

IN THE HIGH COURT OF SINDH AT KARACHI

Present:

Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Adnan-ul-Karim Memon

CONST. PETITION NO.D-1248 OF 2025

Petitioner: NEIE-SMADB-LELLEY-RMS through
Mr. Ahmed Ali Hussain, Advocate.

Respondent Nos.1: Through Mr. Ghous Bux, Special
Prosecutor NAB.

Respondent No.3: Through Mr. Salman Mansoor,
Advocate for WAPDA.

Date of Hearing: 20.05.2025

Date of Announcement: 27.05.2025

J U D G M E N T

Mohammad Karim Khan Agha, J; The petitioner through this petition seeks enforcement of impugned judgment passed by this Court on the issue involved in this petition on 20.02.2025 and in particular the declaration that the impugned decision dated 20.02.2025 (impugned decision) issued by Respondent No.3 (WAPDA) to unilaterally revise the IPC's of the Petitioner is malafide, arbitrary and patently illegal and in violation of the revised MOU and the directions of the Honorable High Court vide order dated 06.10.2023 passed in C.P. No.D-4529 of 2023 and set it aside.

2. The brief facts of the case are that the petitioner entered into a contract with Wapda on 13.01.2011 to construct a mega public project called the Nai Gaj Dam in Dadu (the project). The construction of the project in essence primarily dragged on on account of the petitioner not being paid the relevant advances/funds on time by the concerned Government authority which led to the Supreme Court taking Suo Moto notice of the matter and seeking update reports from Wapda concerning the delay in completing the project. After much litigation between the parties the parties entered into arbitration whereby they settled their

dispute by consent on 19.02.2021 which also became an order of the court. In essence the key aspects of the Arbitration settlement was that (a) the contract should be completed within 3 years and (b) there would be no further escalation in price. Thereafter the economy of Pakistan went into virtual meltdown which put a number of public contracts at risk throughout Pakistan. Hence, the Pakistan Engineering Council (PEC) created under the PEC Act 1996 devised guidelines for upward price adjustment keeping in view the dire economic conditions for implementation of contracts throughout Pakistan so that contractors could complete their contracts on time which would otherwise have been abandoned causing great loss to the public exchequer and to the public itself through non completion of the contract in question. The petitioner wrote to Wapda requesting that PEC's price adjustment policy/guidelines be applied to his contract as due to the adverse economic conditions which had suddenly arisen after agreeing the arbitration settlement which had led to a massive escalation in price he would not be able to complete the contract as he could no longer afford to do so. The respondent Wapda however declined his request and insisted on the no escalation clause remaining in place. Hence the petitioner approached this court for relief under the PEC Price adjustment guidelines.

3. This court in CPD No.D-4529 of 2023 dated 06.10.23 held as under;

“23. We also find that based on the particular facts and circumstances of the case the PEC’s guidelines on price escalation are binding on Wapda which is a statutory body.

24. The question of before us in essence is whether due to an unforeseen virtual financial meltdown/emergency in the economy of this country we should sit back and allow a project which is for the benefit of the people to fail with the consequences that it would cause a massive loss to the exchequer and to the people of Sindh when we have legal tools at hand to try to prevent this scenario keeping in view that the PEC guidelines require a decision to be made based on the particular facts and circumstances of each case.

25. As such based on the particular facts and circumstances of this case and contract and the unforeseen economic meltdown in the country and the objective of saving the contract and preventing wastage of tax payers money we hereby substitute the non escalation clause in the settlement agreement by consent as endorsed by this court and replace it with the PEC guidelines on price escalation which the Chairman Wapda is directed to consider not with standing any MOU or other document in the field vis a vis the petitioners case after considering its written contentions and affording a personal hearing to the petitioner and thereafter issue a speaking order within 6 weeks of the date of this order. In making such

order / decision we expect Wapda to keep the best interests of the economy, completion of development projects of this country in mind and any potential loss to the exchequer / tax payer whose money should not be wasted unnecessarily as indicated above in terms of the cost of re tendering as opposed to negotiating keeping in view the current economic meltdown."

4. This lead to the MOU being entered into on 04.04.2024 between the parties whereby quite sensibly and reasonably for the benefit of all parties concerned and especially the people of Sindh who would benefit form the project which was a dam to the following MOU being signed between the parties;

**“AMENDMENT NO.1
CONTRACT FOR CONSTRUCTION OF NAIR GAJ DAM PROJECT**

This Amendment No.1 of MoU dated: 21.09.2021 (Annex-I) entered into 4th day of April, 2024 between the same parties i.e Pakistan Water and Power Development Authority (hereinafter called the Employer) of the one part and the Joint venture comprising M/s NEIE, SMADB, LILLY & RIMS (hereinafter called the Contractor) of the other part in compliance to the order dated 06-10-2023 (Annex-II) of the Honorable High Court of Sindh, Karachi in pursuance to CP No.D-4529 of 2023 as under:

The 2nd part of Clause (iii) of MoU dated: 21.09.2021 reads as:

“iii.....Escalation shall freeze at the cost indices on the date of termination (August-2018) for next three years from the re-commencement of works. If the work is not completed within 03 years due to default of the Employer it will be dealt as per Contract Provision for the extended period beyond 03 years.”

Shall stand substituted as under:

“iii... ..Price Adjustment under clause 70.1 of CoC shall be effective as in Appendix-C Bid of Contract Agreement and shall be paid accordingly with effect from issuance of the court order dated: 06.10.2023

The other terms and conditions of the MoU Dated 21.09.2021 shall remain unchanged. (bold added)

Signed on behalf of the Contractor

(Shahzad Ali)

M/s NEIE-SMADB-LILLY-RMS (JV)

Witness

***(Engr. G.C Pinjani)
Executive Director (Works)***

M/s NEIE-SMADB-LILLY-RMS (JV)

Signed on behalf of the Contractor

(Aamir Mughal)

***General Manager (Projects)
South, WAPDA, Hyderabad***

Witness

***(Muhammad Khalid Memon)
Chief Engineer/PD
Nai Gaj Dam Project, Dadu***

Witness

(Ahmed Waheed Bhatti)
Project Manager
Nai Gaj Dam Project, Dadu

Witness

(Muhammad Arshad
Farooqui)
The Engineer,
Nai Gaj Dam Project, Dadu"

5. This MOU and price escalation formula was put into place and for a period of 17 months the respondents/Wapda complied with the MOU as per price escalation and the project continued as it had the necessary advance payments for labour, raw materials, machinery etc.

6. Then out of the blue the respondent/wapda issued the impugned decision which in effect unilaterally amended the agreed upon MOU as set out and above and did away with the price escalation requirement which made the project not economically viable for the petitioner. The impugned decision is set out below for ease of reference;

**"Pakistan
Water And Power Development Authority**

TELE :	(025) 9200417-8	Office of the
FAX :	(025) 9200416	Chief Engineer/PD
Email :	naigajdamproject@yahoo.com	Nai Gaj Dam Project, Dadu

No.CE&PD/NGD/203

Dated. 20/02/2025

The Chief Resident Engineer,
M/s. TCI (Pvt.) Ltd.,
Nai Gaj Dam Project, Dadu.

Sub: AUTHORITY DECISION MADE IN ITS MEETING HELD ON 15.03.2024 AT WAPDA HOUSE, LAHORE REGARDING ESCALATION ALLOWED TO THE CONTRACTOR IN COMPLIANCE OF SINDH HIGH COURT ORDER DATED: 06.10.2023.

Ref: This office letter No.CE&PD/NGD/313 dated 04.04.2024
Apropos, in connection to the approval of WAPDA Authority in meeting held on 15.03.2024 and already transmitted to your office. Authority has explained the said decision as under:

Authority accorded the approval for;

- i) Restoring / unfreezing Price Escalation (frozen due to MoU) under clause 70.1 of the Condition of the Contract and Appendix-C to Bid of Contractor of Construction of Naj Gaj Dam Project

w.e.f. the date of court order dated 06.10.2023 in compliance of High Court of Sindh Karachi's Judgment / order dated 06.10.2023.

a. The Price adjustment due to change in cost in accordance with Sub-Clause 70.1 of CoC was frozen at cost indices falling on the date of termination of the Contract (Construction of Nai Gaj Dam Project) on 29.08.2018, which was consented by the Contractor in MoU dated 21.09.2021 while Pn Factor was 0.4049.

b. Sequel to the Decision of Sindh High Court dated 06.10.2023, the Contractor will continue to absorb the difference between the escalation factor based on previous normal trend and the escalation factor (frozen as per MOU).

The same is illustrated in graph attached as Annex-I

- ii) *Amendment No.01 to MoU dated 21.09.2021 between WAPDA and M/s. NEIE-SMADB-LILLEY-RMS (JV) for allowing such escalation.*

In view of foregoing, IP's No.93,94,95,96 & 97 are hereby returned to issue revised certificates in light of above explained decision of Authority, please.(bold added)

*Sd/-
Chief Engineer/PD
Nai Gaj Dam Project"*

7. It is the above impugned decision which the petitioner has challenged as being illegal and without lawful authority.

8. Learned counsel for the petitioners have mainly contended that this petition is maintainable as it effects the building of a dam for water which is a fundamental right and a part of the right to life; that the unilaterally made impugned decision by the respondent/wapda to reduce the price of the project is completely unlawful and is without legal effect as in effect it has neutralized their ability to complete the project due to a lack of funds. In support of their contentions they placed reliance on the cases of **Haqbahoo Corporation V. P.I.A. and another** (PLD 2003 Karachi 369), **Messrs Airport Support Services V. The Airport Manager, Quaid-e-Azam International Airport Karachi** (1998 SCMR 2268) and **Messrs Zia Brothers V. Secretary of Purchase Committee for the Girl Community Model School Alipur** (2007 CLC 1181).

9. On the other hand learned counsel for the respondents/Wapda has in effect contended the petition is not maintainable and that the respondents had every right to reduce the contract price especially as the project was behind schedule and that the impugned decision reducing the price of the project was completely legal and justified. In support of his

contentions he has placed reliance on the cases of **Pakistan International Airlines Corporation V. Messrs Pak Saaaf Dry Cleaners** (PLD 1981 SC 553), **Muhammad Farooq V. Nazir Ahmad** (PLD 2006 SC 196), **7C'S Corporate Services V. Oil & Gas Development Company Limited** (PLD 2017 Islamabad 115), **Gerry's International (Pvt.) Ltd. V. Aeroflot Russian International Airlines** (2018 SCMR 662), **Ch. Nazir Ahmed V. Ali Ahmed and another** (PLD 2016 SC 214) and **PAKCOM Limited and another V. Federation of Pakistan and another** (PLD 2011 SC 44).

10. Respondent/NAB who seem to be a proforma respondent in this case confirmed that there is no on going inquiry in respect of the petitioner.

11. We have heard the parties, perused the record and considered the relevant case law cited at the bar.

12. The genesis of the dispute as mentioned above stems from this courts orders, the subsequent MOU which was made between the parties with its price escalation clause and the impugned decision.

13. First of all, we take up the issue of the maintainability of instant petition under Article 199 of the Constitution, 1973. In our view, Article 9 of the Constitution provides the right to life. If a person is deprived of a fundamental right, he can always approach this court by invoking Constitutional jurisdiction with a rider that such right is not hampered by any law. Article 4 of the Constitution guarantees legal protection for all. Article 38 of the Constitution outlines the State's role in promoting the well-being of its people. The State shall ensure the well-being of all citizens by improving living standards, providing work and livelihood facilities within available resources, and guaranteeing the necessities of life, including water. Fundamental rights protect individuals from arbitrary state power and are essential for a free society. Even unremunerated rights integral to named rights are protected. While fundamental rights are crucial, they must be balanced against the state's need to maintain order. Besides, the High Courts can strike down policies against public interest via a Writ jurisdiction, a legal principle consistently upheld by the Supreme Court. However in the present case, the issue of construction of NaiGaj Dam situated at District Dadu, Sindh is important project for the people of Sindh as water conservation and security is

connected to the right to life as guarantee under Article 9 of the Constitution of the Islamic Republic of Pakistan; and, the construction of subject Dams is a matter of great and public importance thus cannot be left unattended for indefinite period as sufficient time has already been lapsed since 2012, and this right of construction of Dam, which right is deemed to be public right of people of Sindh, however, if infringed could be examined by this court. Primarily, Article 199 of the Constitution allows individuals to approach High Courts to challenge the actions of state authorities or bodies performing public functions, even if they have not suffered a direct personal injury. Based on Supreme Court precedents, particularly the Diamer Bhasha, Mohamand Dam, and NaiGaj Dam (C.P. No. 64 of 2018) cases, this petition is maintainable.

14. In a nutshell we find this petition maintainable under Article 199 of the Constitution since the project concerns the construction of a dam in the interior of Sindh where water is desperately required and is a part of the right to life as protected under Article 9 of the Constitution for the people of Sindh.

15. Although this matter might be deemed as a contractual dispute we find that we also have the jurisdiction under Article 199 to intervene based on this courts earlier order which set in motion the new MOU on price escalation and the fact that constitutional obligations can be considered under Article 199 of the Constitution. In this respect reliance is placed on the cases of **Maqbahoo Corporation** (Supra) and **Messrs Zia Brothers** (Supra). No arbitration proceedings have been initiated and this petition simply revolves around a unilateral variation of an MOU to the disadvantage of the petitioner. Now we turn to the merits of the case.

16. The issue in hand is a relatively simple one. Namely, whether after agreeing to an MOU with the petitioner the respondent/wapda could unilaterally vary it to the disadvantage of the petitioner and essentially derail this public interest project.

17. We have not found any mention in the MOU that either party could unilaterally vary the MOU to the disadvantage of the other let alone doing so without even giving any notice of such intention.

18. The MOU had been agreed upon to enable the public interest project to be completed timely and to cover any cost escalation as the

country was going through an economic meltdown (and is even today still trying to come out of that economic meltdown) No valid reason was given for unilaterally amending the MOU in terms of price escalation although at the last minute the respondent has claimed that the contract was coming to an end and that the project was not progressing fast enough. Notably neither of these reasons are given in the unilaterally amended MOU and appear to be an after thought. If the petitioner was not performing under the contract why did the respondents not issue appropriate non compliance notices under the contract which it failed to do?

19. Ultimately, we are drawn to the irresistible conclusion that the respondent/Wapda was running short of funds to finance the project as per price escalation and therefore decided to illegally unilaterally vary that aspect of the MOU which it must have known would severely hinder, if not derail, a project in the national interest. The impugned decision was made without even issuing a notice to or giving the petitioner the right to be heard.

20. Notably even when the respondent/wapda attempted to not fulfill the payment in terms of the MOU on price escalation this was pointed out to the respondent by the project director that the respondent/wapda was in breach of the MOU in the following terms;

“NAI GAJ DAM PROJECT – Construction Supervision Consultants
Techno Consult International (Pvt) Ltd. In association with
Hydropower Engineering

The Chief Engineer & PD
Nai Gaj Dam Project, **February 27, 2025**
Dadu.

Subject: CONSULTANCY SERVICES FOR CONSTRUCTION
SUPERVISION OF NAI GAJ DAM PROJECT.

Authority Decision made in meeting held on 15.03.2024 at WAPDA house, Lahore regarding Escalation allowed to the Contractor in compliance with of Sindh High Court order dated 06.10.2025.

Reference: (i) Client’s Letter No.CE&PD/NGD/203 dated February 20, 2025.

Dear Sir,

With reference to your above-referred letter, we have reviewed Amendment No.1 to the Contract signed between the Contracting parties on 4th April 2024 consequent to the decision of the Honorable Division Bench of High Court of Sindh in Constitution Petition No.D-4529 of 2023 dated 6th October 2023.

The content of Para (i)b of your above-referred letter is not in line with Amendment No.1 to the Contract. We are compelled to follow Amendment No.1 to the Contract mutually agreed and signed between the Contracting parties.

Therefore, in view of the above, we request you to please get Amendment No.1 aligned with the Authority Decision by getting the Contractor's Consent and signing of new Amendment accordingly incorporating contention about absorbing the difference between the escalation factor based on previous normal trend and the escalation factor frozen as per MoU.

We trust the above clarifies the position of the Consultant regarding the issued interim Payment Certificates by the Engineer.

Thanking and assuring you of our best and sincere services at all times.
(bold added)

Very truly yours.
For-Techno-Consult Intl. (Pvt) Ltd.

Sd/-
S.M. Shahid.
Chief Resident Engineer (TCI)"

21. Keeping in view the background discussed above we find that the respondent/wapda was trying to ride rough shot over the petitioner by illegally unilaterally varying and backing out of the agreed price escalation in the MOU for reasons best known to itself but presumably due to a lack of available finance in these times of austerity without advancing any compelling reasons, serving notice on the petitioner and giving the petitioner the right to be heard. Thus, we find that the impugned decision is malafide and passed without lawful Justification and is set aside with the result that the petition is allowed in terms of paragraph one of this judgment.

22. The competent authority of Wapda is directed to immediately remove any obstacles hindering the smooth operation of the project. Wapda must also clear the outstanding dues of the petitioner, if any, on account of any price escalation as stipulated in the original, agreed-upon memorandum of Understanding (MOU) that was in place before the disputed decision, provided it accounts for such escalation. In turn, the petitioner is directed to complete any necessary remedial or other works on the project within four months of this judgment's date. Wapda will make separate provisions and reimburse the petitioner for these works undertaking during these four months, subject to the work being

completed on the spot. The reimbursement rate will be based on the price escalation in the originally, agreed-upon MoU (before the impugned decision), which incorporates the price escalation stipulated in the original MoU.

23. During this aforesaid period of four months if the contract is coming to an end we expect the parties to use their best endeavors in good faith to renegotiate an extension of the existing contract so that the project can be completed through continuity in a timely fashion to the benefit of the people of Sindh and not be left as a half built project/monument to the wastage of tax payers money which seem to blight the landscape of the interior of Sindh. In assisting the parties in determining the amount of work actually completed by the petitioner the petitioner and the respondent/wapda shall jointly appoint a well qualified senior member of the PEC who should ascertain precisely the amount of work completed by the petitioner whose cost of appointment shall be borne equally by the parties whose assessment may assist the parties in determining whether or not to extend the contract.

24. A copy of this judgment shall be sent to Chairman Wapda for implementation through fax and electronic means.

25. The petition is disposed of in the above terms however learned counsel for wapda shall place a compliance report on record on 12.06.2025 when the office is directed to fix this petition before this bench for the purposes of compliance.

HEAD OF CON`ST. BENCHES

JUDGE