

ORDER SHEET
THE HIGH COURT OF SINDH, KARACHI
C.P. No.D-6136 of 2021

Dated: _____ Order with signature of Judge(s)

1.For orders on office objections.

2.For hearing of Main Case.

1). Mr. Justice Yousuf Ali Sayeed

2). Mr. Justice Mohammad Abdur Rahman

Date of hearing : 30.05.2023

Petitioner : Allah Bux Brohi through Mr. Aftab Ahmed Memon, Advocate.

Respondent No.1 : Government of Sindh through Mr. Asad Iftikhar, Assistant Advocate General, Sindh.

Respondents No.2
3 & 4 : Represented by Mr. Naseer Ahmed Leghari, Law Officer.

Respondent No.5 : Omer Khalil Jan through Mr. Muhammad Yasir, Advocate.

JUDGEMENT

MOHAMMAD ABDUR RAHMAN, J. This Petition has been maintained by the Petitioners under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 against a letter dated 9 August 2021 issued by the Respondent No. 2, "Blacklisting" the Petitioner from participating in Government Contracts for a period of one year.

2. The facts giving rise to this Petition are that the Petitioner participated in a Public Auction regarding the auction of Royalty Rights on Surface Minerals, Marble and Silica Sand in District Thatta Areas for the year 2019-2020 conferring on him the right to collect excise duty on specified minerals on behalf of the Mines Labour Welfare Organization. The bid made by the Petitioner was successful and by an order dated 25

July 2019 issued by the Assistant Commissioner Mines Labour Welfare Sindh, he was awarded that right.

3. It is not known as to what had happened for the period 2020-2021 but for the period 2021-2022, a Public Auction Notice was issued on 28 May 2021, stating therein that an auction would be held on 14 June 2021 of the Royalty Rights on Surface Minerals, Marble and Silica Sand in District Thatta Areas for the year 2020-2021 to collect excise duty on specified minerals on behalf of the Mines Labour Welfare Organization. The auction was by a corrigendum issued on 11 June 2022 adjusted to being held on 18 June 2021 and by a further two corrigendum's dated 21 June 2021 and 23 June 2022 adjusted to be held on 30 June 2021.

4. On 30 June 2021, the auction was held and whereat there was, according to the Petitioner, some irregularity with the manner in which the Respondent No. 5 made his bid. The Petitioner had contended that the Respondent No. 5 bid was actually a fraudulent bid and which he believed would not be honoured by the Respondent No. 5. Thereafter, it seems that the Respondent No. 5 instead of honouring his bid, preferred to institute Constitution Petition No.D-4724 of 2021 before this Court asking for a substantially reduced bid to be accepted by the Respondent No. 2. The Petitioner made an application in that Petition to intervene and where after the Court on 9 August 2021 proceeded to hold:

“ ... *Learned Addl. Advocate General have not been able to explain the mechanism adopted by the respondents for the public auction for the purposes of collection of excise duty on mines and minerals in District Thatta, therefore, we would direct the respondent to file detailed comments in this regard along with relevant rules. In the meanwhile, let the re-auction proceeding may take place, whereas, the petitioner and all the eligible parties may be allowed to participate in the said proceedings in accordance with law. However, the proceedings shall not be finalized and will be subject to further orders of this Court.*”

5. The reauction was also held on 9 August 2021, however the Petitioner states that for reasons that were not known to him at that time, he was not permitted to participate in those proceedings. It seems that, unknown to the Petitioner, an inquiry had been initiated and pursuant to which the office of the Mukhtiarkar (Revenue) Taluka & District Thatta had issued a letter dated 28 July 2023 disputing the issuance of a Solvency Certificate bearing No. TTA/427 dated 19 July 2021 for a sum of Rs.200,000,000/- (Rupees Two Hundred Million) (hereinafter referred to as the "Solvency Certificate") that he stated had not been issued by that office in favour of the Petitioner.

6. This Letter was forwarded by the Director (Admin & Finance) Mines & Mineral Development to the Deputy Commissioner, District Thatta on 30 July 2021 and which apparently found its way to the Director (Admin & Finance) Chairman of Auction Committee Mines & Mineral Development. By a letter dated 9 August 2021 (hereinafter referred to as the "Impugned Letter") issued to the Petitioner the Director (Admin & Finance) Chairman of Auction Committee Mines & Mineral Development "blacklisted" the Petitioner for a period of one year from participating in government contracts alleging that the Solvency Certificate had been fraudulently submitted by the Petitioner.

7. It is apparent that the letter being issued on 9 August 2021, the period for which the Petitioner had been blacklisted having at the time of the hearing of this Petition already lapsed and as the Petitioner was being permitted to participate in government contracts why this Petition should not be treated as having become infructuous. The Petitioner however submitted that there being a stigma as against his name, he continued to wish to press the Petition seeking to set aside the Impugned Notice.

8. The Petitioner contended that the process of backlisting of a contractor was at present governed by the Blacklisting of Bidders, Contractors, Supplies and Consultants Regulations, 2023. However, as these Regulations had not been notified at the time when the Petitioner had been blacklisted, they would not be applicable to adjudicate on his rights as were in existence at that time. He submitted that, the Impugned Letter had been issued in violation of the fundamental rights of the Petitioner as contained in Article 18 of the Constitution of the Islamic Republic of Pakistan, 1973 and also in violation of the rules of Natural Justice in as much as not even a show cause notice was issued to him prior to blacklisting him, let alone him being afforded a hearing. He relied on a decision of the Supreme Court of Pakistan reported as **New Jubilee Insurance Company Ltd. Karachi vs. National Bank of Pakistan, Karachi**¹ and a decision of the Lahore High Court, Lahore reported as **M.A. Aleem Khan & Sons (Pvt.) Ltd. Vs, Province of Punjab etc**² to advance the proposition that the illegal blacklisting of a firm is a violation of the fundamental rights of the Petitioner as contained in Article 18 of the Constitution of the Islamic Republic of Pakistan, 1973. To advance a proposition that an order blacklisting a contractor without following the rules of natural justice was illegal he relied on the decisions reported as **Rehim Khan vs. Divisional Superintendent Pakistan Railways Rawalpindi**,³ **Zulfiqar Ali vs. Divisional Superintendent (Workshops) Pakistan Railways (Moghalpura), Lahore another**,⁴ **Nizami Construction Company through Sole Proprietor vs. Chief Executive Officer, Gujranwala Electricity Supply Company (GEPCO) and 2 others**,⁵ **Messrs Fast Tracks through Sole Proprietor vs. Federal**

¹ PLD 1989 SC 1126

² PLD 2006 Lhr 84

³ 2003 YLR 63

⁴ PLD 2001 Lhr 13

⁵ 2005 CLC 366

Investigation Agency,⁶ and M.A. Aleem Khan & Sons (Pvt.) Ltd. Vs, Province of Punjab etc.⁷ He then relied on a judgement of a Division Bench of this Court reported as Adam Sugar Mills Limited vs. Federation of Pakistan⁸ and a decision reported as Humeria Imran through Attorney vs. Government of Pakistan, Ministry of Defence and Production⁹ wherein the earlier decision was followed to state that in matters pertaining to the blacklisting of a person as a contractor the remedies prescribed under Rule 48 of the Public Procurement Rules, 2004 that provided a redressal committee to address such an issue could not be considered as an alternate efficacious remedy to redress such a grievance.

9. Mr. Asad Iftikhar, the Assistant Advocate General Sindh addressed arguments on behalf of the Province of Sindh and stated that this Petition was not maintainable as the Petitioner had an alternate efficacious remedy which he had not availed. He submitted the process of blacklisting was done pursuant to Rule 35 of the Sindh Public Procurement Rules 2010 by submitting a false Solvency Certificate and as such the conduct of the Petitioner fell within the purview of clause (b) of Sub-Rule (1) of Rule 35 of the Sindh Public Procurement Rules, 2010 and was clearly a “fraudulent” act. He clarified that under Sub-Rule (2) of Rule 35 of the Sindh Public Procurement Rules, 2010, the procuring agency could on its own initiative carry out an investigation to consider whether to blacklist a contractor and if blacklisted, a contractor would thereafter have the right to submit an appeal to the Authority under Sub-Rule (4) of Rule 35 of the Sindh Public Procurement Rules, 2010 and which Authority would refer the matter to a review committee constituted under Sub-Rule (8) to (15) of Rule 31 of the Sindh Public Procurement Rules, 2010. He

⁶ 2021 CLC 1160

⁷ PLD 2006 Lhr 84

⁸ 2012 CLC 1780

⁹ PLD 2019 Sindh 467

concluded by stating that as the Petitioner had never filed any appeal with the Authority and had directly filed this Petition before this Court, the Petition was not maintainable. The Law Officers for the Respondents No. 2,3 and 4 and the Counsel for the Respondent No. 5 each adopted the arguments raised by the Assistant Advocate General Sindh and prayed for the dismissal of the Petition.

10. We have heard the Counsel for the Petitioner, the Assistant Advocate General Sindh, the Law Officers of the Respondents No. 2, 3 and 4 and the Counsel for the Respondent No. 5 and have perused the record. The right of a procuring agency to blacklist a contractor is contained in Rule 35 of the Sindh Public Procurement Rules, 2010 and which reads as under:

- “ ... 35. *Blacklisting of Suppliers, Contractors and Consultants*
- (1) *The following shall result in blacklisting of suppliers, contractors, or consultants, individually or collectively as part of consortium:*
- (a) *conviction for fraud, corruption, criminal misappropriation, theft, forgery, bribery or any other criminal offence;*
 - (b) *involvement in corrupt and fraudulent practices while obtaining or attempting to obtain a procurement contract;*
 - (c) *final decision by a court or tribunal of competent jurisdiction that the contractor or supplier is guilty of tax evasion;*
 - (d) *willful failure to perform in accordance with the terms of one or more than one contract;*
 - (e) *failure to remedy underperforming contracts, as identified by the procuring agency, where underperforming is due to the fault of the contractor, supplier or consultant;*
- (2) *Procuring agency may, on its own motion, or information provided by any party, carry out an investigation to determine, whether there is sufficient cause for blacklisting a contractor, consultant or supplier. If the procuring agency is satisfied that such a cause exists, **it shall initiate the process of blacklisting in accordance with the procedure laid down in regulations to be issued by the Authority;***
- (3) *As a result of the scrutiny process, as mentioned above in sub-rule (2), the procuring agency may take one of the following decisions;*
- (a) *contractor or consultant or supplier may be blacklisted;*
 - (b) *contractor or consultant or supplier may be debarred temporarily, specifying the time period;*

(c) contractor or consultant or supplier may be blacklisted if he fails to take the specified remedial actions within a specified time period;

Provided that the procuring agency shall duly publicize and communicate its decision to the Authority, other Government departments, and also hoist on its own website.

(4) Any party being aggrieved by the decision of the procuring agency may submit an appeal to the Authority, which shall refer the matter to the review panel, as provided in Rule 31, sub-rule (8) to (15);

(5) Chief Secretary on the basis of recommendations furnished by the review panel, may confirm, overrule or modify any decision taken by the procuring agency

(Emphasis is added)

It is an admitted fact that on 9 August 2021 when the Impugned Letter was issued, the Blacklisting of Bidders, Contractors, Supplies and Consultants Regulations, 2023 had not been notified. As such, the Procuring Agency could not, at that time, have initiated “ **the process of blacklisting in accordance with the procedure laid down in regulations to be issued by the Authority**” as admittedly at that time no regulations had been notified. There being no regulations that had been framed the Procuring Agency could not have acted under the provisions of Sub-Rule (2) of Rule 35 of the Sindh Public Procurement Rules, 2010 to initiate the process to blacklist the Petitioner or pursuant thereto to give a decision under Sub-Rule (3) of Rule 35 of the Sindh Public Procurement Rules, 2010. Correspondingly, the right of review that was available under Sub-Rule (4) of Rule 35 of the Sindh Public Procurement Rules, 2010 could also not have therefore been invoked by the Petitioner as against the decision in Sub-Rule (3) of Rule 35 of the Sindh Public Procurement Rules, 2010. Having considered the issue, we are of the opinion that the argument of the Assistant Advocate General of Sindh that as there was an alternate efficacious remedy in the form of a review available to the Petitioner under Rule 31 of the Sindh Public Procurement Rules, 2010 rendering this Petition as not being maintainable must fail as such a remedy was in effect not available to the petitioner under Rule 31 of the Sindh Public Procurement Rules, 2010 at the relevant time. Needless to say, in the

event that any Procuring Agency was to today blacklist a contractor, that Procuring Agency would have to follow the Blacklisting of Bidders, Contractors, Supplies and Consultants Regulations, 2023 and a person aggrieved by any decision given by the Procuring Agency under Sub-Rule (3) of Rule 35 of the Sindh Public Procurement Rules, 2010 would generally have to, in accordance with Sub-Rule (4) of Rule 35 of the Sindh Public Procurement Rules, 2010, avail the remedy of a Review under Rule 31 of the Sindh Public Procurement Rules, 2010 before approaching this Court in its jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973.

11. The authority of the Procuring Agency having not been found in the Sindh Public Procurement Rules, 2010 it is apparent that any administrative action that was carried out in respect of the blacklisting of the Petitioner had to be premised on the principles of Natural Justice. Admittedly neither a show cause notice let alone a hearing was afforded to the Petitioner before issuing the Impugned Notice. The Supreme Court of Pakistan in the decision reported as **Collector Customs Model Customs Collectorate Pehsawar vs. Muhammad Ismail and others**¹⁰ has held that:

“ ... 8. A show cause notice is served by an authority under the relevant provisions of law in order to provide a reasonable opportunity to defend the allegations and to explain as to why any penal action should not be taken against him. In essence, it is a well-structured process to provide a fair chance to the accused to respond to the allegations and explain their position within the stipulated timeframe or, in other words, it provides a levelheaded course of action to ensure impartiality, justness and rectitude to the person in receipt of notice with an opportunity to explain why he is not guilty of any violation of law. The show cause must contain all the allegations categorically and unambiguously, including the legal provisions related to the transgression of law or default.

9. *The principles of natural justice require that the delinquent should be afforded a fair opportunity to converge, give explanation and contest it before he is found guilty and condemned. The doctrine of natural justice is destined to safeguard individuals and whenever civil rights, human rights, Constitutional rights or other guaranteed rights under*

any law are found to be at stake. The principles of natural justice and fair-mindedness are grounded in the philosophy of affording a right of audience before any detrimental action is taken, in tandem with its ensuing constituent that the foundation of any adjudication or order of a quasi-judicial authority, statutory body or any departmental authority regulated under some law must be rational and impartial and the decision maker has an adequate amount of decision making independence and the reasons of the decision arrived at should be amply well defined, just, right and understandable, therefore it is incumbent that all judicial, quasi-judicial and administrative authorities should carry out their powers with a judicious and evenhanded approach to ensure justice according to tenor of law and without any violation of the principle of natural justice [Ref: Sohail Ahmad Vs. Government of Pakistan through Secretary of Interior Ministry, Islamabad and others (2022 SCMR 1387) & Inspector General of Police, Quetta and another Vs. Fida Muhammad and others (2022 SCMR 1583)]. In the case of Commissioner of Income-Tax, East Pakistan Vs. Fazlur Rahman (PLD 1964 SC 410), this Court held in an Income Tax matter that where the proceedings are judicial or quasi-judicial in nature it is sufficient to entitle a party to a hearing in the absence of a specific provision to the contrary. At the same time it should be pointed out that the right to be heard is not confined to proceedings which are judicial in form. As has been held by this Court in *The Chief Commissioner, Karachi v. Mrs. Dina Sohrab Katrak* (PLD 1959 S C (Pak.) 45) the maxim "no man shall be condemned unheard" is not confined to Courts but extend to all proceedings, by whomsoever held which may affect the person or property or other right of the parties concerned in the dispute, and the maxim will apply with no less force to proceedings which affect liability to pay a tax. In the case of *University of Dacca through Vice Chancellor and another Vs. Zakir Ahmed* (PLD 1965 SC 90), this Court held that nevertheless, the general consensus of judicial opinion seems to be that, in order to ensure the "elementary and essential principles of fairness" as a matter of necessary implication, the person sought to be affected must at least be made aware of the nature of the allegations against him, **he should be given a fair opportunity to make any relevant statement putting forward his own case and to correct or controvert any relevant statement brought forward to his prejudice.** Of course, the person, body or authority concerned must act in good faith, but it would appear that it is not bound to treat the matter as if it was a trial or to administer oath or examine witnesses in the presence of the person accused or give him facility for cross-examining the witnesses against him or even to serve a formal charge-sheet upon him. Such a person or authority can obtain information in any way it thinks fit, provided it gives a fair opportunity to the person sought to be affected to correct or contradict any relevant statement prejudicial to him. In other words, in order to act justly and to reach just ends by just means the Courts insist that the person or authority should have adopted the above "elementary and essential principles" unless the same had been expressly excluded by the enactment empowering him to so act. Whereas in the *Mrs. Anisa Rehman vs. P.I.A.C. and another* (1994 SCMR 2232), it was held by this Court that there is judicial consensus that the Maxim *audi alteram partem* is applicable to judicial as well as to non-judicial proceedings. The above Maxim will be read in as a part of every statute if the right of hearing has not been expressly provided therein."

The Supreme Court of Pakistan has clearly opined that prior to taking any action of a penal nature, a government body is mandated to comply with the principles of Natural Justice and issue a show cause notice to the person who it is initiating penal action as against so as to afford that person **"a reasonable opportunity to defend the allegations and to**

explain as to why any penal action should not be taken against him.”

It is apparent that prior to the issuance of the Impugned Notice no show cause notice was issued to the Petitioner to give him a reasonable opportunity to defend the allegations made as against him. Instead, the Impugned Notice was issued without a show cause notice informing the Petitioner of the allegations as against him of purportedly falsely procuring the Solvency Certificate, and thereby depriving the Petitioner from being **“given a fair opportunity to make any relevant statement putting forward his own case and "to correct or controvert any relevant statement brought forward to his prejudice.”** Suffice to say there being no show cause notice issued a hearing on the allegations that were levelled as against the Petitioner in respect of falsely procuring the Solvency Certificate could never have been constituted thereby also depriving the Petitioner of a right to being heard on those allegations. As has been held, it was mandatory for the Director (Admin & Finance) Chairman of Auction Committee Mines & Mineral Development while issuing the Impugned Letter to have acted in accordance with the Rules of Natural Justice and as this was clearly not done we are of the opinion that the Impugned Letter cannot be sustained.

12. For the foregoing reasons, we are of the considered opinion that the Impugned Letter issued by the Director (Admin & Finance) Chairman of Auction Committee Mines & Mineral Development was issued in violation of the principles of natural justice and is set aside and the Petition is therefore granted with no order as costs.

JUDGE

Karachi dated 28 August 2023

JUDGE

Nasir PS.