



2. it was further contended by the learned counsel for the petitioner that due to sudden cancellation of the orders from Yemen, the petitioner could not perform its contractual obligations under the EFS Part I and EFS Part II as a result of the war in Yemen and generally due to devaluation of currency of importing countries. Despite aforesaid force majeure circumstances, the petitioner was charged with excessive fine by the respondent No.1 on account of short performance. Since the EFS provided for a refund mechanism in terms of Circular No.5 of 2008 dated 26.12.2008 therefore, the petitioner applied for the refund and moved applications to the Director, Infrastructure, Housing & SME Finance Department of the respondent No.1. Learned counsel made much emphasis that the applications were submitted with all documentary evidence but same were not considered with proper application of mind by the Infrastructure, Housing & SME Finance Department and on 02.05.2018 a non-speaking order was communicated to the President Habib Metropolitan Bank that the application filed by the petitioner for refund of fine charged on account of non/short performance against the loans obtained under EFS has been rejected. Learned counsel for the petitioner further argued that no fair opportunity of hearing was provided to the petitioner while rejecting their application. He referred to sub-section (1) of Section 24-A of the General Clauses Act, which provides that 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. Sub-section (2) focused that 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. Learned counsel has also relied on Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973.

3. Quite the opposite, the learned counsel for the respondent No.1 assisted by Umar Hashmi, Assistant Director, SBP argued that the application of the petitioner was properly considered and the fate of the rejection was communicated to the concerned Bank. Learned counsel for the respondent No.1 further argued that opportunity of hearing was provided to the petitioner, but nothing reflects from the record that any fair opportunity of hearing was provided to the representative of Bank, however, it is simply stated that the application has been examined but the same cannot be acceded to under provision of refund procedure of the scheme. Learned counsel for the respondent No.1 has also referred to the Para 6 of the comments and argued that the situation in the Yemen was started deteriorating before availing of said finance facility by the exporter. Learned counsel has further relied upon Para 7 of the comments wherein it is mentioned that war in Yemen was started in 2015 which cannot be termed as unforeseen event for the exporter requiring export performance in FY 2015-2016 against finance facility availed under Export Finance Scheme. He has also referred to Para 9 of the comments and argued that the refund of fine requests are primarily considered on the basis of force majeure event duly supported by valid documentary evidence.

4. Be that as it may, according to the petitioner all the relevant documents were attached with the applications which were not considered whereas learned counsel for the respondent No.1 (State Bank of Pakistan) articulated that no documentary evidence was attached with the application. The bone of contention raised vice versa is precisely based on factual controversy which cannot be decided in the writ jurisdiction but it is unequivocally reflects that a fair opportunity to justify the claim has not been afforded to the petitioner. Due process is prerequisite that needs to be respected at all stratum. In the case of **Inbox Business Technologies Limited vs. Pakistan**

**& others (reported in 2018 PTD 621) (authored by one of us Muhammad Ali Mazhar-J)** in which the scheme and concept of fair trial and due process was discussed in detail and the court held that in our Constitution, right to fair trial is a fundamental right and this constitutional reassurance envisaged and envisioned both procedural standards that courts must uphold in order to protect peoples' personal liberty and a range of liberty interests that statutes and regulations must not infringe. On insertion of this fundamental right in our Constitution, we ought to analyze and survey the laws and the rules/regulations framed thereunder to comprehend whether this indispensable right is accessible or deprived of? In case of stringency and rigidity in affording this right, it is the function rather a responsibility of court to protect this right so that no injustice and unfairness should be done to anybody. The proactive role of the court must alone prove that this right is not confined only within the precincts of the Constitution but in actuality and for all practicality it exists to do good to the people. The right to a fair hearing and or trial necessitates that no one should be penalized by the decision upsetting and afflicting his right or legitimate expectations unless he is given prior notice of the case, a fair chance to answer it and a fair opportunity to explicate/present the case. The right to a fair trial means that general public and commonalities can be sure that process will be fair and certain which is the finest method of detaching and disengaging a guilty from an innocent thereby protecting against injustice. The honourable Supreme Court in the case of Warid Telecom (Pvt.) Limited v. Pakistan Telecommunication Authority, reported in 2015 SCMR 338 held as under:

**“Constitution of Pakistan. Article 10A. Fundamental Rights. Whenever adverse action was being contemplated against a person a notice and/or opportunity of hearing was to be given to such person. Said principle was a fundamental right under Article 10A in the Constitution. However, both the requirements of a notice and providing an opportunity of a hearing may also be dispensed with in certain type of cases e.g. where such requirement would cause "more injustice than justice" or it was not in the "public interest". The Indian Supreme Court in the case of Karnataka Public Service Commission v. B. M. Vijaya Shankar (AIR 1992 Supreme Court 952) stated that, when meeting the requirement of notice and providing an opportunity of hearing will**

cause "more injustice than justice" or it is not in the "public interest" the same may be withheld. It will be useful to reproduce the following portion from the said judgment:--

"(4) Was natural justice violated? Natural justice is a concept which has succeeded in keeping the arbitrary action within limits and preserving the rule of law. But with all the religious rigidity with which it should be observed; since it is ultimately weighed in balance of fairness, the courts have been circumspect in extending it to situations where it would cause more injustice than justice. Even though the procedure of affording hearing is as important as decision on merits yet urgency of the matter, or public interest at times require, flexibility in application of the rule as the circumstances of the case and the nature of the matter required to be dealt may serve interest of justice better by denying opportunity of hearing and permitting the person concerned to challenge the order itself on merits not for lack of hearing to establish bona fide or innocence but for being otherwise arbitrary or against rules. Present is a case which, in our opinion, can safely be placed in a category where natural justice before taking any action stood excluded as it did not involve any misconduct or punishment."

Another case from the India in a similar vein is the case of Union of India v. J. N. Sinha (AIR 1971 Supreme Court 40) where it was held, that:--

"As observed by this Court in Kraipak v. Union of India, AIR 1970 SC 150, "the aim of rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. In other words they do not supplant the law but supplement it." It is true that if a statutory provision can be read consistently with the principles of natural justice, the Courts should do so because it must be presumed that the legislatures and the statutory authorities intend to act in accordance with the principles of natural justice. But, if on the other hand, a statutory provision either specifically or by necessary implication excludes the application of any or all the rules of principles of natural justice then the Court cannot ignore the mandate of the legislature or the statutory authority and read into the concerned provision the principles of natural justice. Whether the exercise of a power conferred should be made in accordance with any of the principles of natural justice or not depends upon the express words of the provision conferring the power, the nature of the power conferred, the purpose for which it is conferred and the effect of the exercise of that power."

5. As a result of above discussions, this petition is disposed of with the directions to the Director, Infrastructure, Housing & SME Finance Department of the respondent No.1 to provide fair opportunity of hearing to the proprietor/representative of the petitioner and consider all relevant documents attached with the applications thereafter pass a speaking order in accordance with law within 45 days after receiving copy of this order.

Judge

Judge