guarantee can be placed for encashment is unfounded from the reading of the guarantee, hence the line of reasoning does not hold water. So for as the argument for considering the definition of notice in default as provided in the contract between the parties is concerned, it is maintained that the guarantee is an independent and self-governing document and only words of the same can be considered for its decision without

considering agreement or contract for making any decision on it.

33. Now about the condition mentioned in the guarantee, keeping in view the law laid down by the honourable Supreme Court in the above referred judgments, I am of the considered view that guarantee must follow its terms and conditions. Although in guarantee the notice of default must have been issued is only term and power of determination for encashment has been entrusted to the employer. If these conditions are read together, these are self-contradictory in nature. On the one hand if notice for default has to be issued before exercising the power of encashment, then it means the power for encashment which is one of the conditions will be rendered redundant. It signifies that after issuing notice and settling the dispute with the petitioner or Bank, then the power will be exercised which on the face of it does not seem to be the intention of the executants. In fact, there are three conditions - the third one is that the bank is bound to make payment whenever it is placed before it and if last two conditions are put in juxtaposition, then the result would be that the sole power, whenever be exercised, the bank will comply with it. So the single condition carries no meaning and cannot be interposed on the basis of this condition. The subsequent two conditions have their independent effect and meanings and even otherwise in the earlier part of judgment it has been held that it has no consequence, hence it has no material bearing on the sole power for encashment. In this context, the argument of the learned counsel for the petitioner loses its convincing power.

34. To my mind it is settled law that any condition cum provision of law which has no consequence is also considered advisory and directory but not having any mandatory consequence and any provision which has no mandatory effect, if not complied with, does not vitiate the effect of the act/order for that matter. So in keeping with this aspect of the case, the language used in the guarantee is only advisory or directory because there is nothing about the consequence if any violation has been made.

35. Moreover, I have earnestly considered the case according to the arguments of the learned counsel for the parties that the guarantee cannot be placed for encashment unless condition of issuing notice of default has not been met. So I come to this irresistible conclusion that if the guarantee has been placed for encashment, the present petitioner has no grievance against the respondents but he would be aggrieved against the respondent bank if it would encash the guarantee in violation of the terms of the guarantee because being the guarantor means, he is appointed as trustee for the fulfilment of the requirement/demand whenever asked for and if any violation is committed that would deemed to have been committed by the Bank/guarantor. In this state of affairs, the present petition is not maintainable about impugned letter. So the petitioner will have to avail the remedy provided by the law against the action of the Bank/guarantor. However, It is astonishing to this court as to why the Bank has issued the letter for making arrangement to the petitioner although the bank itself has been bound down to make the payment without there being any question of getting any arrangement from the petitioner. It amounts to

providing an opportunity to the petitioner to open the flood of litigation.

36. **PLD 2003 SC 191**

This judgment is last judgment in the chain of citations wherein all the available case-laws have been referred and considered and drew the following conclusion.

15. The "guarantee" as defined and discussed hereinabove would indicate that it contains the ingredients of "dedicated commitment", "absolute undertaking", "an unambiguous assurance", "unconditional willingness", "definite certainty", "compliance without objections", "sacred obligation", and "defined responsibility". In view of the ingredients as mentioned hereinabove which constitute a guarantee on the basis whereof its binding effect and nature can be well-adjudged, a guarantee once given cannot be avoided, except on the ground of fraud or misrepresentation which were never alleged by the petitioner.

24. In the light of what has been discussed hereinabove it can be inferred safely that encashment of bank guarantee has no nexus with the spirit of the contract executed between the parties being an independent contract containing its own terms and conditions to be performed by the concerned parties. The encashment of the bank guarantee had nothing to do with the alleged dispute between the petitioners and the respondent which must be decided independently on the basis of terms of that contract without involving the contract of bank guarantee. It must be noted that bank guarantee is an autonomous contract and imposes an absolute obligation on the bank to fulfill the terms and the payment on the bank guarantee becomes due on the happening of a contingency on the occurrence of which the guarantee becomes enforceable. If any authority is needed reference can be made to case titled National Construction Company Limited v. Aiwan-e-Iqbal (PLD 1994 Supreme Court 311)

37. So from the law laid down by the honourable Supreme Court the guarantee along with its condition shall be considered for its encashment. Keeping in view the judgments of the honourable Supreme Court, I am of the well thoughtout view that this guarantee is not attached with any terms, otherwise if the beneficiary is required to assert a breach by using some particular form of words, this ought to be clearly specified in the guarantee. Since nothing is mentioned in the guarantee about the form of default which has to be asserted in the particular words, so simple submission of guarantee for encashment implies fulfillment of condition (if any) required to be brought in the notice of the Bank. Since the bank has no power to scrutinize the same whether any default has been committed or not, then it is otherwise insignificant on the

ground that the word default has not been inserted in the letter for encashment. To my mind the demand of encashment, in itself, amounts to default otherwise there was no point and purposes to place the guarantee for encashment. It has been consistently held by the honourable Supreme Court in the above referred cases that the guarantee once placed for encashment cannot be stayed and Bank is bound to encash it and courts are refrained to interfere in such-like matters.

38. Learned counsel relying on the Uniform Rules for Demand Guarantees ICC publication No.458, Articles 10 and 11 contends the Bank under these Articles have been empowered to refuse the demand.

39. I have examined all the relevant Articles of these Rules and following Article is relevant for this purpose of its application.

b. This clause of Article 2 agrees on this point it is duty of the guarantor to make payment in any case if it call on apart from any condition has been imposed.

40. So from bare reading of this clause of Article 2 of Uniform Rules it is clear that Bank is duty bound to make the payment whenever the guarantee is placed for its encashment although it must accompany those documents which form part of the guarantee. But in the present case no document is required to be attached with the guarantee. Mere issuance of notice of default carries no meaning except that it purports to declaration of default committed by the petitioner/contractor. Moreover this rule makes it necessary to make the payment even if there are conditions which have not been fulfilled. So the rules 10 and 11 do not come to the rescue of the writ petitioner in the presence of the rule 2(b).

41. After threadbare review of whole law and related judgments passed by the honourable Supreme Court and this court, it has been laid down that guarantee once put for encashment cannot be stayed and it has to be encashed and aggrieved person may challenge in the ordinary course of law or avail the remedy of arbitration as provided under the contract.

42. Another argument of the learned counsel for the petitioner is that the letter has not been issued by the competent authority nor the respondent has attached the order of the competent authority on whose direction this letter has been issued. But I find no substance in this argument as nothing is contained in this guarantee as to who will ask for the encashment of this guarantee.

So whosoever concerning the respondent will issue this letter, unless the Bank/guarantor found it fictitious and some fraud is apparent, only then Bank/guarantor can object to its encashment. Since guarantee has been directed to be encashed in Govt.'s account No.4409-2 National Bank of Pakistan which has been mentioned in the letter and Bank/guarantor has not raised any objection, hence the objection is misconceived and unwarranted.

43. Moreover, the Bank has submitted its written reply whereby it has categorically stated that the Bank is ready to make the payment in the light of this statement and otherwise considering all the relevant provisions the guarantee of bearing present status cannot be stopped from payment. There is no ambiguity left as raised by the petitioner.

44. It may not be out of place to mention here that while sitting in writ jurisdiction this Court cannot delve into factual depth to resolve the whole dispute in a slipshod manner. The questions which involve factual controversies cannot be resolved by this Court through the present summary procedure under Article 199 of the Constitution. Thus, the matter needs evidence which exercise cannot be undertaken by this Court for which the petitioners have to approach before the proper forum.

45. For what has been discussed above I do not find any merit in these writ petitions which are hereby dismissed.

M.A.K./S-126/L Petitions dismissed.