IN THE HIGH COURT OF SINDH, KARACHI

Before: Nadeem Akhtar &
Mohammad Abdur Rahman,JJ,

C.P. No.D–3380 of 2023

Anoud Tasveer Jumani

Vs.

Federation of Pakistan & Others

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1. For hearing of Misc. No.15911/2023 (Stay) :
2. For hearing of main case:

Petitioner:	Through Mr. Munir A. Malik along with Ms/ Mohsin Kadir Shahwani, Ahsan Malik and Syed Aminuddin, Advocates
Respondent No.3:	Through Mr. Khalid Mehmood Siddiqui, Advocate
Respondent Nos.4 to 6:	Through M/s. Khursheed Javed, Mubarak Ali Shah and Ms. Nazia Siddiqui , Advocates
Respondent No.9:	Through Mr. Qurban Ali Malano, Advocate
Date of hearing:	13.12.2023

O R D E R

MOHAMMAD ABDUR RAHMAN,J: This Petition has been maintained under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 by the Petitioner challenging a notice dated 23 June 2023 issued by the Pakistan State Oil Company Limited (hereinafter referred to as "PSO") cancelling a Dealership License Agreement that had been entered into by it with the Petitioner to act as an Distributor of CNG at a Station located at Survey No, 9th Mile, Shahra-e-Faisal, Karachi. (hereinafter referred to as the "Said Property).

A. The Facts

2. The Said Property was on 1 January 1968 leased by the Karachi Development Authority (hereinafter referred to as the “KDA”) to the KDA Sports-Cum Recreation Center for a period of 99 years for the purpose of establishing a Petrol Pump. The KDA Sports-Cum Recreation Center had thereafter on 18 June 1970 executed a Lease Deed with Pakistan National Oils Limited granting a demise of the Said Property for a term of ten years commencing from 16 June 1970. On account of re-structuring, in both KDA Sports-Cum Recreation Center and in Pakistan National Oils Limited, the rights under the Lease Deed dated 1 January 1968, that vested in KDA Sports-Cum Recreation Center have now come to vest in the KDA Officers Club (hereinafter referred to as the “KDA OC”) while the rights under the Lease Deed dated 16 June 1970 that vested in favour of Pakistan National Oils Limited have come to vest in PSO.

3. The Lease Deed as between KDA OC and PSO had from time to time lapsed and was renewed every 10 years. In this regard, it is pertinent to mention that a Lease Deed was executed and registered on 13 March 2013 for a further term of 10 years commencing from 1 May 2013 and which was to expire on 30 April 2023. During the term of this lease, PSO itself operated the Petrol Pump at the Said Property but had entered into a Dealership License Agreement with the Petitioner’s aunt for operating a CNG Station at the Said Property. The Petitioners aunt had assigned her rights under that Agreement in favour of the Petitioner. PSO consented to the assignment and on 28 October 2021 a Dealership License Agreement was executed as between PSO and the Petitioner for operating a CNG Station at the Said Property in the name and style of “Ideal CNG”.

4. On 14 December 2022, KDA OC issued a letter to PSO giving it a 6 months notice, in accordance with clause 5 of the Lease Deed dated 13 March 2013, signifying its intention of not renewing the Lease Deed on its expiry on 30 April 2023. It seems that thereafter correspondence was exchanged as between the KDA OC and PSO whereby PSO attempted to negotiate for the renewal of the Lease Deed of the Said Property and which being inconclusive led to KDA OC sealing the Said Property on 3 May 2023. To protect its interests, PSO instituted Suit No. 315 of 2023 on the Original Side of this Court as against the KDAOC and in which suit, on an injunction application, orders were passed on 6 May 2023 restraining the possession of the Said Property from being handed over by the KDA OC to any third party.

5. It seems that simultaneously with the instituting of that Suit, PSO was entering into negotiations with KDA OC to renew the Lease for a further term of ten years and which was eventually acceded to by KDA OC on 7 June 2023 at a meeting of their Managing Committee. It is therefore clear that on 7 June 2023, KDA OC had subject to PSO agreeing to those terms signified its intention to renew the Lease for the Said Property for an additional term of ten years.

6. That on 23 June 2023 PSO issued a letter to KDA OC confirming that the terms for the renewal of the Lease Deed as between it and KDA OC had been agreed and that only the formalities of execution of the Lease Deed remained to be implemented. That on the very same date i.e. 23 June 2023 PSO issued a letter to the Petitioner stating therein:

> *" … As you are aware that ownership of land of the subject retail station belongs to the KDA Officers Club and the lease deed in respect of subject suit was expired on 30.04.2023, after which the continuation of lease is under dispute. It may also be appreciated that the subject site is a company financed site and therefore all the major expense for its establishment has been incurred by PSO.*
>
> *In view of the foregoing, since there is no lease in existence and PSO is also not in possession of site, therefore, in pursuance of clause 16.3 (x) of the Dealership License Agreement, PSO hereby revokes your Dealership License Agreement with immediate effect."*

7. That thereafter PSO, having renewed the lease for the Said Property, on 11 July 2023 chose to appoint the Respondent No. 9 as the Licensed Dealer for the Said Property to operate a CNG Station, in effect replacing the Petitioner, and which had on 15 July 2023 caused the Petitioner to maintain this Petition. It seems that thereafter the Respondent No. 9 also instituted Suit No. 1206 of 2023 *inter alia* as against the Petitioner seeking a declaration that she had been validly appointed as the Licensed Dealer of PSO and had on 19 July 2023 obtained an interim order restraining any coercive action from being taken against her by the Petitioner, other than in accordance with law.

B. The Submissions on Behalf of the Petitioner.

8. Mr. Munir A. Malik had entered appearance on behalf of the Petitioner and contended that the letter dated 23 June 2023 issued by PSO terminating the Dealership of the Petitioner has been issued with malice as it was the sole intention of PSO to terminate the Petitioner's as Dealership Agreement and to replace the Petitioner with the Respondent No.9. He further contended that the entire dispute as between the KDA OC and the PSO was contrived so as to terminate the Dealership of the Petitioner and to replace her with the Respondent No. 9 as a clause existed in the Dealership Agreement that gave PSO the right to terminate that Agreement in the event that the Lease as between PSO and KDA OC had determined. He premised his contentions on two letters each dated 23 June 2023 the first issued by PSO confirming that they had terminated the Dealership Agreement of the Petitioner on the ground that the Lease for the Said Property had expired, while on the same day they had issued a second letter to the KDA OC confirming that they had acceded to all the terms for the renewal of the Lease for the Said Property with KDA OC. He contended that if this was not evidence enough of the obvious malice on the part of PSO it was fortified by the fact that while PSO had very soon thereafter entered into a new Dealership Agreement with the Respondent No. 9 on 11 July 2023, they had as per the Dealership Appointment Letter issued to the Respondent No. 9 confirmed that they had received a Bank Guarantee from the Respondent No. 9 also on 23 June 2023 as a security deposit for her appointment as the Dealer of PSO. On this basis Mr. Munir A. Malik contended that the letter dated 23 June 2023 terminating the Dealership Agreement was liable to be set aside on this ground of Malice. Mr. Munir A. Malik submitted that this Court had, subject to certain limitations, the requisite jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 to adjudicate on contractual obligations and which in this case were clearly not premised on any disputed questions of fact to oust the jurisdiction of this Court. While noting that the Dealership Agreement as between PSO and the Petitioner contained an Arbitration Clause, he contended that this would not prevent this Court from exercising its jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 when the actions of PSO were clearly premised on Malice in Law and which actions can be assailed in this Courts Constitutional Jurisdiction.

9. In support of his contentions to set aside the Letter dated 23 June 2023 terminating the Dealership Agreement, Mr. Munir A. Malik relied on a decision of the Honourable Supreme Court of Pakistan reported as ***Messrs Airport Support Services vs. The Airport Manager, Quaid e Azam International Airport, Karachi and others***[1] wherein while deciding an appeal maintained against a judgment of this Court, addressing the legality of the issuance of a notice to vacate premises on the basis of contractual rights, keeping in mind the jurisdiction of a High Court under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, it was held that this Court had the requisite jurisdiction to adjudicate on contractual rights in certain circumstances and which cast on a duty on a public body must act "reasonably, fairly, justly and for the advancement of the purpose of its enactment" and when such a public body fails to act in such a manner such actions would be deemed to be an action which was Malice in law. He contended that PSO's actions on the 23 June 2023 clearly fall afoul of such a rule. He further contended that the simpliciter existence of an Arbitration Clause in the Dealership License Agreement would not oust the jurisdiction of the Court as in the aforementioned decision of the Honourable Supreme Court of Pakistan it was held that:

> *" … Neither of the conclusions of the High Court is sustainable. It has consistently been held that while routine contractual disputes between private parties and public functionaries are not open to scrutiny under the Constitutional jurisdiction, breaches of such contracts, which do not entail inquiry into or examination of minute or controversial questions of fact, if committed by Government, semi-Government or Local Authorities or like controversies if involving dereliction of obligations, flowing from a statute, rules or instructions can adequately be addressed for relief under that jurisdiction. Further a contract, carrying elements of public interest, concluded by functionaries of the State, has to be just, fair, transparent, reasonable and free of any taint of mala fides, all such aspects remaining open for judicial review. The rule is founded on the premises that public functionaries, deriving authority from or under law, are obligated to act justly, fairly equitably, reasonably, without any element of discrimination and squarely within the parameters of law, as applicable in a given situation. Deviations, if of substance, can be corrected through appropriate orders under Article 199 of the Constitution. In such behalf even where a contract, pure and. simple, is involved, provided always that public element presents itself and the dispute does not entail evidentiary facts of a disputed nature, rederess may be provided ….*

[1] 1998 SCMR 2268

The doctrine has further been recognised and augmented by the recent insertion of section 24-A in the General Clauses Act, 1897, which declares that where a statute confers a power to make any order or to give any direction to any Authority, office or person, such would be exercised reasonably, fairly, justly and for the advancement of the purpose of the enactment. What is more, the order or direction, so far as necessary or appropriate would reflect reasons for its making or issuance and, where the same is lacking, an affectee may demand the necessary reasons, which, in response, would be furnished. Section 24-A (supra) is this:--

> *"24-A. 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 purpose of the enactment.*
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> *(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.*
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> *(3) Where any order made or any direction given in exercise of the powers conferred by or under an enactment affects any person prejudicially such person may require the authority, office, or person making the order or giving the direction to furnish the reasons for the order or, as the case may be, the direction and such authority, office or person shall, furnish the reasons to such person." …*

As regards arbitration clauses in contracts of the genus, the normal rule of bar of proceedings under section 34 of the Arbitration Act and other postulates of the same law, manifestly, do not, with conventional force, reflect on Constitutional remedies, for the simple reason that a sub-Constitutional legislation cannot curtail or otherwise cut across the Constitutional mandates.' Even while the preclusions -in the ordinary laws may contextually, stand so l clogged, and in the category may relevantly be included in the Contract Act, 1872, the Specific Relief Act, 1877 and Sale of Goods Act, 1930, the Court, when addressing a Constitutional relief cannot be altogether oblivious of the just, reasonable and salutary provisions in such legislations. Thus, where a contract in terms of the Specific Relief Act cannot be specifically enforced or under the Contract Actis void ab initio or under the Sale of Goods Act giving effect to the same may contravene the principles and postulates of that law, a Constitutional Court would be slow in extending relief. It is for this reason that a servant cannot be forced on an unwilling master nor can contracts eminently unsuitable for specific performance

> *to be directed to be specifically performed nor considerations of public policy may be ignored in extending a Constitutional remedy. All this, however, in the Court's discretion may give way to public interest and public good, where a State functionary has exceeded his power and wilfully or wantonly trampled upon vested private or public rights. That such a power, relevant to the Arbitration Act, 1940, vests in the superior Court has clearly been recognised in at least two of the reported cases from this jurisdiction, which have been cited by Mr. Fazl-e-Mehmood, appearing for the appellant. Such are Anjuman-e-Ahmadlya Sergodha v. Deputy Commissioner, Sargodha, PLD 1966 SC 639 and Muhammad Ashraf Ali v. Muhammad Naseer 1986 SCMR 1096."*

He also relied upon a judgment of a Full Bench of the Learned Lahore High Court, Lahore reported as ***Messrs Wak Orient Power and Light Limited through Chief Exectuive Officer Lahore vs. Government of Pakistan Ministry of Water and Power through Secretary, Islamabad and 2 others***[2] in which it was held that an arbitration clause in an agreement will not interfere with this Court exercising its jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan when the enforcement of a contractual obligation was found to be exercised by a statutory authority arbitrarily, unreasonably or with mala fide. He finally relied on a decision of the Honourable Supreme Court of Pakistan reported as ***Justice Qazi Faez Isa vs. The President of Pakistan***[3] to highlight the difference between what has been held to be "mala fide in fact" and "mala fide in law" and wherein it was held that:

> *" … A recent judgment of this Court in Said Zaman Khan v. Federation of Pakistan (2017 SCMR 1249) has studied not only the entire case-law on the subject but has also analysed the essential yet different ingredients of both mala fide in law and malice in fact. It would be useful at this stage to reproduce the relevant portions from the said judgment:*
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> > *"82: ...where any action is taken or order passed not with the intention of fulfilling its mandate or to achieve its purpose but is inspired by a collateral purpose or instigated by a personal motive to wrongfully hurt somebody or benefit oneself or another, it is said to suffer from malice of facts. In such cases, the seat of the malice or bad faith is the evil mind of the person taking the action be it spite or personal bias or ulterior motive."*
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> > *"83: ...where an action taken is so unreasonable, improbable or blatantly illegal that it ceases to be an action countenanced or contemplated by the*

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[2] 1998 CLC 1178

[3] PLD 2021 SC 1

> *law under which it is purportedly taken malice will beimplied and [the] act would be deemed to suffer from malice in law or constructive malice. Strict proof of bad faith or collateral propose in such cases may not be required.*
>
> *"90: ... The mere allegation that an action has been taken wrongly is not sufficient to establish mala fide of facts. Specific allegations of the collateral purpose or an ulterior motive must be made and proved to the satisfaction of the Court."*

> *48. The crux of our analysis will be focused on malice in fact since the petitioner has primarily levelled allegations of ulterior motives against the respondents. However, to present a complete picture of mala fides, two general points of importance from the above quoted observations need to be stated. First, that apart from the generally recognised category of actions driven by a foul personal motive described here as malice in fact, there is another category of reckless action in disregard of the law termed as mala fide in law. The first type of mala fide is attributed to a person whereas the second is levelled against the impugned action. While the former is concerned with a collateral purpose or an evil intention to hurt someone under the pretence of a legal action, the latter deals with actions that are manifestly illegal or so anomalous that they lack nexus with the law under which they are taken. Thus it becomes clear that malice in fact and mala fide in law have different ingredients, the former being comprised of factual elements with the latter being composed of legal features, that need to be established as such for the respective consequences to ensue. Secondly, it is clarified that an accusation of mala fide in law involves more than errors of misreading the record or non-application of the law or lack of proportionality in the impugned action. Instead, this is a serious allegation of wanton abuse or disregard of the law. However, when an ulterior motive to cause harm is proved then the repercussions of malice in fact follow. It is for this reason that a mere allegation that an action has been taken wrongly cannot be grounds to hold that such action suffers from mala fide in law or malice in fact. This is also consistent with the view propounded in para-90 of the Said Zaman case (supra)."*

10. Mr. Munir A Malik also contended that as PSO was an entirely government owned entity, as such the Dealership License Agreement that was entered into by it with the Respondent No. 9 without complying with the provisions of the Public Procurement Regulatory Authority Ordinance, 2002 (hereinafter referred to as the "2002 Ordinance") and the provisions of the Public Procurement Rules, 2004 (hereinafter referred to as the "2004 Rules") was illegal and could not be sustained. He therefore contended that, in the event that this Court concluded that either malice in law was not

established or could not be adjudicated on by this Court; that he had every right to agitate that the Dealership License Agreement that was entered into by PSO with the Respondent No. 9 was illegal as no process for procurement in conformity with the provisions of the 2002 Ordinance and the 2004 Rules had preceded such an Agreement being executed. He did not rely on any case law in support of this contention.

C. The Submissions on Behalf of PSO

11. Mr. Khalid Mehmood Siddiqui entered appearance on behalf of PSO and assailed the maintainability of the Petition on two grounds which are summarised hereinunder:

(i) He contended that the Petition was not maintainable as the Dealership License Agreement as between PSO and the Petitioner admittedly contained an arbitration clause and which, on account of that being an alternate efficacious remedy being available to the Petitioner, disentitled the Petitioner from approaching this Court in its jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973.

In support of this proposition Mr. Khalid Mehmood Siddiqui relied on three decisions of the Honourable Supreme Court of Pakistan. The first is reported as ***Mumtaz Ahmed vs Zial Council Sahiwal***[4] wherein it was held that the Petitioner having the remedy of approaching an arbitrator would disentitle him from available a remedy before this Court in its Constitutional Jurisdiction it being held that:

> *" … Anyhow, if they had any grievance, they could have invoked the Arbitration clause and referred the matter to the Arbitrator or file appeal under the relevant rules, but in view of the availability of these* remedies, they could not have invoked the writ jurisdiction."

Reliance was also placed on same ground on the decision reported as ***Federation of Pakistan through Secretary Ministry of Petroleum and Natural Resources vs. Dewan Petroleum (Pvt.) Ltd. through M.D./Chief Executive and***

[4] 1999 SCMR 117

another[5] and an unreported judgment of the Honourable Supreme Court of Pakistan in Civil Appeal No. 1137 of 2014 entitled ***Cantonment Board Peshawar, Peshawar CANN through Executive Officer and another vs. M/S RACO Advertisers* & another**.

To support his contentions, he also relied on a decision of a Learned Single Judge of the Islamabad High Court reported as ***Pakistan Oilfields Limited vs. Government Holding (Pvt.) Limited and others*** [6] in which it was held that:

> *" … 10. If the petitioner is of the view that the decision of respondent No.1 not to further extend the term of the contract is in violation of the provisions of the contract, at best, the petitioner's remedy lies in damages and not by seeking a writ of mandamus directing respondent No.1 to continue its contractual relationship with the petitioner. Such dispute can be resolved in accordance with the arbitration clause (clause 11) of the contract.*
>
> *11. Ordinarily, the High Court, in exercise of its jurisdiction under Article 199 of the Constitution, does not entertain a petition filed by a petitioner seeking the enforcement of its rights under a contract executed with an instrumentality of the State. Although sub-constitutional legislation cannot curtail the jurisdiction of this Court under Article 199 of the Constitution, and there are numerous precedents where this Court has exercised its Constitutional jurisdiction in contractual matters where the executive acts in an irrational, illegal or procedurally irregular manner, or in excess of jurisdiction, the facts of the case at hand are not such where this Court ought to exercise its Constitutional jurisdiction.*
>
> *12. It is well-settled that when an alternative and equally efficacious remedy is open to a litigant, he should be required to pursue that remedy and not invoke the Constitutional jurisdiction of the High Court for the issuance of a writ. It is also well settled that where there exists an arbitration agreement, the parties are required to get their disputes arising out of the contract adjudicated by the domestic forum created by them. The respondents have correctly asserted that the existence of an arbitration clause in the contract between respondent No.1 and the petitioner leaves no option to the Writ Court but to point to the parties in the direction of arbitration. …*

[5] PLD 2012 SC 189
[6] 2021 CLC 2114

Reliance was also placed on an order of the same Learned Judge of the Islamabad High Court reported as ***Opi Gas (Private) Limited vs. Government Holding (Pvt.) Limited***[7] and on a judgment of the Supreme Court of India reported as ***Bisra Stone Lime Co. Ltd. and Ors. Vs. Orissa State Electricity Board and Ors***.[8] wherein similar findings were given on the same issue.

Reliance was also placed on the decision of the Honourable Supreme Court of Pakistan in the decision reported as ***Injum Aqeel vs. Latif Muhammad Chaudhry and others***[9] to state that the Arbitrator is a "final Judge on the law and facts" and concluded that as such all the issues, either factual or legal, emanating from the termination of the Dealership License Agreement could be adjudicated on by the Arbitrator.

(ii) On the issue of Malice, he contended that such an issue could not be agitated in this Courts Jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973. He submitted that the issue of malice could not be premised on the simple making of an allegation and required evidence to substantiate the allegation. Reliance in this regard was placed on three decisions of the Honourable Supreme Court of Pakistan reported as ***Fauji Foundation and another vs. Shamimur Rehman,***[10] ***Sub. (Retd.) Muhammad Ashraf vs. District Collector Jhelum and others,***[11] ***Said Zaman Khan vs. Federation of Pakistan through Secretary Ministry of Defence and others,***[12] a judgment of a Learned Single Judge of the Lahore High Court, Lahore reported as ***Muhammad Imran Younas and 3 others vs. District Collector (Ring Road), Lahore and 2 others***[13] and a decision of High Court of Peshawar reported as ***Messrs Pak China Fertilizers (Pvt.) Ltd. through General Attorney vs. District Coordination Officer, Haripur***[14] in which it was held that a question of malice could not be determined without recording evidence.

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[7] 2021 MLD 1916
[8] AIR 1976 SC 127
[9] 2023 SCMR 1361
[10] PLD 1983 SC 457
[11] PLD 2002 SC 706
[12] 2017 SCMR 1249
[13] 2015 CLC 285
[14] 2009 MLD 807

12. On the merits of the Petition Mr. Khalid Mehmood Siddiqui placed reliance on various clauses of the Dealership License Agreement which he contended gave him the unilateral right to terminate that Agreement and hence even if the Petition was found as maintainable the letter dated 23 June 2023 had been issued in consonance with the obligations as between the Petitioner and PSO and had been incorrectly assailed by the Petitioner in this Petition.

13. Regarding the alternative contention raised by Mr. Munir A. Malik that the Dealership License Agreement, that had been entered into as between PSO and the Respondent No. 9, fell afoul of the provisions of the 2002 Ordinance and the provisions of the 2004 Rules, Mr. Khalid Mehmood Siddiqui referred us to the Lease Deed dated 18 June 1970 that had been entered into between the predecessors in interest of PSO and KDA OC, the Dealership License Agreement dated 23 October 1996 entered into between the Petitioner's Aunt and PSO and the assignment of the interest in the Dealership License Agreement dated 23 October 1996 to the Petitioner on 5 April 2021 and stated that as these obligations, if read together, predated the provisions of the 2002 Ordinance and the 2004 Rules, hence the Dealership License Agreement, that had been entered into as between PSO and the Respondent No. 9 on 11 July 2023, could not be considered to have been entered into in violation of the provisions of that statute.

D. ***<u>The Submissions on Behalf of the Respondent No. 9</u>***

14. Mr. Qurban Ali Malano appeared on behalf of Respondent No.9 and assailed the maintainability of the Petition on the following three grounds:

(i) the Petition suffered from laches as between the date when the Said Property was sealed by the KDA OC and the date of the appointment of the Respondent No. 9 as the Dealer of PSO, the Petitioner took no steps to agitate their rights;

(ii) the Power of Attorney that had been issued by the Petitioner in favour of her attorney was deficient and hence the Petition was not maintainable;

(iii) That the pendency of Suit No. 315 of 2023 that had been instituted by the Respondent No. 9 barred the Petitioner from maintaining this Petition.

Mr. Qurban Ali Malano did not rely on any case law in support of his contentions.

E. <u>The Opinion of the Court</u>

15. We have heard Mr. Munir A. Malik, Mr. Khalid Mehmood Siddiqui and Mr. Qurban Ali Malano and have perused the record.

(i) <u>Power of Attorney</u>

16. It has been contended by Mr. Qurban Ali Malano that the Petition has been instituted by the Petitioner on the basis of a Power of Attorney that has not been verified by the Ministry of Foreign Affairs and as such the Petition cannot be maintained. We are not impressed by this Argument. Firstly, Article 95 of the Qanun e Shahdat Order, 1984 raises a presumption of the validity of a Power of Attorney that has been notarised. Secondly, Sub-Section (1) of Section 3 of The Diplomatic And Consular Officers (Oaths And Fees) Act,1948 permits both Diplomats and Consular Officers of a Pakistan's Embassy or High Commission to perform notarial functions. We note that there is no other requirement in any law that requires a document that has been attested by such an officer, to be subjected to a further requirement of reverification of that document by the Ministry of Foreign Affairs. Admittedly, the document has been attested by a Consular Officer of a Pakistani High Commission and to our mind that is enough to reject the proposition raised by Mr. Qurban Ali Malano. Further, even if there was an illegality in respect of the execution or attestation of a Power of Attorney and on which much jurisprudence has developed in our Courts, each of those decisions are to now be read in light of two decisions of the Honourable Supreme Court of Pakistan. The first is reported as ***<u>S.D.O./A.M., Hasht Nagri Sub-Division, Pesco, Peshawar and Others vs. Khawazan Zad</u>*** [15] and wherein it was held that:

> *" … 9. Having examined the scope of the above-cited rules of procedure contained in the C.P.C., we must reiterate the principle, which is by now well settled, that 'the proper place of procedure in any system of*

[15] 2023 SCMR 174

administration of justice is to help and not to thwart the grant to the people of their rights ... Any system, which by giving effect to the form and not to the substance defeats substantive rights, is defective to that extent.' The courts, thus, always lean in favour of adjudicating the matters on merits rather than stifling the proceedings on procedural formalities. The rules of procedure are meant to facilitate the court proceedings for enforcing the rights of litigants, not to trap them in procedural technicalities for frustrating their rights. They are the tools to advance the cause of justice and cannot be used to cause the miscarriage of justice. The ultimate object of securing the ends of justice, therefore, outweighs the insistence on strict adherence to such rules. The same is the purpose of the rules of procedure discussed above. Any defect or omission in signing and verifying, or presenting, a pleading (plaint or written statement) or a memorandum of appeal or revision petition does not affect the merits of the case or the jurisdiction of the court and is therefore taken to be such an irregularity which can be cured at any stage of the proceedings. ***Likewise, any defect in the authority of a person to sign and verify a pleading filed in a suit by or against a corporation, or to institute or defend such a suit by presenting that pleading to the court, or in signing or filing of a memorandum of appeal or revision petition by a corporation, can also be cured at any stage of the proceedings***″

Similarly, in the second decision reported as ***Rahat And Company through Syed Naveed Hussain Shah vs. Trading Corporation of Pakistan Statutory Corporation, Finance and Trade Center through Secretary or Chief Executive Officer*** [16]

" … 12. We turn now to the request of the learned amicus that the matter of ratification of a suit filed without competent authority (i.e., of a proper board resolution) also be considered. The learned amicus correctly admitted that the point does not, as such, arise here on the issue as presented in the appeal. His contention that it is mentioned in passing in the impugned judgment by the learned Division Bench (at para 11 thereof) is correct as far as it goes, but, with respect, does not go far enough. However, the learned amicus has referred to several decisions of the High Courts in this country where, according to him, there is a conflict of views. In some cases it is held that the defect cannot be ratified, while in others apparently an opposite conclusion is reached. On such basis it is submitted that an authoritative pronouncement from this Court is desirable.

13. In our view, since the matter does not as such arise in this appeal, a definitive pronouncement is not possible. That must await a case where the issue arises

[16] PLD 2020 SC 366

as such for determination. However, a tentative view may be expressed. As noted above, the learned amicus has referred to certain decisions from the English and Indian jurisdictions. ***Without considering the decisions of the High Courts of our country in any detail (which analysis must be deferred to some other case where the point actually arises), we are tentatively of the view that the stance taken by the English Court of Appeal in Presentaciones Musicales SA v. Secunda and another[1994] 2 All ER 737 and the Indian Supreme Court in United Bank of India v. Naresh Kumar and others AIR 1997 SC 3, namely that any defect can be cured by subsequent ratification, is correct and is to be preferred over any view to the contrary. In the first cited case, the Court of Appeal held as follows (pg. 743):***

> ***"It is well recognised law that where a solicitor starts proceedings in the name of a plaintiff - be it a company or an individual - without authority, the plaintiff may ratify the act of the solicitor and adopt the proceedings. In that event, in accordance with the ordinary law of principal and agent and the ordinary doctrine of ratification the defect in the proceedings as originally constituted is cured: see Danish Mercantile co Ltd. v Beaumont[1951] 1 All ER 925, [1951] Ch 680, since approved by the House of Lords. The reason is that by English law ratification relates back to the unauthorised act of the agent which is ratified: if the proceedings are English proceedings, the ratification which cures the original defect, which was a defect under English law, must be a ratification which is valid under English law."***

The view taken by the Indian Supreme Court in the above cited decision is as follows (pp. 5-6; emphasis supplied):

> ***"10. It cannot be disputed that a company like the appellant can sue and be sued in its own name. Under Order 6 Rule 14 of the Code of Civil Procedure a pleading is required to be signed by the party and its pleader, if any. As a company is a juristic entity it is obvious that some person has to sign the pleadings on behalf of the company. Order 29 Rule 1 of the Code of Civil Procedure, therefore, provides that in a suit by against a corporation the Secretary or any Director or other Principal Officer of the corporation who is able to depose to the facts of the case might sign and verify on behalf of the company. Reading Order 6 Rule 14 together with Order 29 Rule 1 of the Code of Civil Procedure it would appear that even in the absence of any formal letter of***

> ***<u>authority or power of attorney having been executed a person referred to in Rule 1 of Order 29 can, by virtue of the office which he holds, sign and verify the pleadings on behalf of the corporation. In addition thereto and de hors Order 29 Rule 1 of the Code of Civil Procedure, as a company is a juristic entity, it can duly authorise any person to sign the plaint or the written statement on its behalf and this would be regarded as sufficient compliance with the provisions of Order 6 Rule 14 of the Code of Civil Procedure. A person may be expressly authorised to sign the pleadings on behalf of the company, for example by the Board of Directors passing a resolution to that effect or by a power of attorney being executed in favour of any individual. In absence thereof and in cases where pleadings have been signed by one of its officers a Corporation can ratify the said action of its officer in signing the pleadings. Such ratification can be express or implied. The Court can, on the basis of the evidence on record, and after taking all the circumstances of the case, specially with regard to the conduct of the trial, come to the conclusion that the corporation had ratified the act of signing of the pleading by its officer.</u>”***

The decision of the Supreme Court of Pakistan in ***<u>Rahat And Company through Syed Naveed Hussain Shah vs. Trading Corporation of Pakistan Statutory Corporation, Finance and Trade Center through Secretary or Chief Executive Officer</u>*** [17] is clearly obiter dicta and which, despite it being so, is still binding on this Court.[18] As it has now been held by the Honourable Supreme Court of Pakistan that any defect in the Power of Attorney is curable, such objections are, to our mind, no longer sustainable before a Court unless the Donor of the Power of Attorney expressly disowns the Power of Attorney or refuses to ratify or cure the deficiency. As such we are of the opinion that the objection raised by Mr. Qurban Ali Malano on the basis of the aforementioned judgements of the Honourable Supreme Court of Pakistan cannot be sustained and is rejected.

(ii) ***<u>Laches</u>***

17. The Honourable Supreme Court of Pakistan in the decision reported as ***<u>Ardeshir Cowasjee and 10 others vs. Karachi Building Control Authority (KMC), Karachi and 4 others</u>***[19] while discussing as to how a

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[17] PLD 2020 SC 366
[18] See ***<u>Justice Khurshid Anwar Bhinder vs. Federation of Pakistan</u>*** PLD 2010 SC 483, ***<u>Dr Iqrar Ahmad Khan vs. Dr Muhammad Ashraf</u>*** 2021 SCMR 1509
[19] 1999 SCMR 2883

Court is to exercise its jurisdiction while determining a question of laches has held that:

> " … *In our view laches per se is not a bar to Constitutional Petition. There is marked distinction between delay in filing of a legal proceedings within the period specified in Article of the Schedule to the Limitation Act, 1908 and the delay in filing of a Constitutional petition. In the former case delay of each day is to be explained by furnishing sufficient cause for seeking condonation of delay under Section 5 of the Limitation Act, in filing of a legal proceedings after the expiry of the of the statutory period. Where, in the latter case, the delay or the question of laches is to be examined on equitable principles for the reason that grant of Constitutional relief is a discretionary relief and the Court decline to press into service its Constitutional jurisdiction if it would be inequitable keeping in view the conduct of a Petition. The question of delay or laches is to be considered with reference to the facts of each case. Delay/laches of several years can be overlooked in a Constitutional petition if the facts of the case and dictates of justice so warrant as pointed out by this Court in the case of The Chairman District Screening Committee, Lahore and another v. Sharif Ahmad Hashmi (PLD 1976 SC 258) (supra), or the delay/laches of a few months may be fatal to a Constitutional Petition."*

As can be seen the determination of laches in respect of Petition is not a bar to maintaining the petition, rather it is bar to the grant of relief on the basis that on account of the delay caused in maintaining the Petition other rights have accrued in favour of another person and which rights having been permitted to accrue impress on the Court not to grant the Petitioner relief. There must therefore be a comparison as between the rights lost by a Petitioner and the rights that accrued in favour of a Respondent ***on account of the delay on the part of the Petitioner to maintain the Petition***.

18. In the facts of this Petition, the Petitioners rights were purportedly terminated on 23 June 2023 and the purported rights of the Respondent admittedly commenced from 11 July 2023 and the challenge to which, through this Petition, had been made on 15 July 2023 i.e. 4 days later. Such a time period can barely be considered to be a long enough period where rights can be deemed to have become so entrenched in the Respondent No. 9 so as to disentitle the Petitioner from maintaining this Petition on the ground of laches. Mr. Qurban Ali Malano's contention that such time period should be determined from 3 May 2023 i.e. the day when the Said Property was sealed by KDA OC is also misplaced. The Petitioner is not in this Petition challenging the right of the KDA OC to seal the Said

Property and as such making that date as the basis for determining laches is illogical. Consequentially, this contention is also rejected. We hence find that the relief sought by the Petitioner in this Petition is not barred by laches and cannot be rejected on this ground.

(iii) The Pendency of Suit No. 315 of 2023 and Suit No. 1206 of 2023

19. Suit No. 315 of 2023 had admittedly been instituted by PSO on the original side of this Court against KDA OC regarding its entitlement to the Said Property and which has admittedly been withdrawn by PSO on 16 November 2023. Suit No. 1206 of 2023 has been maintained on the Original Side of this Court by the Respondent No. 9 on 19 July 2023, after the presentation of this Petition, seeking a declaration as to its status as a Licensed Dealer of PSO being authorised to sell CNG at the Said Property and in which interim orders had been passed on 20 July 2023 by a Learned Single Judge of this Court stating that the Petitioner should not take any "coercive/adverse" action against the Respondent No. 9 in respect of the Respondent No. 9 "Dealership License Agreement" except "in accordance with law."

20 We cannot see how the pendency of Suit No. 1206 of 2023 can disentitle the Petitioner from maintaining a Petition to challenge the legality of the termination of it's Dealership with PSO or to challenge the Distribution License Agreement as entered into between PSO and the Respondent NO. 9 on the grounds that the provisions of the 2002 Ordinance and the 2004 Rules were not complied with prior to the execution of that Agreement. While the issue of the legality of the Respondents No. 9 right as a Licensed Dealer of POS may be an issue in Suit No. 1206 of 2023 and which rights have also been assailed by the Petitioner on the basis of the failure on the part of PSO to comply with the provisions of the 2002 Ordinance and the 2004 Rules, we do not see how the pendency of that suit filed by the Respondent No. 9 can disentitle the Petitioner from maintaining this Petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973. This contention is also misconceived and is rejected.

(iv) Malice in Fact and Malice in Law

20. Mr. Munir A. Malik has maintained that whenever an act of a public authority afflicts an injury on a person illegally i.e. in violation of a law such an act is to be considered an action which amounts to "Malice in law" and on which basis this Courts jurisdiction under Article 199 of the Constitution

of the Islamic Republic of Pakistan, 1973 can be invoked to set aside such an act. We have no hesitation in accepting such a proposition and in support of which reliance has been correctly placed by Mr. Munir A. Malik on the decisions of the Honourable Supreme Court of Pakistan reported as ***Messrs Airport Support Services vs. The Airport Manager, Quaid e Azam International Airport, Karachi and others***[20]***, Justice Qazi Faez Isa vs. The President of Pakistan***[21] and on a decision of a Full Bench of the Learned Lahore High Court, Lahore in the decision reported as ***Messrs Wak Orient Power and Light Limited through Chief Exectuive Officer Lahore vs. Government of Pakistan Ministry of Water and Power through Secretary, Islamabad and 2 others.***[22] A summation of the law on this issue has been made by the Honourable Supreme Court of Pakistan in the decision reported as ***Said Zaman Khan and others vs. Federation of Pakistan through Secretary Ministry of Defence and others***[23] and in which the Honourable Supreme Court has *inter alia* approved the decision of the House of Lords reported as ***Shearer and another vs. Shields***[24] in which while explaining the difference between "malice in fact" and "malice in law" it was held as follows:

> *" … Between malice in fact and malice in law there is a broad distinction which is not peculiar to any particular system of jurisprudence. A person who inflicts an injury upon another person in contravention of the law is not allowed to say that he did so with an innocent mind; he is taken to know the law, and he must act within the law. He may, therefore, be guilty of malice in law, although, so far as the state of his mind is concerned, he acts ignorantly, and in that sense innocently."*

As such where an action of a public functionary inflicts injury on a person illegally, then that illegal action being premised either through a deliberate act or in innocence of the law or in ignorance of the law; must be considered to be an action which can be impugned before this Court in its jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973.

21. To prove such malice, as has correctly been contended by Mr. Khalid Mehmood Siddiqui, some undisputed "Cogent" Evidence must be presented to this Court. The "Cogent" evidence that has been placed before this Court, to being with, comprises of two letters each dated 23 June 2023 which are each issued by PSO, ***which have not been denied by PSO***, and

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[20] 1998 SCMR 2268
[21] PLD 2021 SC 1
[22] 1998 CLC 1178
[23] *op cit. See paragraph 75 to 83*
[24] 1914 A.C. 808

which to our mind take two wholly contradictory positions. The letter dated 23 June 2023 that was written by PSO to the Petitioner ending the Dealership License Agreement as between PSO and the Petitioner was premised on a term which allowed PSO to terminate that agreement in a situation where the Lease as between PSO and KDA OC had determined. The second letter dated 23 June 2023, also written by PSO, but this time to KDA OC, confirms that PSO had ***on the same date*** in fact aceeded to all the terms that had been made by KDA OC for the renewal of the lease and all that remained to be done was to execute the renewed Lease on the agreed terms. To our mind the only logical conclusion that can be placed on the issuance of these two letters on the same date was that there was a predetermined motive on the part of PSO to terminate the Petitioner on a ground which they knew was false. The ***motive*** for the issuance of the letter by PSO to the Petitioner becomes evident when ***again on 23 June 2023*** PSO receives a Bank Guarantee from the Respondent No. 9, thereby securing her services to perform the same obligations that were being performed by the Petitioner. The actions on the part of the PSO were clearly orchestrated to oust the Petitioner from her role as a distributor and to appoint the Respondent No. 9, in her stead, on an illegal ground that the Lease as between PSO and the KDA OC had determined when in fact it had not. If the lease had in fact determined there would have been no basis for the PSO, on the same date, to have asked for and accepted the Bank Guarantee from the Respondent No. 9 on the same date. Clearly, PSO was well aware that the Lease Deed for the Said Property was and continued to subsist.

22. While Mr. Khalid Mehmood Siddiqui had also contended that there were other terms of the Distributor License Agreement, that permitted PSO to terminate that Agreement, even without cause, clearly the rights exercised by PSO were admittedly not exercised on those terms and we make no comment on those terms or as to whether or not PSO could terminate the Agreement on the basis of those terms. We are clear however that the Termination Letter dated 23 June 2023 was not issued on the basis of such terms and that the only ground that was maintained in that letter was that the Lease Deed of the Said Property had determined and which admittedly was incorrect and hence was clearly an action that can be considered to be Malice in Law. As PSO is a company that is wholly owned by the Federation and performing *"functions in connection with the affairs of the Federation"*[25] it is, when it acts, bound to follow the same standard as

[25] See ***Salahuddin and 2 others vs. Frontier Sugar Mills & Distillery Limited Tokht Bhai and 10 others*** PLD 1975 SC 244; ***Aitchson College Lahore vs. Muhammad Zubair*** PLD 2002 SC 326;

mandated to public officials. Each of the documents mentioned above ***having not been denied by PSO***, clearly the Termination Letter dated 23 June 2023 had been issued illegally and which action would amount to Malice in Law and which is clearly not sustainable . The Termination Letter dated 23 June 2023 is hence not sustainable and is liable to be set aside.

(v) Public Procurement

23. Under the Provisions of Rule 3 of the 2004 Rules that have been framed under the powers conferred by Section 26 of the 2002 Ordinance, it has been directed that:

> *" … 3. Scope and applicability:*
>
> *Save as otherwise provided, these rules shall apply to all* ***procurements*** *made by all* ***procuring agencies*** *of the Federal Government whether within or outside Pakistan."*

Under Sub-Rule (2) of Rule 2 of the 2002 Rules it has been directed that:

> *" … (2) The expressions used but not defined in these rules shall have the same meanings as are assigned to them in the Ordinance.*

The expression "Procuring Agency" has not been defined in the 2004 Rules but has been defined in Sub-Section (j) of Section 2 of the 2002 Ordinance to mean"

> *" … i. any Ministry, Division, Department or any Office of the Federal Government;*
>
> *ii. any authority,* ***corporation****, body or organization established by or under a Federal law or which is* ***owned or controlled by the Federal Government****;*

There is no dispute as to the fact that PSO is a "corporation" that is both "owned" and "controlled" by the Federal Government and which would bring it within the purview of the expression "procuring agency" as used in Rule 3 of the 2004 Rules.

While the expression "procurement" has not been defined either in the provisions of the 2002 Ordinance or in the 2004 Rules, the expression

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Federal Government Employees Housing Foundation vs. Muhammad Akram Alizai, Deputy Controller 2002 PLC (C.S.) 1655; **Ziaullah Khan Niazi vs. Chairman, Paksitan Red Crescent Society** 2004 SCMR 189; ***Pakistan Red Crescent Society vs. Syed Nazir Gillani*** PLD 2005 SC 806; ***Pakistan International Airline Corporation vs. Tanweer ur Rehman*** PLD 2010 SC 676; ***Noor Jehan Shah vs. Pakistan Defence Officers Housing Authorit***y 1997 MLD 2261

"public procurement" has been defined in clause (l) of Section 2 of the 2002 Ordinance and which has been held to mean:

> *" … means acquisition of **goods**, **services** or construction of any **works** **financed wholly or partly** out of the **Public Fund**, unless excluded otherwise by the Federal Government;*

The expression "goods" is defined in Sub-Section (e) of Section 2 of the 2002 Ordinance as under

> *" … means articles and objects of every kind and description including raw materials, products, equipment, machinery, spares and commodities in any form and includes services incidental to installation, transport, maintenance and similar obligations related to the supply of goods if the value of these services does not exceed the value of such goods*

The expression "works" comes to be defined in Sub-Section (p) of Section 2 of the 2002 ordinance as under:

> *" … means any construction work consisting of erection, assembly, repair, renovation or demolition of a building or structure or part thereof, such as site."*

The expression "service" has been defined in Sub-Section (o) of Section 2 of the 2002 Ordinance as under:

> *" … means any object of procurement other than goods or works"*

Finally the expression "Public Fund" has been defined in Sub-Section (o) of Section 2 of the 2002 ordinance as under

> *" … means the Federal Consolidated Fund and the Public Account of the Federation and includes **funds of enterprises which are owned or controlled by the Federal Government**."*

As is apparent the obligation on PSO under Rule 3 of the 2004 Rules, has to be read in light of the definitions given to the abovementioned expressions in the 2002 Ordinance and by which every procuring agency, which we have no doubt includes PSO, is obligated to carry out the procurement of any "goods," "works" or "services" through the process as laid out in 2004 Rules. Clearly the scope of the agreement as between PSO and the Respondent No. 9 not coming within the meaning of the

expression “goods” and “works” would come within the scope of the residuary definition of “services.”

The sole question that remains is as to whether the services that are being acquired by PSO are being ***financed*** wholly or in part by ***funds*** of enterprises which are owned or controlled by the government.

The Expression “Finance” of which the expression “Financed” is a verb has been defined in Blacks Law Dictionary to mean:

> *“ … As a verb to supply with Funds though the payment of cash or issuance of stocks, bonds, notes or mortgages, to provide with* ***capital*** *or loan money as needed to carry on business.”*

24. We have perused the entire Agreement as between PSO and the Respondent No. 9 and which while not involving PSO extending any monetary support or payment to the Respondent No. 9, however, clearly does provide ***capital in the form of land*** comprising a portion of the Said Property being extended to the Respondent No. 9 and therefore we are clear that the Agreement is being “financed” by PSO. The capital i.e. the Said Property having been procured by “funds” of PSO which is an “***enterprise which is owned or controlled by the Federal Government,”*** the provisions of the Ordinance 2002 and the Rules 2004 are therefore applicable to the Agreement as entered into between PSO and the Respondent No. 9 and which Agreement, to our minds, does not fall within the exceptions as contained in Rule 14 of the 2004 Rules.[26]

25. Mr. Khalid Mehmood Siddiqui has defended the failure on the part of PSO to comply with such rules on the premise that the Lease Deed dated 18 June 1970 that had been entered into between the predecessors in interest of PSO and KDA OC, the Dealership License Agreement dated 23 October 1996 entered into between the Petitioner’s Aunt and PSO and the assignment of the interest in the Dealership License Agreement dated 23 October 1996 to the Petitioner on 5 April 2021 and stated that as these obligations, if read together, predated the provisions of the 2002 Ordinance and the 2004 Rules, hence the Dealership License Agreement, that had been entered into as between PSO and the Respondent No. 9 on 11 July 2023, could not be considered to have been entered into in violation of the provisions of that statute. We are not persuaded by such an argument.

[26] See also ***Humera Imran through Attorney vs. Government of Pakistan, Ministry of Defence and Production through Secretary and 3 others*** PLD 2019 Sindh 467;

Clearly, while any agreements that may have been entered into prior to the promulgation of the 2002 Ordinance might not be regulated by the provisions of that Ordinance and the rules made thereunder, but clearly the Dealership License Agreement dated 11 July 2023 is an independent contract and cannot be considered to be an extension of the earlier agreements as referred to by Mr. Khalid Mehmood Siddiqui. We are therefore of the opinion that the Dealership License Agreement dated 11 July 2023 that had been entered into as between PSO and the Respondent No. 9 has been entered into illegally and which constitutes mis-procurement within the meaning to given to that expression under Sub-Section (h) of Section 2 of 2002 Ordinance read with Rule 50 of the 2004 Rules and which cannot be sustained. The Dealership License Agreement dated 11 July 2023 as entered into between PSO and the Respondent No. 9 is therefore set aside.

(v) Alternate Efficacious Remedy – Arbitration.

26. As is now more than well settled, the existence of an alternate efficacious remedy would bar a Petitioner from maintaining a Petition before this Court under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973. On the objection raised by Mr. Khalid Mehmood Siddiqui, we are therefore left to consider as to whether the simpliciter existence of an arbitration clause would ***ipso facto*** bar a Petition from being maintained under Article 199 of the Constitution of the Islamic Republic of Pakistan?

27. We are minded that this question raises two distinct arguments. The first is as to whether Section 34 of the Arbitration Act, 1940 would on an appropriate application being maintained compel this court to stay these proceedings and allow the matter to proceed to arbitration. This issue has been considered and decided by the Honourable Supreme Court of Pakistan reported as ***Messrs Airport Support Services vs. The Airport Manager, Quaid e Azam International Airport, Karachi and others***[27] and in which it was held that the provisions of Section 34 of the Arbitration Act, 1940 "*cannot curtail or otherwise cut across the Constitutional mandates"* thereby holding that the bar in that section can clearly not curtail a High Court from exercising our jurisdiction of this Court under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973. It is apparent that

[27] 1998 SCMR 2268

for this reason that Mr. Khalid Mehmood Siddiqui had on 6 December 2023 had not pressed CMA NO. 19516 of 2023 that PSO had maintained under that provision and instead pressed his objection on a separate and distinct line of argument that the remedy of arbitration could well be considered as an "alternate efficacious remedy" thereby prohibiting the court from exercising its jurisdiction within the meaning as given to that expression by the Honourable Supreme Court of Pakistan while interpreting the provisions of Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973. Indeed, the Judgment of the Honourable Supreme Court of Pakistan reported as ***Mumtaz Ahmed vs Zial Council Sahiwal***[28] had held as such while in another decision of the Honourable Supreme Court of Pakistan reported as ***Federation of Pakistan through Secretary Ministry of Petroleum and Natural Resources vs. Dewan Petroleum (Pvt.) Ltd. through M.D./Chief Executive and another***[29] on an appeal against an order of the Lahore High Court, Rawalpindi Bench passed in a Writ Petition it had been held that that in the presence of an arbitration clause the remedy of an arbitration *"ought to have been followed by the parties for resolution of their dispute long ago."* This would lead to the conclusion that where such an arbitration clause exists the fact as to whether such a remedy was or was not an "adequate" remedy must be examined subjectively in the facts and circumstances of each case.

28. We have considered a decision of Four Learned Judges of the Honourable Supreme Court of Pakistan in the decision reported as ***Anjuman-e-Ahmadlya Sergodha v. Deputy Commissioner,Sargodha***[30] wherein an application had been made by the Petitioners to the Deputy Commissioner for the allotment of land and which having been granted was subsequently cancelled. A Writ Petition was maintained on the ground that the notice cancelling the allotment of land was arbitrary, illegal and in disregard of the principles of natural justice and which was dismissed by the High Court saying that an alternate remedy in the form of a suit was available. The Honourable Supreme Court of Pakistan while allowing the appeal held that:

> *" … Thus once it is established that the remedy sought is for the performance of some public duty then relief by way of an extraordinary remedy of this nature is not to be denied merely because some other remedy under the general law is available, unless such alternative remedy can be considered to be equally inexpensive,*

[28] 1999 SCMR 117
[29] PLD 2012 SC 189
[30] *op cit.*

expeditious, beneficial and efficacious. The policy underlying the introduction of this form of extraordinary remedy is, as observed by Lord Mansfield in Rex v. Barker ((1762) 3 Burr. 1265=97 R W) "to prevent disorder from a failure of justice and defect of police" in an inexpensive, expeditious and effective manner "where the law has established no specific remedy and where in justice and good Government there ought to be one". ***In a case where this remedy is in other respects warranted it is rarely that the Courts in England have considered an action in law to be such an adequate alternative remedy as to refuse the writ unless complicated questions of fact have to be determined, or a question of title to land is involved or the remedy sought is, in effect, for the recovery of damages.*** *…*

In our view, when the relief sought for is by its nature one which lends itself to be effectively remedied by orders of the nature contemplated in paragraphs (a), (b) and (c) of sub Article (2) of Article 98, then the intention of the Constitution appears to be that the remedy granted by the Constitution should be made available to the citizen unless the Court is satisfied that other adequate remedy is provided by law. ***The other adequate remedies provided by law would, in the ordinary circumstances, have reference to the remedies provided by the particular statute itself which has created the right of obligation and not a general remedy at law, as for example by a suit****. On the other hand, if the remedy sought for is in substance a remedy which is available under the ordinary law then a suit and not the extraordinary remedy under Article 98 should be the appropriate remedy, for, the remedy provided by this Article is not intended to be a substitute for the ordinary forms of legal action.* ***But where this is not the case the remedy by way of a suit can hardly be considered to be an adequate alternative remedy. A suit is by no means as inexpensive or speedy or beneficial a remedy as the remedy provided by this Article****.*

Even in the first case where full redress can be given by an order contemplated under sub-article (2) of Article 98 if an alternative remedy by the law creating the right or obligation has been prescribed the Court has still to consider whether such a prescribed alternative remedy is equally, inexpensive, expeditious, efficacious and beneficial*."*

The Honourable Supreme Court of Pakistan in the abovementioned decision thereafter held that what the Appellant wanted through the Petition:

" *…* ***was the performance of a public duty****, namely, that the authorities seeking to cancel its grant should proceed in accordance with law, namely, the provisions of the Colonization of Government Lands Act, 1912, under which the grant was made."*

and for which relief, in the circumstances of that case, the Honourable Supreme Court of Pakistan held could be availed in the "Writ" Jurisdiction of this Court and that a suit would not be an inexpensive, expeditious, efficacious and beneficial" to rectify the breach the performance of a public duty to prevent a High Court from exercising such a jurisdiction.

29. The Petitioner in this Petition, similarly seeks the enforcement of a public duty and seeks to set aside the Termination Letter dated 23 June 2023 on the ground that it was motivated by Malice and as PSO was company that is wholly owned by the Federation and performing *"functions in connection with the affairs of the Federation"*[31] it was bound to follow the same standard as mandated to be followed by a public official.

30. The actions of PSO, as held above, in terminating the Petitioner is an action, as has been held by us hereinabove, to be an act which is Malice in Law and while such an issue does come within the perimeters of the obligations of the Dealership License Agreement as between PSO and the Petitioner and which would hence come within the jurisdiction of an arbitrator, we do not think that the Petitioner seeking the remedy of an arbitration **to set aside the termination letter dated 23 June 2023** would either be as inexpensive or expeditious as maintaining this Petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973. To maintain such an arbitration the Petitioner would be burdened with substantial cost, not only in terms of the arbitration proceedings but also in terms of making any award passed by the arbitrator a rule of the Court. Obviously, if the nature of relief that the Petitioner was seeking involved a determination of obligations under the Dealership License Agreement then we would have been minded to consider otherwise. However, as the Petitioners is only challenging the legality of the issuance of the termination letter we are minded to consider that the remedy of arbitration would neither be inexpensive nor expeditious and hence not an efficacious remedy so as to bar this Court from exercising its jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973.

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[31] See ***Salahuddin and 2 others vs. Frontier Sugar Mills & Distillery Limited Tokht Bhai and 10 others*** PLD 1975 SC 244; ***Aitchson College Lahore vs. Muhammad Zubair*** PLD 2002 SC 326; ***Federal Government Employees Housing Foundation vs. Muhammad Akram Alizai, Deputy Controller*** 2002 PLC (C.S.) 1655; **Ziaullah Khan Niazi vs. Chairman, Paksitan Red Crescent Society** 2004 SCMR 189; ***Pakistan Red Crescent Society vs. Syed Nazir Gillani*** PLD 2005 SC 806; ***Pakistan International Airline Corporation vs. Tanweer ur Rehman*** PLD 2010 SC 676; ***Noor Jehan Shah vs. Pakistan Defence Officers Housing Authority*** 1997 MLD 2261

31. We have also considered as to whether the 2002 Ordinance or the 2004 Rules contain any remedy which the Petitioner could have availed to challenge the appointment of the Respondent No. 9 in violation of the mandates of that Ordinance and those Rules. We note that while Rule 48 of the 2004 Rules grants a remedy for the redressal of a grievance during the process of a procurement, there is no remedy provided either in the 2002 Ordinance or in the 2004 Rules for addressing an issue of mis-procurement and for which the jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 is hence available. The Petition is as such nor barred on this ground and is maintainable

F. The Order of this Court

32. For the foregoing reasons, it is held that:

(i) The Termination Letter dated 23 June 2023 issued by PSO to the Petitioner is illegal and is set aside; and

(ii) The Dealership License Agreement dated 11 July 2023 that had been entered into as between PSO and the Respondent No. 9 was entered into by PSO in violation of the provisions of the 2002 Ordinance and the 2004 Rules and constituted mis-procurement and is therefore invalid and is set aside.

The Petition stands allowed in the above terms, along with all listed applications, with no order as to costs.

JUDGE

JUDGE

ANNOUNCED BY

JUDGE

JUDGE