

HIGH COURT OF AZAD JAMMU & KASHMIR

Writ Petition No: 591/2022.

Date of Institution: 10.02.2022.

Date of decision: 03.06.2022.

Riaz Furnishers (Pvt.) Limited through Mr. Muhammad Ali Jan Qureshi Director/Primary/Authorised User having CNIC No.34201-0362840-9 Railway Road, Gujrat NTN 1330749-5.

(Petitioner)

Versus

1. Executive Engineer Physical Planning and Housing Department Maintenance Division Azad Jammu and Kashmir Government having office at District Complex, Muzaffarabad.
2. Chief Engineer, Physical Planning and Housing Public Works Department (North), Muzaffarabad Azad Jammu and Kashmir Government having his office at District Complex, Muzaffarabad.
3. Superintendent Engineer, Physical Planning and Housing Public Works Department Azad Jammu and Kashmir Government having his office at District Complex, Muzaffarabad.
4. Sub-Divisional Officer/Assistant Engineer Maintenance Division, Public Works Department Azad Jammu and Kashmir Government Kashmir House, Islamabad.

(Respondents)

WRIT PETITION

Before: Justice Syed Shahid Bahar J.

PRESENT:

Raja Muhammad Hanif Khan, Advocate for the petitioner.

Maqbool Ur Rehman Abbasi, Legal Advisor and A.A.G on behalf of respondents.

Judgment:

The above titled writ petition has been filed under Article 44 of the Azad Jammu & Kashmir Interim Constitution,

1974, whereby following relief has been solicited by the petitioner:-

“It is, therefore, respectfully prayed:-

- (A) That termination order bearing No.233-38/XEN-Maint/Drawings/2022 dated 27.01.2022 (Annexure “PG”) and invitation for bids No.897-900/2022 dated 24.02.2022 may kindly be declared without lawful authority.
- (B) The respondents may kindly be restrained from re-inviting tender or inviting fresh quotation for the project in dispute.
- (C) The respondents may kindly be directed to allow the petitioner to carry on the work order dated 14.12.2021 as per the specification mentioned therein.
- (D) The respondents may kindly be restrained from initiating any proceeding contrary to law against the humble petitioner.
- (E) Any other relief admissible in accordance with law, though not claimed may also be granted in the interest of justice.”

I. BRIEF FACTS:-

The claim of the petitioner is that the Chief Engineer Physical Planning and Housing, Azad Jammu and Kashmir Government vide his order No.CE/building/PHE(North) (Drawing)/1791-94 dated 01.09.2021, pre-qualified the petitioner for furnishing of the offices of the Government for the year 2021-22. It is contended that petitioner submitted his quotation for supply of furniture for the purpose of Furnishing of Additional Accommodation of Kashmir House Islamabad. The quotations were opened on 02.11.2021, whereby the quotation of the petitioner being **lowest** was found suitable and the same was approved by the Chief Engineer Physical Planning and Housing Public Works Department Azad Jammu and Kashmir Government

on 08.12.2021, resultantly, the work order was issued on the approval of the Chief Engineer by the Executive Engineer vide letter dated 14.12.2021. The petitioner approached to the office of Sub-Divisional Officer Incharge for getting necessary layout at site, but the same was not provided and instead of that he was directed to provide Demo sample of Furnitures, hence, the petitioner submitted Demo Sample of Furnitures alongwith other articles. It is contended that the aforesaid samples were not for the purpose that the whole material should be supplied on the basis of the Demo samples provided by the petitioner to the Executive Engineer. However, the X.EN, treating the abovementioned demo samples to be a final sample informed the petitioner vide letter dated 10.01.2022 (Annex. "PE"), to the effect that the samples do not fulfill the quality and therefore are rejected. It is further averred that petitioner explained the position to the respondents vide letter dated 17.01.2022 (Annexure "PF/1") to the effect that he displayed Demo samples which were prepared according to the layout at the site and that the layout was prepared by the interior designer. It is maintained that the petitioner has been approaching to the respondents anxiously since long, however, the respondents did not give any response to the petitioner. The Executive Engineer without assigning any reason, terminated the work order No.3336-40 dated 14.12.2021 vide termination letter No.233-38/XEN-Maint/Drawings/2022 dated 27.01.2022 (Annex.PG).

II. PETITIONER'S SUBMISSIONS:-

The learned counsel for the petitioner, Mr. Raja Muhammad Hanif Khan, vehemently contended that the petitioner has explained the position with full details and given assurance to the respondents that each and every item mentioned in the work order shall be provided in accordance with the terms of the work order. The learned counsel further contended that the authority to sanction the project in question "Furnishing of Additional Accommodation of Kashmir House Islamabad" is the Chief Engineer, whereas the Executive Engineer has no authority to cancel the work order dated 14.12.2021. The learned counsel staunchly contended that during pendency of the writ petition, the respondents initiated the process of re-tendering with malafide intention, hence, the process of inviting bid dated 24.02.2022 (Annex.PAA) is violative of the rule of law laid down by Hon'ble Supreme Court of AJ&K in the case of "**Zaib-un-Nisa vs. Tahira Khanum**" reported as (2015 SCR 860). The learned counsel prayed that the termination order bearing No.233-38/XEN-Maint/Drawings/2022 dated 27.01.2022 (Annex.PG" and invitation for bids No.897-900/2022 dated 24.02.2022 (Anex.PAA) may kindly be declared without lawful authority. The learned counsel also placed reliance on the following case law:-

- (i) 1993 SCR 88.
- (ii) 2021 SCR 665 (A).
- (iii) 2019 SCR 703.
- (iv) 2020 SCR 361 (A) at page 365.
- (v) 2019 YLR 725 (AJK)
- (vi) 2011 CLC 469 (AJK)
- (vii) 2007 SCMR 152.
- (viii) PLJ 2020 Lahore 488

(ix) 2003 PLC (CS) 490

(x) 2019 CLC 1118.

III. RESPONDENTS' SUBMISSIONS:-

Mr. Maqbool Ur Rehman Abbasi, the learned Legal Advisor appearing on behalf of respondents tenaciously opposed the version of the petitioner and contended that the samples/articles submitted by the petitioner were not according to the required demands/standards and quality, hence, the same have been denied by the respondents. The learned counsel maintained that the wood provided and used in samples were not according to benchmark standard and PC-1 of the Project. He strenuously contended that the respondents provided better rates for the Project but petitioner has shown an ordinary demo of furniture/articles /models which were not acceptable according to required criteria and standards and same were also against the terms and conditions of AJ&K PPRA, laws. Finally, the learned Legal Advisor prayed for dismissal of the writ petition.

The learned A.A.G supported the version of the learned Legal Advisor for respondents and also prayed for dismissal of the writ petition.

Arguments heard. Record appended with the writ petition has been perused.

IV. DETERMINATION BY THE COURT:-

Synopsis of the above factual matrix reveals that the order impugned has been passed by the authority without

mentioning any reasons whatsoever. I have confronted the learned Assistant Advocate General appearing on behalf of the official respondents as to how work order of a lowest bidder (petitioner) could be recalled/cancelled and taken back just with a stroke of pen without assigning any reasons, who contended that as prior to issuance of the impugned letter correspondence in this regard on part of the official quarters with the petitioner is self explanatory and meets the requirement of furnishing reasons in support of the order impugned herein and there was no need of inserting or alleging reasons in the order of cancellation of work order, hence, reasoning was itself reflecting from correspondence.

Be that as it may how previous correspondence in this connection could be read with impugned order, thus, impugned order is bald, bereft of any reason and did not conform to mandatory requirements of law, order not containing any reasons and not showing its passing on objective consideration would be treated as 'arbitrary' and result of misuse of authority vested in public functionary. Issuance of such order in slipshod and sketchy manner mocks the concept of better government provided in the preamble of the AJ&K Interim Constitution, 1974 as well as militates against the doctrine of administrative justice and due process of law, that too sheer violation of fundamental right No.19 read with right No.1, besides it also flouts the principle of natural justice i.e. Audi alteram partem. In this regard, reliance is placed

on the case-law reported as [1997 PLC(CS) 356] wherein it was held as infra:-

“Before any order was passed affecting right and privilege of any person, it would be necessary to hear him and provide him opportunity of contradicting any material point or circumstances which was sought to be produced against him.”

Public Functionaries are under legal obligation to decide controversies between parties with reasons. Superior Courts time and again insisted upon disclosure of reasons in support of an which is injurious to anyone, order impugned herein is not in the colour and attire of Section 24-A of the General Clauses Act 1897. Thus, if the Public Functionaries failed to act within parameters of Section 24-A of the above Act, High Court has ample jurisdiction to give direction to the relevant authority to act strictly in accordance with law.

No cavil with the proposition that where allegations of parties are based on statutory rules and other legal documents for enforcement of such contractual liabilities, constitutional petition is competent. Ready reference in this regard is [**1996 MLD 1972**].

Modern and progressive juristic approach regarding maintainability of constitutional petition pertaining to contractual liability seems tilting in favour of competence of writ petition rather to push back petitioner to resort to other alternate remedies by way of filing civil suit or arbitration. Reliance in this regard is placed on 1998 CLC 1178 wherein it has categorically laid down as infra:-

“---S.37---Constitution of Pakistan (1973), Art. 199--- constitutional petition---Maintainability--Jurisdiction of High Court in terms of Art. 199 of the Constitution in matters relating to contractual obligations---Implementation agreement signed between petitioner and respondent (Government) for establishment of Barge Power Project---Termination of contract on behalf of Government---Remedy of Constitutional petition would be permitted to be resorted to in cases involving contract between private persons and State/Statutory functionary for such remedy was considered to be more efficacious and speedy remedy as compared to civil suit or arbitration proceedings---Petitioner was, however, not seeking enforcement of terms and conditions of contract but was asserting its rights against action of State which was termed by it to be unlawful---Breach of contract complained of on part of State could be deemed to be breach of statutory obligation, therefore, Constitutional petition was maintainable.”

Majesty of law demands that Public functionaries must act honestly, fairly, in matters of contracts regarding public interest, such obligation is created by the respective Contract itself. AJK PPRA Rules could be enforced through Article 44 of the AJ&K Interim Constitution, 1974, although, arbitration clause is existing in AJK PPRA Rules, but remedy of arbitration and civil suit is not in a sense an adequate and efficacious remedy.

Law does not allow any rigmarole and zigzag, issuance of orders in deviation of law gives birth to concept of club law and lawlessness. Law requires performance of an act in a way as it is prescribed otherwise performance of the same is nullity.

In the realm of administrative law parameters quo structuring of discretionary powers have already stood recognized as how such like powers are regularized to excess. In the words of “Professor Culp Davis”, an authority on administrative law (which have allowed the status of universally accepted principles), a discretion should fulfill the following requirements:-

- (i) open plans
- (ii) open policy statement
- (iii) open rules
- (iv) open finding
- (v) open reasons
- (vi) open precedent and fair procedure

Thus, power quo reversal of a validly issued legal instrument which creates certain rights in favour of other party and in furtherance of some decisive steps already taken could not be set at naught simply in guise of discretionary powers, that too without disclosing any reason in this regard at the time of reversal of such like instrument when the relevant authority opted to undo the same. Cancellation of work order of a Contractor (Lowest bidder) at initial stage without affording an opportunity of hearing (which is hallmark of the concept of the due process of law) would entail serious consequences of attaching stigma against him apart from suffering financial losses and losing good will in business with Govt./respondent functionaries; such practice could not be resorted to without observing due process of law.

Majesty of law demands that public functionaries dealing with rights and obligations of persons were required to give valid reasons in their orders which were likely to operate

adversely against such persons, orders impugned herein are telegraphic and the same do not qualify to be treated as well reasoned valid orders. Principle of natural justice must be followed not merely as a formality but as a well/meaningful and effective requirement of law, however, it was not only the matter of providing an opportunity of hearing, but requirement of the fundamental right No.1 and 19 as guaranteed in the Azad Jammu & Kashmir Interim Constitution, 1974. Stigmatizing the petitioner a registered/listed Contractor, that too at the back of him is not warranted by law, seems arbitrariness and offends the doctrine of Administrative Justice which takes breath from preamble clause of the Azad Jammu & Kashmir Interim Constitution, 1974.

Universally accepted golden principle of natural Justice i.e. audi alteram partem seems to be violated. Ready reference in this regard i.e. 2003 YLR 63 (Lah.).

Every citizen has to be dealt with in accordance with law and not on the basis of whims and caprice of the executive authorities.

Govt. functionaries have to act fairly, justly, equitably and reasonably. As per section 24.A of the General Clauses Act, reasoning in support of issuing of such like order was essential. Abstract of the section 24-A of the General Clauses Act, is reproduced as infra:-

[“24A. 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.”]

Thus, without assigning any plausible reason in the order which is likely to be passed against anyone creates dent in the said order. Ready reference in this regard is 2019 YLR 725, 2011 CLC 469 and 2020 SCR 361.

Plethora of precedents are glaring in the law digests on this subject indicating roadmap as a beacon of light.

I am fortified to follow the latest precedents of the Hon’able Apex Court in this connection i.e. (i) AJK Govt. & others Vs. Muhammad Sadique [2017 SCR 640] (ii) Ministry of Kashmir Affairs VS. M/S ZK Associates (Pvt) & others [2020 SCR 659].

In the vertical precedent of the Apex Court 2017 SCR 640, supra, it has categorically been laid down as under which is a roadmap in this regard:-

“15. In the light of above survey of constitutional and statutory provisions of law as well as relevant legal precedents of the superior Courts of the sub-continent, it can safely be concluded as follows:-

(i) there is no absolute bar for exercising writ jurisdiction regarding the matters arising out of the contracts or involving contractual obligations or liabilities;

- (ii) the extraordinary writ jurisdiction conferred upon the High Court is of paramount importance in the system of administration of justice for redressal of grievance if there is no other adequate remedy available under law;
- (iii) the determination of the adequacy and availability of the remedy depends upon the facts and nature of the case and the High Court is the sole authority to decide whether in view of the peculiar facts of the case the exercise of writ jurisdiction is justified or not. Mere availability of the alternate remedy should not be a hurdle in exercise of power of judicial review under section 44 of the Azad Jammu and Kashmir Interim Constitution Act, 1974, when the matter is of an urgent nature and if the aggrieved party is directed to seek redress through alternate remedy available under law the very remedy would be frustrated, then it would be proper for the Court to exercise the writ jurisdiction;
- (iv) It is a celebrated principle of law that the remedy of writ is not available against the private person and the writ jurisdiction can only be exercised when the person performing functions in connection with the affairs of Azad Jammu & Kashmir or local authority is party and remedy against him is sought in shape of writ of prohibition, mandamus, certiorari, habeas corpus or quo-warranto;
- (v) Even the contractual rights and obligations may be enforced in the situation where the rights are based on statute, law or rules framed thereunder or when an obligation or duty vests in a public functionary or a statutory body, performing functions in connection with the affairs of the Azad Jammu & Kashmir or local authority;
- (vi) The acts of executive authority are subject to judicial review and where a statutory functionary acts mala-fidely or in a partial, unfair, unjust and oppressive manner, the High Court in the exercise of its writ jurisdiction has ample power to grant relief to the aggrieved party. Same is the case in the matters involving the enforcement of fundamental rights, specially, equal

treatment to a person placed under similar circumstances; and

- (vii) There is also consensus of the superior Courts in the light of enunciated principle of law that ordinarily the exercise of writ jurisdiction in the propositions requiring detailed inquiry or recording of evidence and intericated and complicated questions of facts, is avoided. On the touchstone of this principle the High Court may decline to exercise the writ jurisdiction in the matters of enforcement of contractual obligations or rights and liabilities arisen out of the Contracts requiring detailed inquiry or recording of evidence.

In our considered opinion, for the above stated reasons, under the Constitution there is no specific or absolute bar in exercising writ jurisdiction in the matters of contractual obligations, liabilities or claims based upon the contracts, subject to hereinabove stated exception. Every case has to be judged and decided according to its own peculiar facts and circumstances, therefore, we hold that the principle of law laid down in Neelum Floor Mills's case (supra) does not mean that there is an absolute bar of exercising writ jurisdiction in the maters involving the contractual obligations, liabilities or the matters arisen out of the contracts.”

CRUX.

As adumbrated, the petitioner has specifically alleged his stance and categorically in Para. Nos. 2, 3 and 4 portrayed that he has only produced demo samples to the respondents and thereafter meeting was held between the parties quo finalizing the matter but respondents instead of following the minutes of the meeting and matter agreed upon, issued the impugned order without providing opportunity of hearing. The above paras of writ petition have been replied in evasive manner by the respondents, even no reply has been given regarding subsequent meeting and

agreement of the matter between the parties, thus, evasive denial and non-reply on part of respondents amounts to admission of the relevant averments made in the writ petition and it is celebrated principle of law that admitted things need not to be proved. The petitioner has specifically attributed allegations against respondents No.1 and 4 and tendered affidavit but no specific affidavit on their part was offered in rebuttal.

Nub of above discussion is that instant petition is accepted as prayed for, the impugned notification dated 27.01.2022 passed by Executive Engineer PP&H Maintenance Division Muzaffarabad (respondent No.1) is hereby set-aside.

Muzaffarabad,
03.06.2022.

-Sd-
JUDGE

Approved for Reporting

-Sd-
JUDGE