

HIGH COURT OF AZAD JAMMU & KASHMIR

Writ petition No.2050/2019.
Date of institution 19.12.2019.
Date of decision 08.04.2024.

1. Raja Ishtiaq Ahmed Khan s/o Mohammad Ikhtlaq Khan r/o Bagh Tehsil & District Bagh, Azad Jammu & Kashmir;
2. Haji Malik Mohammad Siddique Khan s/o Sain Khan r/o Bagh Tehsil & District Bagh, Azad Jammu & Kashmir;
3. Ishtiaq Ahmed s/o Mukhtar Khan r/o Bagh Tehsil & District Bagh, Azad Jammu & Kashmir;
4. Khan Abdul Qadeer Khan s/o Dost Mohammad Khan r/o Bagh Tehsil & District Bagh, Azad Jammu & Kashmir.

Petitioners

VERSUS

1. Municipal Corporation Bagh through Administrator Municipal Corporation Bagh, Azad Jammu & Kashmir;
2. Administrator Municipal Corporation Bagh, Azad Jammu & Kashmir;
3. State Officer Municipal Corporation Bagh, Azad Jammu & Kashmir;
4. Azad Govt. of the State of Jammu & Kashmir through Secretary Local Government and Rural Development, having his office at New Secretariat Muzaffarabad;
5. Local Government Board Azad Government of the State of Jammu & Kashmir through Secretary Local Government Board having his office at Upper Chatter Muzaffarabad;
6. Secretary Local Government Board Azad Government of the State of Jammu & Kashmir, having his office at Upper Chatter Muzaffarabad;
7. Mohammad Sagheer Siddique s/o Mohammad Siddique Khan r/o Bagh Tehsil & District Bagh, Azad Jammu & Kashmir.

Respondents

WRIT PETITION

Before:- Justice Syed Shahid Bahar, J.

IN PRESENCE OF:

Sardar Karam Dad Khan, Advocate for the Petitioners.
Raja Ishtiaq Ahmed Khan, Advocate for Respondents Nos.2, 3 & 7.

JUDGMENT:

Through this constitutional petition the petitioners are seeking annulment of the agreement executed between respondents No.2 & 6 dated 30.10.2019 and order dated 16.10.2019 and also sought direction against the respondents to issue tender for construction of 400 feet safety wall to utilize the land comprising survey Nos.1962 and 1979 measuring 35 kanal 19 marlas situated near Al-Shamas Bridge Bagh.

2. The stance of the petitioners taken in the instant petition is that the Government through notification dated 05.12.2018 in exercise of the powers conferred under Azad Jammu & Kashmir grant of Khalsa Land (ground rent and lease) Rules 1985 transferred the crown land bearing survey No.1962 measuring 5 kanal and khasra No.1979 measuring 30 kanal 19 marlas total land measuring 35 kanal 19 marlas situated in Bagh city in lieu of rupees ten thousand (10,000) per kanal in favour of Municipal Corporation Bagh and thereafter respondent No.2 executed an agreement with respondent No.7 for construction of 400 ft. safety wall to make the land for utilization on 30.10.2019 and the construction work was allotted to respondent No.7 just on single simple application by violating the law of the land and without adopting due course of rules through order dated 16.10.2019, hence, this petition for setting aside the agreement and work order supra.

3. Respondents Nos. 2, 3 & 7 filed amended written statement stating therein that as per notification dated 05.12.2018,

it has been mentioned in condition No.2 of the notification that after issuance of the notification, the Municipal Corporation Bagh will duly bound to get the possession of the land and necessary steps for protection of the land in shape of boundary wall shall also be taken, so, Municipal Corporation Bagh in light of sub section 5 (2) of Local Council (Contract) Rules 1982 executed an agreement with respondent No.7 as per sub section 2, 3 of the supra Rules 1982. According to this agreement, the persons constructing the protective wall will not be paid by the Municipal Corporation Bagh as the condition No.1 of the contract is clear in this regard. Thus, according to condition No.3 of the contract, the organization will not be responsible for any sudden disaster, flood or any kind of the damage and neither respondent No.7 has any claim to any Court, Government or Organization for redressing the loss and as per condition No.5 of the contract, respondent No.7 will be the lessee of the institution and the land will be in the ownership of the institution. Meeting of the businessman/traders and other locality was held by the Estate Officer Municipal Corporation Bagh on the advice of Administrator Municipal Corporation Bagh and notice for information of public at large was also pasted outside the office of Municipal Corporation Bagh and in light of proceedings of the meeting, respondent No.7 applied for the supra work, so, on 16.10.2019 work order was duly issued in his favour. It has further been alleged that as the institution does not make any payment as per contract and PPRA rules are needed when the institution should issue an open business work order or contract through the advertisement after allocating money for the project, the agreement

with respondent No.7 has been executed in order to make the land usable with the condition that the department or institution will not pay funds for the purpose, hence, no violation of PPRA rules has been made by the respondents while making contract. Finally, it has been prayed for dismissal of the writ petition with costs.

4. Heard, record perused. A perusal of notification dated 05.10.2018 shows that the land measuring 35 kanal 19 marlas situated at Tehsil & District Bagh was transferred by the Revenue Department to Municipal Corporation Bagh for consideration of Rs.3,59,500/- (Rs.10,000/- per kanal) and as per condition No.1 of the said notification, the Municipal Corporation Bagh will duty bound to make necessary steps in shape of constructing boundary wall after taking possession of the land and the transferred land will also be used for the useful and beneficial purpose of the institution and thereafter a contract was made between Administrator Municipal Corporation Bagh and respondent No.7 Mohammad Saghir Siddique and the Administrator Municipal Corporation Bagh awarded the construction work to complete 400 ft. wall of the land in light of section 5 (2) of Local Council (Contract) Rules 1982 for making the land usable and for the interest of institution as well as public at large. The institution will pay nothing to respondent No.7 for construction of the said wall according to condition No.3 of the contract, the organization will not be responsible for any sudden disaster, flood or any kind of the damage and neither respondent No.7 has any claim to any Court, Government or Organization for redressing the loss and as per condition No.5 of the contract, respondent No.7 will be the lessee of the institution and the land

which is in the ownership of the institution will be given to lessee for rental purpose as per PWD's rates. It reflects from the record that the land was given to respondent No.7 for construction of wall who after making construction will utilize the land as lessee and the rent shall be paid to the institution.

Under Section 7 of the AJ&K Local Council (Contracts) Rules 1982, procedural modalities have been envisaged. It is useful to reproduce the above rule as infra;

7. TENDERS WHEN TO BE INVITED.

1. Subject to the provisions of sub-rule (2) the Chairman shall, at least seven days before entering into a contract involving an expenditure exceeding rupees Twenty Five Thousand, give a public notice in a newspaper inviting tenders for such contract and may accept any of the tenders so made which appears to him, upon a view of all the circumstances, to be the most advantageous: provided that;
 - (i) If he rejects the lowest tender or all the tenders made in pursuance of the public notice, the reasons for his so doing shall be recorded;
 - (ii) If it is a contract entered into with the approval of the local council, the approval of the local council shall be obtained before rejecting the lowest tender; and
 - (iii) The Chairman may in case of calamity or any other emergency and with the previous sanctioned of the local council, dispense with the formality of inviting tenders, and enter into a contract with any person for the execution of any work for the provision of any supplies with due regard to the quality of work or speedy execution of the contract.

5. Admittedly the procedure provided in the supra rules have not been followed, neither public notice was issued in view of the sub section (I) of section 7 nor the requirement of publicity by way of notice was dispensed with specifically and

expressly as per sub rule (iii) of the Rule 7 of the Azad Jammu & Kashmir Local Council (Contracts) Rules 1982. While on the other hand, special law for governing and regulating the procurement of goods and service and works in public sector and for matters connected therewith is very much in field known as the Azad Jammu & Kashmir Public Procurement Regulatory Authority Act 2017 and rules made thereunder. Word. Mis-procurement has been defined in the supra Act as under:-

2. J. Mis-procurement means public procurement in contravention of any provision of the act, rules, regulations orders or instructions made thereunder or any other law in respect of or relating to the public procurement;

While the word public procurement has been defined as infra;

3. Public procurement means procurement of goods works or services by a procuring agency wholly or partly financed out of the Azad Jammu & Kashmir consolidated fund or the public account of the stali or funds of procuring agency.

Alternative methods of procurements have also been provided in Rule 42 of the Azad Jammu & Kashmir Public Procurement Rules 2017 under rule 42 supra alternate method for the purpose is elaborated and indicated in case of petty purchases, request for quotations, direct contracting and negotiated tendering. The most relevant rules is rule 42 (D) infra reproduced;

(D) negotiated tendering. A procuring agency may engage in negotiated tendering with one or more suppliers or contractors with or without prior

publication of a procumbent notification. This procedure shall only be used when;

- (i) -----
- (ii) -----
- (iii) for reasons of extreme urgency brought about by events unforeseeable by the procuring agency the time limited laid down for open and limited bidding methods cannot be met. The circumstances invoked to justify extreme urgency must not be attributable to the procuring agency;

(II) For technical or artistic reasons, or for reasons connected with protection of exclusive rights. Under Section 51 of the said rules, overriding effect has been given to the PPRA rules overall other connected or correlated rules. Rule 51 is reproduced as under;

51. Overriding effect;

The provisions of these rules shall have effect notwithstanding anything to the contrary contained in any other rules concerning public procurements. Provided that the prevailing rules and procedure shall remain applicable only for the procurement of goods services and works for which notice for invitation of bids has been issued prior to the commencement of these rules unless the procuring agency deems it appropriate to re-issue the notice for the said procurement after commencement of these rules.

Now coming back to the notification dated 5th December 2010 through which a piece of crown land was transferred in favour of the Municipal Corporation Bagh. Total piece of land is comprising 35 kanal 19 marlas, certain conditions have imposed in the said notification which reads as under.

شرائط

- (i) میونسپل کارپوریشن باغ کی اجرائگی کے بعد اراضی کا قبضہ حاصل کرنے اور اسکی تحویل و حفاظت کے لیے ضروری اقدامات از قسم تعمیر چار دیواری وغیرہ کرنے کی پابند ہوگی۔
- (ii) منتقل شدہ اراضی صرف اور صرف میونسپل کارپوریشن باغ اور اسکے متعلقہ لوازمات کے لیے استعمال ہوگی۔
- (iii) میونسپل کارپوریشن باغ منتقل شدہ زمین دیگر کسی شخص یا ادارہ کو بورڈ آف ریونیو کی پیشگی منظوری/اجازت کے بغیر منتقل نہیں کرے گی۔

It is also worthwhile to reproduce the contract arrived at

between the parties as under:-

معاهدہ نامہ بحق میونسپل کارپوریشن ہارغ

1۔ ایڈمنسٹریٹو میونسپل کارپوریشن ہارغ (فریق اول) 2۔ محمد صغیر ولد محمد صدیق خان ساکن حال ہارغ (فریق دوم) شناساتی کارڈ نمبر 82102.4628576-9

یہ کہ معاہدہ نامہ ہذا میں ایڈمنسٹریٹو میونسپل کارپوریشن ہارغ فریق اول اور مسٹر محمد صغیر صدیق ولد محمد صدیق خان ساکن حال ہارغ قومی شناساتی کارڈ نمبر 82102.4628576-9 کو بطور فریق دوم لکھا اور پڑھا جائیگا۔

یہ کہ ایڈمنسٹریٹو میونسپل کارپوریشن ہارغ نے آزاد جموں و کشمیر لوکل کونسل کنٹرولنگ ایکٹ 1982 کی دفعہ 5 (2) کے تحت حاصل اختیارات کو بروئے کار لاتے ہوئے حسب استند عا محمد صغیر صدیق ولد محمد صدیق خان ساکن حال ہارغ (فریق اول) میونسپل ہارغ کی ملکیتی اراضی واقع نزد الشمس برج تا سابقہ رہائش چائیز کمپنی بطرف نالہ ماہل زیر نمبر خسره 1962، 1979 جو کہ سردست روہڑ غیر ممکن ہے اور بالکل ناقابل استعمال ہے۔ اس اراضی کو قابل استعمال بنانے اور مفاد ادارہ اور عوامی سہولت کے منصوبہ جات کی تکمیل کے لیے اس اراضی کے ہر اطراف نالہ ملوانی از مین الشمس برج بطرف جنوب مغرب چار سو فٹ حفاظتی دیوار تابع شرائط جو منظوری صادر فرمائی ہے۔ اس کی روشنی میں مورخہ 17.10.2019 سے موقع پر کام شروع کیا گیا ہے۔ معاہدہ نامہ ہذا مابین فریقین آج تاریخ 30.10.2019 روہڑ گولہ بان کے تحریر کیا جاتا ہے تاکہ سندر ہے اور بوقت ضرورت کام آسکے۔

شرائط بذیل ہیں۔

1. حفاظتی دیوار کی تعمیر از گره خود کرنا ہوگی۔ ادارہ ہذا کسی بھی قسم کی ادائیگی نہیں کریگا۔
2. حفاظتی دیوار کی تعمیر کے لیے ایسے کنٹریکٹس سے رابطہ کیا جائے جو کہ بہترین شہرت اور اپنی ذاتی مشینری کا حامل ہو۔
3. کسی بھی ناگہانی آفت یا طغیانی نالہ ماہل سے دیوار کو نقصان کی صورت میں ادارہ ہذا یا حکومت آزاد کشمیر سے کسی بھی قسم کا کلیم برائے ادائیگی نقصانات نہیں کیا جاسکے گا۔
4. منصوبہ ہذا سے قبل ادارہ سے باقاعدہ معاہدہ نامہ بابت شرائط بالآخر بر کرنا ہوگا۔
5. تعمیر حفاظتی دیوار کے بعد حاصل ہونے والی اراضی دیوار کی تعمیر کرنے والے شخص کو PWD ریٹس کے مطابق کرایہ پر دی جائے گی۔ یہ اراضی بلدیہ ہارغ کی ملکیت ہوگی اور دیوار تعمیر کرنے والا شخص محض کرایہ دار ہوگا اور کسی بھی قسم کی ملکیت کے حصول کے لیے کسی بھی فورم / عدالت میں نہیں جاسکے گا۔ البتہ اس کو یہ اختیار حاصل ہوگا کہ وہ اس اراضی پر کاروبار کرے یا تعمیرات کرے۔ البتہ جو بھی کریگا ادارہ ہذا کی تصریحات اور منظوری سے۔
6. حفاظتی دیوار کی نگرانی ادارہ ہذا کے سب انجینیر، ایس ڈی او صاحب موقعہ پر معائنہ کریں گے اور اس ٹیکنیکل عملہ کی ہدایت کی روشنی میں موقع پر کام کیا جائے گا۔

It transpires from condition No.5 of the Contract that in fact the entire exercise is being made to extend some favour to the respondent Mohammad Sagheer Siddique. Condition No.5 is as under;

شرط 5- تعمیر حفاظتی دیوار کے بعد حاصل ہونے والی اراضی دیوار کی تعمیر کرنے والے شخص کو PWD ریٹس کے مطابق کرایہ پر دی جائے گی۔

6. Meaning thereby that anyone else who could have been desirous to obtain the said land on rent has initially been deprived from this rights. Question is even then when the respondent come forward and submitted an application for construction of wall, it was incumbent upon the official respondents to ensure publicity of the said works in accordance with law by way of advertisement and then enter into contract. Mod of allocating impugned work in favour of the answering

respondent not only militates the PPRA Code Procurement Rules of 2017 but is also violative of the sister rules i.e. AJ&K Local Council (Contract) Rules 1982.

It depicts from the record that the entire proceedings were managed and aimed for extending benefit to the respondent (Contractor). Trite that a thing which is required to be done in a particular way can only be performed accordingly otherwise its existence is nullity in the eye of law. Act of mala-fide and discrimination cannot be allowed to remain in field.

Transparency and fairness is lacking in the proceedings impugned. The learned counsel for petitioners in support of his version referred the authorities as [2014 SCR 1385][AIR 1982 SC India 149][PLD 1992 Kar. 54][2008 PLC CS 11][PLD 2013 High Court of AJ&K 34][SCMR 2012 455][SCMR 1998 2268] which are fully applicable in the case in hand. However, the authorities referred to and relied upon by the learned counsel for respondents i.e. [2003 YLR 1570][2018 SCR 1220] are not applicable due to distinguishable facts of the case.

7. So far as the objection qua locus standi raised by the answering respondents is concerned, trite that it cannot be dealt with and taken in a static manner. Supra term is based upon the latin maxim "Locus Standi" consists of two words which means place and standi means the right to bring in action, so, collectively it refers to the right to appear in Court or to file an action. According to this principle, before approaching the Court one

must demonstrate his legal capacity, it means that the person can only go to the Court if his personal interests are jeopardized or he is injured. One of the core concepts of the adversarial legal system is this maxim. There are two types of locus standi;

- (i) Public Locus Standi, which refers to the right to file a case on behalf of public interest. This type of locus standi is granted by law or statute and it can be invoked by anyone who has sufficient interest in the matters at hand;
- (ii) Private Locus Standi. It refers to one's personal interest in an issue or case. This type does not require any special qualification on behalf of its holder, but must still show some connection between themselves and whatever they are suing over.

Locus standi or standing plays a vital role in the legal system and serves several important purpose ¹. **The foremost purpose served by locus standi doctrine is Access to Justice, as locus standi ensures the individuals and entities with a legitimate interest in the case to have access to the Courts by way of agitating their alleged grievances and get redressal of the same, thus, locus standi is a weighing apparatus which determines the fate of lis at the outset qua its progress.**

(emphasis supplied)

For the supra multiple reasons, the writ petition at hand is disposed of with a direction to the respondents to advertise the proposed work strictly in accordance with law

¹. Concept of locus standi by Samreen Saba PLD 2024 Journal 27.

and ensure transparency and fairness in the relevant process. No order as to costs. file shall be kept in archive.

Muzaffarabad.

08.04.2024 (Saleem)

JUDGE

Note:- Judgment is written and duly signed. The office is directed to intimate the parties or their counsel accordingly.

JUDGE

Approved for Reporting

JUDGE