

# IN THE HIGH COURT OF SINDH AT KARACHI

Present: **Mohammad Ali Mazhar** and **Agha Faisal, JJ.**

CP D 6540 of 2019 : SICPA SA vs.  
Federation of Pakistan & Another

CP D 6379 2019 : Arwen Tech Private Limited vs.  
Federation of Pakistan & Another

For the Petitioners : Mr. Haider Waheed, Advocate  
Mr. Zoha Sirhindi, Advocate

For the Respondents : Mr. Kafeel Ahmed Abbasi  
Deputy Attorney General  
Mr. Irfan Memon  
Deputy Attorney General

Mr. Ameer Bux Metlo, Advocate  
Mr. Aqeel Qureshi, Advocate  
(Federal Board of Revenue)

Mr. Ali Ibrahim, Advocate  
(National Radio Telecommunication  
Corporation)

Dates of hearing : 30.10.2019, 12.12.2019, 24.12.2019  
20.01.2020 & 17.02.2020

Date of announcement: 09.03.2020

## JUDGMENT

**Agha Faisal, J.** The present petitioners have individually challenged a tender process, and subsequent award therein, after their joint bid was unsuccessful. Since the subject matter is common *inter se*, therefore, these petitions were heard and reserved conjunctively and shall be determined vide this common judgment.

2. Briefly stated, in order to prevent the leakage of revenue, under reporting of production / sales of tobacco products and to ensure prompt payment of taxes on the manufacture and sale of tobacco products, the Federal Board of Revenue ("FBR") sought to license the implementation of a track and trace system, to be developed, maintained and operated

by the licensee for tobacco products manufactured or imported into Pakistan.

An invitation for license for electronic monitoring of production and implementation of the track and trace system for tobacco products (“IFL”) was issued pursuant to the Licensing Rules 2019 (“Rules”) and the petitioners comprehensively participated in the tender process. The petitioners were aggrieved with the result of the evaluation proceedings, and the subsequent award, whereby their bid was not declared successful, hence, filed these petitions individually, despite the fact that they had participated in the tender process as a single joint venture entity.

3. Mr. Haider Waheed, Advocate represented the petitioners and submitted that tender process was discrepant since insufficient time was provided for the submission of bids; additional time would have enabled the petitioners to submit a more competitive bid; and the evaluation criteria was inefficient. Learned counsel submitted that their bid was erroneously disqualified and in addition thereto challenged the eligibility of the successful candidate and submitted that award of the tender thereto amounted to conflict of interest. In addition thereto the learned counsel also assailed the vires of Rule 150ZG(d) of the Rules.

4. Mr. Ameer Bux Maitlo, Advocate submitted on behalf of the Federal Board of Revenue (“FBR”) that the petition was not maintainable. It was demonstrated that Rule 150ZQQ of the Rules created a special forum for adjudication of disputes. Learned counsel also adverted to Rule 48 of the Public Procurement Rules 2004 (“PPRA Rules”) to denote another specialized forum for adjudication of the present dispute. Learned counsel demonstrated from the record that the petitioners had participated in the tender process without any demur and their grievance only arose upon them being evaluated as unsuccessful. In so far as the vires were concerned it was submitted that the grounds invoked were devoid of merit and even otherwise since the prayer clause sought issuance of a new IFL, pursuant to the same law / Rules, hence, the challenge to the vires was in itself conceded.

In conclusion it was submitted that the entire tender process was conducted in accordance with the law and in conclusion thereof a successful candidate<sup>1</sup> had already been declared.

5. Mr. Ali Ibrahim, Advocate appeared<sup>2</sup> on behalf of the National Radio Telecommunication Corporation and amplified the legal arguments earlier advanced on behalf of the FBR. It was submitted that the respective petitioners had participated in the tender process by virtue of a teaming agreement<sup>3</sup> and in operation of clause 7.1 thereof the said agreement already stands terminated, hence, the petitioners no longer retain any *locus standi* to maintain the petitions. Learned counsel articulated in extensive detail with regard to the factual aspects of the case and in such context submitted that such factual controversies were not amenable for determination in the writ jurisdiction.

Learned counsel stressed upon the existence of an alternate remedy and demonstrated that the National Radio Telecommunication Corporation itself had approached the designated forum for mitigation of its reservations and the said process culminated in the award thereto, being the lowest evaluated bidder.

In conclusion it was submitted that the invocation of the issue of vires was a mere smokescreen, intended entirely to obviate the due process of the law.

6. We have heard the respective legal counsel and have also considered the law, regulations and record to which our surveillance was solicited. The primary question before us is whether the petitioners were justified in invoking the writ jurisdiction of this Court, in the demonstrable presence of alternate fora specially created for the adjudication of such disputes. It is thus considered appropriate to abjure any observations with regard to the merits of the case of the respective parties and circumscribe this deliberation to the determination of the aforesaid question.

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<sup>1</sup> National Radio Telecommunication Corporation.

<sup>2</sup> On court notice dated 30.10.2019.

<sup>3</sup> Dated 06.09.2019.

7. It is considered imperative to denote the provisions of the law providing a forum for the adjudication of the present dispute. The Rules, where under the entire process was conducted with the active participation of the petitioners, stipulate as follows:

“150ZQQ. Dispute Resolution. If any dispute arises during or after the process of licensing, the matter shall be referred to the dispute resolution committee to be notified by the board on an application by an aggrieved party...”

(Underline added for emphasis.)

Rule 48 of the PPRA Rules provides as follows:

“48. Redressal of grievances by the procuring agency.-

(1) The procuring agency shall constitute a committee comprising of odd number of persons, with proper powers and authorizations, to address the complaints of bidders that may occur prior to the entry into force of the procurement contract.

(2) Any bidder feeling aggrieved by any act of the procuring agency after the submission of his bid may lodge a written complaint concerning his grievances not later than fifteen days after the announcement of the bid evaluation report under rule 35.

(3) The committee shall investigate and decide upon the complaint within fifteen days of the receipt of the complaint.

(4) Mere fact of lodging of a complaint shall not warrant suspension of the procurement process.

(5) Any bidder not satisfied with the decision of the committee of the procuring agency may lodge an appeal in the relevant court of jurisdiction.”

It is an admitted fact that the petitioners, either conjunctively in terms of their teaming agreement or otherwise, did not avail either of the prescribed fora and filed these Constitutional Petitions instead.

8. Learned counsel for the respondents argued that in view of the demonstrable existence of an alternate remedy the present petitions were not maintainable<sup>4</sup>.

On the contrary learned counsel for the petitioners had argued that the alternate remedy was not availed as vires had been challenged in the present petitions. It was further argued that the petitioners could not have approached the dispute resolution committee as it was constituted by the FBR and the actions of the said institution was tainted with *mala fides*.

9. We have considered the issue of vires and our findings thereupon are delineated herein below. In so far as the objection with regard to the

<sup>4</sup> 2016 CLC 1; 2015 MLD 1790; 2011 MLD 1876.

dispute resolution committee is concerned, we find that same to be *prima facie* contradictory, hence, untenable.

It beggars belief that the petitioners participated in a tender process under the auspices of the FBR, submitted their bids thereunder, have filed this petition to seeking directions to the FBR to conduct the process afresh, yet have reservations in respect of a dispute resolution committee constituted by the FBR. It is considered appropriate to observe that no *mala fides*, attributable to the FBR, have been demonstrated before us.

A plain reading of Rule 150ZQQ of the Rules demonstrates that a special forum has been created for adjudication of any dispute arising during or after the process of licensing. The aforesaid rule adequately provides a forum in respect of the successive grievances of the petitioners. It is thus our deliberated view that the petitioners have been unable to demonstrate any cogent reason for avoiding the special dispute resolution fora available thereto, hence, in view of the preponderance of binding authority<sup>5</sup> no case has been made out to justify invocation of the writ jurisdiction of this court.

10. The claims of the respective parties are rested on conflicting factual controversies and a plethora of documentation, containing divergent observations and interpretations, has been filed. It is trite law that disputed question of fact<sup>6</sup> and / or contractual matters<sup>7</sup> are not generally amenable for determination in the exercise of writ jurisdiction. The Supreme Court has recently reiterated that where a factual controversy has arisen it is settled position in law that such a matter cannot be decided in exercise of writ jurisdiction<sup>8</sup>.

It is also within our contemplation that judicial review the commercial actions of state enterprises is permissible, subject to the

<sup>5</sup> 2016 CLC 1; 2015 MLD 1790; 2011 MLD 1876.

<sup>6</sup> 2016 CLC 1; 2015 PLC 45; 2015 CLD 257; 2011 SCMR 1990; 2001 SCMR 574; PLD 2001 Supreme Court 415;

<sup>7</sup> PLD 2011 SC 44; PLD 2007 SC 642; *Bismillah Metal Impex vs. Federation of Pakistan & Others* (CP D 7061 of 2017).

<sup>8</sup> Per *Mushir Alam J.* in *Province of Sindh vs. Abdul Sattar Arbani* (CP 654-K of 2018) & connected matters

law<sup>9</sup>. This Bench has consistently maintained<sup>10</sup> that the role of the court in matters of judicial review of commercial activities of state enterprises is grounded upon the deliberation as to whether a decision making authority exceeded its powers; committed an error of law; committed a breach of the rules of natural justice; reached a decision which no reasonable person would have reached; or abused its powers. Subjecting the present facts and circumstances to the aforesaid anvil it is observed that the petitioners have been unable to demonstrate any such infirmity with respect to the process under scrutiny.

11. The petitioners had challenged the vires of Rule 150ZG(d) of the Rules. The relevant amendment to the Rules was notified on 06.02.2019; the petitioners jointly participated in the tender process conducted under the very same Rules; they submitted a bid under the IFL, reportedly on 27.09.2019, without any demur, however, seek to challenge the vires of the Rules, only after the result of the tender proceedings not being that which was expected by them, on 07.10.2019 and 12.10.2019 respectively, when the present petitions were filed. It is pertinent to record that the delay occasioned in the instituting a challenge to the vires of the Rules has not been justified before us.

12. It is also consider prudent to advert to the actual impugned provision of the Rules, being simply a constituent of the definition section, in order to consider the objection in such regard:

“150 ZG. Definition. In this chapter, unless there is anything repugnant in the subject or context,

- (a) .....
- (b) .....
- (c) .....
- (d) “licensing committee” means a committee comprising Commissioner (Zone-I) LTU Islamabad, Commissioner (Zone-I) LTU Karachi, Commissioner Mardan Zone, RTO Peshawar, Director Intelligence and Investigation – IR Islamabad, Chief IR Operations I FBR Headquarters Islamabad and any other officer or authority designated by the Board.

.....”

The entire challenge to the vires was rested on the apprehension of the petitioners that the licensing committee did not contain an expert

<sup>9</sup> *Re: Suo Moto Case 13 of 2009* reported as *PLD 2011 Supreme Court 619*.

<sup>10</sup> *Otsuka Pakistan Limited vs. Province of Sindh & Others (CP D 881 of 2019)*; *Guinault SA PA Orleans Sologne vs. Federation of Pakistan & Others (CP D 2531 of 2019)*.

in information technology, hence, could not have undertaken the evaluation of any bids.

13. This Division Bench has revisited the concept of *ultra vires* in the *Shabbir Bijarani case*<sup>11</sup>. The judgment, authored by *Muhammad Ali Mazhar J.*, encapsulated the prevailing law and maintained as follows:

“13. Ultra vires is a Latin phrase and expression which means "beyond the powers". If an act entails legal authority and it is done with such authority, it is symbolized as *intra vires* (within the precincts of powers) but if it carries out shorn of authority, it is *ultra vires*. Acts that are *intra vires* may unvaryingly be acknowledged legal and those that are *ultra vires* illegal. The validity of the subordinate or delegated legislation can be challenged on the ground of being *ultra vires* the enabling or parent Act. If the subordinate or delegated legislation is found in excess of the powers conferred by the parent Act or is made without following the procedure to be followed, the delegated or subordinate legislation may be declared invalid. It is a well settled that constitutionality of any law can be scrutinized and surveyed. The law can be struck down if it is found to be offending against the Constitution for absenteeism of lawmaking and jurisdictional competence or found in violation of fundamental rights. It is also established law that the *vires* of delegated legislation may be subject to judicial review. At the same time it also well-known through plethora of dictums laid down by the superior courts that the law should be saved rather than be destroyed and the court must lean in favour of upholding the constitutionality of legislation unless *ex facie* violative of a Constitutional provision. When the subordinate or delegated legislation is made by the authority exercising its power *mala fide* or with ulterior motive or in an unreasonable and arbitrary manner then of course this court may declare it invalid. In literal sense, the expression *ultra vires* connotes that the rule making authority had no substantive powers under the parent statute to make rules in question. It is well known principle that Rule cannot go beyond the Act. The delegate cannot make a rule which is not authorized by the parent statute and the delegated legislation must fall within the four corners of the parent statute. To strengthen this particular scenario, we surveyed and browsed a few dictums which deduced and deciphered following tenets of law:

(1) This is a settled principle that a statutory rule cannot enlarge the scope of the section under which it is framed and if a rule goes beyond what the section contemplates, the rule must yield to the statute.

(2) The authority of executive to make rules and regulations in order to effectuate the intention and policy of the Legislature, must be exercised within the limits of mandate given to the rule making authority and the rules framed under an enactment must be consistent with the provisions of said enactment.

(3) The rules framed under a statute if are inconsistent with the provisions of the statute and defeat the intention of Legislature expressed in the main statute, same shall be invalid.

(4) The rule making authority cannot clothe itself with power which is not given to it under the statutes and thus the rules made under a statute, neither enlarge the scope of act nor can go beyond the act and must not be in conflict with the provisions of statute or repugnant to any other law in force.

(5) Rules must be read together with the Act under which they are made, cannot repeal or contradict express provisions in the Acts from which they derive their authority, and if the Act is plain, the rule must be interpreted so

<sup>11</sup> *Mir Shabbir Ali Khan Bijarani & Others vs. Federation of Pakistan 7 Others* reported as *PLD 2018 Sindh 603*.

as to be reconciled with it, or, if it cannot be reconciled, the rule must give way to the plain terms of the Act.

(6) If the rules framed under the statute are in excess of the provisions of the statute or are in contravention of or inconsistent with such provisions then those provisions must be regarded as ultra vires of the statute and cannot be given effect to.

(7) The "rules" and "regulations" framed under any Act are meant to regulate and limit the statutory authority.

(8) Rules and regulations being forms of subordinate legislation do not have substantial difference as power to frame them is rooted in the statute.

(9) Statutory bodies are invariably authorized under the Act to make or adopt rules and regulations not inconsistent with the Act, with respect to such matters which fall within their lawful domain to carry out the purpose of the Act.

(10) Rulemaking body cannot frame rules in conflict with or in derogation of the substantive provisions of the law or statute, under which the rules are framed.

(11) Rules cannot go beyond the scope of the Act. No rule can be made which is inconsistent with the parent statute, whereas, no regulation can be framed which is inconsistent with the parent statute or the rules made thereunder.

(12) If a statute is ex facie discriminatory or capable of discriminatory application or violated any provision of the Constitution, it may be declared void ab initio since its inception.

(13) When a right is safeguarded by a Constitutional guarantee is called 'fundamental right' because by doing so it has been placed beyond the power of any organ of State, whether, Executive or Legislative to act in violation of it. Such a right cannot be taken away, suspended or abridged.

(14) The fundamental rights are natural rights which are personal to the individual as a citizen of a free and civilized community.

(15) The essential characteristic of fundamental rights is that they impose limitations, express or implied, on public authorities, interfering with their exercise. It is the duty of the Court to protect Fundamental Rights granted in the Constitution."

14. The competence<sup>12</sup> by virtue whereof the Rules, and / or any amendment thereto, have been notified is not under challenge before us. It has also not been demonstrated as to what provision of the Constitution or the law<sup>13</sup> does the mere definition<sup>14</sup> militate against. Yet the entire special dispute resolution mechanism, per the Rules and / or the PPRA Rules, has been avoided on the pretext that the said fora cannot delve into the issue of vires.

15. It is manifest from the arguments articulated before us, by the petitioners' counsel, that the basic dispute is with respect to the tender process and the subsequent award therein. The challenge to the vires of Rule 150ZG(d) of the Rules *prima facie* appears to be an extraneous ground invoked to seek the adjudication of the grievance before this court in the exercise of its Constitutional jurisdiction.

<sup>12</sup> Federal Excise Act 2005; Sales Tax Act 1990; Customs Act 1969.

<sup>13</sup> Federal Excise Act 2005; Sales Tax Act 1990; Customs Act 1969.

<sup>14</sup> Rule 150ZG(d) of the Rules.



A Division Bench of this High Court, in *Muhammad Saddiq case*<sup>15</sup>, had deprecated the invocation of the writ jurisdiction in private disputes and had held that such action, merely to overcome objections of the branch with respect to maintainability, cannot but be disapproved. This Division Bench has also earlier maintained<sup>16</sup> that the masquerade of pleadings to invoke the Constitutional jurisdiction of this court is undesirable.

The grounds invoked to challenge the vires are unsubstantiated, unjustifiably delayed and cannot be sustained on the anvil of the preponderance of authority elaborated supra, hence, it is observed that no case for challenging the vires of Rule 150ZG(d) of the Rules is made out before us.

16. In view of the reasoning and rationale herein contained, we are constrained to observe that the present petitions are not maintainable as the petitioners were not justified in invoking the writ jurisdiction of this Court, in the demonstrable presence of alternate fora specially created for the adjudication of such disputes, hence, the petitions, along with pending applications/s, are hereby dismissed.

17. The petitioners shall remain at liberty to seek the redressal of their grievance/s before the forum of appropriate jurisdiction, subject to all just exceptions, and any such adjudication shall remain uninfluenced by any observation herein contained.

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<sup>15</sup> *Muhammad Saddiq & Another vs. Ruqaya Khanum & Others* reported as *PLD 2001 Karachi 60*.

<sup>16</sup> *AKD Investment Management Limited & Others vs. JS Investments Limited & Others (CP D 5016 of 2019)*.