

2012 CLD 1734

[Sindh]

Before S. Hasan Azhar Rizvi and

Muhammad Shafi Siddiqui, JJ

ADAM SUGAR MILLS LIMITED — Petitioner

versus

FEDERATION OF PAKISTAN through Secretary

Ministry of Commerce and 2 others—Respondents

Constitutional Petition No.D-2188 of 2012, decided on 10th July, 2012.

(a) Constitution of Pakistan—

***—Art. 199—Constitutional petition Public contract-Judicial review, powers of—scope—
if action of public functionary in awarding contract lacks transparency,
constitutional petition would lie, as it has been their constitutional obligation to
act fairly and justly .while performing administrative functions—If any unfair or
arbitrary actions are complained of or discrimination is agitated, such grievances
can be dealt with in exercise of its powers of judicial review under Art. 199 of the
Constitution, if High Court is otherwise satisfied that action complained of is
arbitrary and unfair and the same can be struck down. [p 1746] A***

Reliance Consultancy v. Federation of Pakistan 2010 CLC 1046 and Arif Builders and
Developers v. Government of Pakistan PLD 1997 Kar, 627 rel.

(b) Public Procurement Rules, 2004—

—R. 48— Constitution of Pakistan, Art. 199— Constitutional petition— Alternate and efficacious remedy—Petitioner sought declaration that categorization of petitioner as defaulter and action taken by authorities on that basis was perverse, arbitrary and unjustified and petitioner had been deprived to participate in tenders for all times to come— Validity— Such situation was not dealt with by Rule 48 of Public Procurement Rules, 2004—Procurement agency itself formulated committee under Rule 48 of Public Procurement Rules, 2004, and this same did not provide efficacious and alternate remedy Petition was maintainable in circumstances. [p. 1748] B

(c) Public Procurement Rules, 2004—

—R. 48—Constitution of Pakistan, Arts, 18, 25 & 199— Constitutional petition—Public tender, awarding of— Defaulter- Determination— Petitioner-company was excluded by Corporation calling for tenders from participating in bidding pursuant to public tender on the ground of its being defaulter—Validity—Petitioner on payment of outstanding dues in terms of award, could not be termed as defaulter and could not be ousted to participate in tender process—Act of ousting of petitioner to participate in tender lacked authority and Jurisdiction and was violative of Articles 18 and 25 of the Constitution—Such acts and decisions of public functionaries were amenable to constitutional Jurisdiction and petitioner had rightly challenged arbitrary and unjustified decision—Tendering Corporation was a public functionary /procuring agency and was obliged to procure such service by means of open competitive biddings in fair and transparent manner and discretion that such public authorities enjoyed, could not be exercised in an arbitrary and capricious manner—Open competitive bidding was invariably 'the best method for ensuring transparent and unobjectionable process—Petitioner had been wrongly ousted from participating in tender and its categorization as

permanent defaulter was not sustainable under law—Petitioner was entitled to participate in bid and was also .entitled for required quota of 10,000 Metric Tons for which it had submitted its bid— Petition was allowed accordingly, [pp. 1752, 1753] C&D

2010 CLC 1810; 2006 CLD 674; 1999 MLD 1238; PLD 1967 SC 530; 2009 MLD 1399; PLD 1996 SC 109; PLD 1998 Kar. 79; Messrs Huffaz Seamless Pipe Industries v. Allied Bank of Pakistan Limited 2001 CLC 713; 2010 CLD 1829; 1998 CLC 221; 2010 CLD 1838; 2001 MLD 1876; Gatron (Industries) Ltd. v. Government of Pakistan 1999 SCMR 1072; Kamran Industries v. Collector of Customs (Exports) PLD 1996 Kar, 68; Gul Ahmed Textile Mills v. Collector of Customs (Appraisalment) 1990 MLD 126; 1990 CLC 1044; PLD 2003 SC 322; Hydri Ship Breaking Industries v. Sindh Government and others 2007 MLD 770; Messrs S. Abdullaand Co. v. Collectors of Customs (Appraisalment) PLD 1992 Kar. 258; Messrs Pacific Multinational (Pvt.) Ltd. v. Inspector-General of Police PLD 1992 Kar. 283; SBLR 2011 Sindh 1249; Mehmoodul-Hasean v. Government of Sindh 2011 PLC 258; BP Pakistan Exploration and Production Inc. v. Additional Commissioner Karachi 2011 PTD 647; Muhammad Akbar Shah v. Federation of Pakistan and others 2011 MLD 1484; Messrs KSB Pumps Company Ltd. v. Government of Sindh 2011 MLD 1876; Pakistan Barman Shell Ltd. v. Mrs. Nasreen Irshad and others 1989 SCMR 1892 and 2006 PCr.LJ 263 **ref.**

Yousuf Ali Sayeed for Petitioner.

Sadaqat Ali Khan Standing Counsel for Respondent No.1.

Rafique Kalwar for Respondent No. 2.

Nemo for Respondent No.3.

Date of hearing: 2nd July, 2012.

JUDGMENT

MUHAMMAD SHAFI SIDDIQUI, J. --- The petitioner is aggrieved of the unjust act of respondent No. 2/TCP whereby it excluded the. petitioner from participating in bid and from being considered as successful bidder pursuant to a public tender despite their offer being the lowest and further aggrieved by the mala fide stance of' the respondent No. 2/TCP that it will continually exclude the petitioner from further tenders, the petitioner filed the present petition.

2. Learned counsel for the petitioner submitted that the petitioner is a public limited company and respondent No. 2 the Trading Corporation of Pakistan (TCP), solely owned and under control of, respondent No. 1, serves as a public sector trading house. The Board of respondent No.2/TCP comprised of Chairman and four directors, all of whom are nominated and appointed by the Government, and a Joint Secretary of the Ministry of Commerce is Included in the Board as ex- officio Director and thus performing functions in connection with the affairs of the government. Respondent No.3 is an autonomous body established under Public Procurement Regularity Authority Ordinance, 2002.

3. Learned counsel for the petitioner submitted that on 21-5-2012 the respondent No. 2/TCP invited applications from sugar mills -of Pakistan for purchase of 200,000 metric tons of white sugar vide tender NO.DOD/Pur-Sugr/27-1/2012 (hereinafter referred as the "subject; .tender"). The interested parties were called upon to submit their bids for a minimum of 5000 and maximum of 10000 metric tons by 7-6-2012.

4. Pursuant to the aforesaid tenders the petitioner submitted bid form dated 6-6-2012 for a quantity of 10,000 metric tons at a price of Rs.50,500 per metric ton. Learned counsel submitted that although the petitioner's offer was responsive, however, it was unlawfully disregarded by respondent No.2/TCP on the alleged ground that the petitioner was a defaulter. The bid amount of Rs.10,100,000, that had been paid pursuant to a Pay Order No.AAA10335225 drawn on Allied Bank Limited on account of bid money equal to 2% of the total value of the quantity, was however retained by respondent No.2.

5. Learned counsel for the petitioner submitted that the petitioner was allegedly

considered as defaulter on account of a dispute that has previously arisen between them in respect of a contract dated 1-6-2004 for the purchase of 12,000 metric tons of sugar. The dispute out of this contract was referred to arbitration before an Arbitral Tribunal comprising of Mr. Justice (Retd.) Haider Ali Pirzada and Mr. Muhammad Khalid Farooqui Advocate. The Arbitral Tribunal passed a unanimous Award on 26-4-2007 (hereinafter referred to as the "said Award") whereby the amount of Rs.5,936,400 was allowed to the respondent No. 2/TCP (hereinafter called as Award amount). The said Award was placed before this Court under the provisions of Arbitration Act, 1940, to make it Rule of the Court, which was registered as Suit No.547 of 2007 wherein an application was filed by respondent No.2/TCP for modification of the amount.

6. Learned counsel submitted that till date no modification has been ordered and the amount that is payable under the Award is unchanged. Learned counsel further submitted that out of the Award amount, an amount of Rs.4,625, 000 was unilaterally misapplied by the respondent No.2/TCP towards adjustment thereof despite the bank guarantee dated 17-9-2005, and call for refund by the petitioner in terms of letter dated 14-2-2012 i.e. the amount which was paid by the petitioner as 2% bid money in respect of the Tender No.DOP/Pur-Sugar/19-98/2012 vides Pay Order No.6570606 dated 30-1-2012. Consequently, the alleged remaining dues after the aforesaid adjustment remained as Rs. 1.311,400. The confirmation of the above adjustment was made by respondent No.2/TCP vide letter dated 5-6-2012 bearing Reference No. TCP/CAD/(L)/355/07. Learned counsel further submits that vide another letter of the same date i.e. 5-6-2012 the respondent No.2/TCP in response to petitioner's letter dated 22-5-2012 addressed that an amount of Rs.5,936,400 had been allowed to the respondent NO.2/TCP under the aforesaid Award and since the petitioner has not preferred any appeal, it was established that the petitioner was defaulter of respondent NO.2/TCP and could not be allowed to participate in future tenders. Accordingly, in response to the said letter a Pay Order bearing No.6571959 dated 6-6-2012 for Rs. 1,311,400 drawn on Habib Bank Limited under cover of a letter was submitted. Thus, per learned counsel the outstanding amount in respect of the Award was promptly tendered.

7. Pursuant to this payment the petitioner addressed respondent NO.2/TCP on 6-6-2012 to allow it to participate in the subject tender in view of the fact that the entire payment of the Award amount has been made /adjusted. The said letter was replied on 7-6-2012 (tender opening date) whereby respondent no.2/TCP on. **refused the petitioner to participate in the tender process** on the ground that the petitioner was a defaulter. More importantly it was stated that they have applied for modification of the-amount and thus the petitioner was not allowed to participate in the tender and the pay order of Rs. 1,311,400 was returned whereas at the time of filing of the petition the amount of Rs. 10,100,000, that had been paid on account of bid money equal to 2% of the total value of the offered quantity, was not returned.

8. Upon opening of the tender, per learned counsel, the petitioner's offer appeared to be lowest of all although petitioner was not allowed to participate and as such the standard operating procedure of respondent NO.2/TCP, was violated which deals with the awarding of the contract to the lowest bidder. Learned counsel contended that since the petitioner's right to participate in the bid was denied as such there is no other efficacious remedy provided under the law and this petition is filed since the departmental appeal would not serve as an efficacious remedy in the circumstances of the case.

9. Thus, learned counsel submitted, that the categorization of the petitioner as a defaulter by the respondent No.2/TCP is perverse, arbitrary, unjustified and violative of principle of natural Justice and fundamental rights and the petitioner through this petition seeks declaration that the categorization of the petitioner as defaulter pursuant to the action taken by the respondent NO.2/TCP is unjustified and violative of principle of natural justice and fundamental rights and that the petitioner's offer has to be considered and accepted by the respondent NO.2/TGP as being the lowest bid in relation to the subject tender and that the respondent NO.2/TCP be restrained from awarding any contract or taking any step in perpetuation or furtherance of the subject tender without considering and accepting the petitioner's offer. Learned counsel in support of his contentions relied upon (i) 2010 CLC 1810, (ii) 2006 CLD 674. (iii) 2010 CLC 1046,

(iv) 1999 MLD 1238. (v) PLD 1997 Karachi 627, (vi) PLD 1967 SC 530. (vii) 2009 MLD 1399, (viii) PLD 1996 SC 109. (ix) PLD 1998 Karachi 79, (x) 2001 CLC 713, (xi) 2010 CLD 1829, (xii) 1998 CLC 221. (xiii) 2010 CLD 1838 and (xiv) 2001 MLD 1876. On preliminary issue of maintainability learned counsel for the petitioner has relied upon 1999 SCMR 1072, PLD 1996 Karachi 68. 1990 MLD 126, 1990 CLC 1044, PLD 2003 SC 322. 2007 MLD 770. PLD 1992 Karachi 258, PLD 1992 Karachi 283.

10. In response to this learned counsel for respondent NO.2/TCP submitted that the petition is not maintainable, under the law as they have not availed the remedy as provided under Public Procurement Regulatory Authority Ordinance, 2002 and the rules framed thereunder. Learned counsel further submitted that the petitioner has been lawfully excluded from participating in the subject tender since by virtue of arbitration Award dated 26-4-2007 the petitioner has been declared as defaulter. Learned counsel further submitted that earlier a tender was awarded vide contract dated 1-6-2004 for the purchase of 12000 metric tons and the petitioner in utter breach of terms and conditions of the tender submitted forged Cane Commissioner's Certificate and subsequently unilaterally cancelled the contract causing loss to the tune of millions of rupees to the respondent NO.2/TCP.

11. Learned counsel further submitted that owing to their past conduct the **petitioner was not allowed to participate in the subject tender** and were rightly excluded as per policy and terms and conditions of the subject tender. Learned counsel further submitted that keeping in consideration said public interest the respondent NO.2/TCP has invoked a policy of excluding those sugar mills who defaulted with respondent No. 2/TCP from participating in the tender unless 'they clear their dues before tender opening date in a bona fide manner. Such contention was also incorporated in Para 4 of the counter-affidavit to the memo of petition. Learned counsel submits that the tenders are awarded by the respondent No. 2/TCP strictly in terms of the Public Procurement Regulatory Authority Ordinance, 2002 and the rules framed there under which were promulgated to regulate the procurement process by public authorities in the larger national interest and that the petitioner's exclusion -was made pursuant to the Ordinance *ibid* and is in consonance

with rules there under. Learned counsel further submitted that they have already preferred an application for the modification of the amount before this Court in Suit No.547 of 2007 and an amount of Rs. 196,624,577 is In fact the actual claim of the respondent No.2/TCP against the petitioner though it is sub judice.

12. Learned counsel further submitted that the respondent No. 2/TCP with an aim to address all the problems of sugarcane growers and sugar Industry decided a summary dated 18-5-2004 that 15% payment of the contract amount in respect of Tender No. E&M/Sugar/Pur-0/04 (earlier awarded to the petitioner) will be made subject to confirmation by the respective Provincial Cane Commissioner that the dues of sugarcane growers are cleared before 15-6-2004. Respondent No.2/TCP floated tender notice dated 21-5-2004 wherein the respondent No.1's said condition of Cane Commissioner's Certificate was incorporated and the petitioner fraudulently obtained a clearance certificate of 100% payment to the grower from the Cane Commissioner. As against this fraudulent submission of certificate the petitioner received 15% payment of the contract amount Illegally in the year 2004 and that the Cane Commissioner on 21-8-2004 has issued a show-cause notice to the petitioner on account of the fact that such clearance certificate was obtained fraudulently and that the issue of show-cause notice was pending adjudication. The petitioner, however, on 31-12-2004 unilaterally cancelled the contract dated 1-6-2004 on the ground that the respondent No. 2/TCP has filed to pay remaining 10% payment payable on start of crushing season which caused loss of millions of rupees to respondent NO.2/TCP.

13. In support of his contentions learned counsel; has relied upon(i) SBLR 2011 Sindh 1249, (ii) 2011 PLC 258,(iii) 2011 PTD 647, (iv) 2011 MLD 1484. (v) 2011 MLD 1876 and (vi) 1989 SCMR 1892.

14. Learned standing counsel appearing for the Federation of Pakistan has adopted the arguments advanced by learned counsel for respondent No.2/TCP.

15. We have heard the learned counsel and perused the record. The prime question that needs to be resolved first is regarding the maintainability of the petition as the propriety demands that such questions are to be decided first. Since learned counsel for respondent

No.2/TCP has raised a crucial point that under Public Procurement Regularity Authority Ordinance, 2002 and rules framed there under an appeal is to be preferred. The subject Rule 48 is reproduced hereunder.

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

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

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

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

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

16. Since the counsel have relied upon certain case-laws In support of their respective contentions' it is beneficial to reproduce, the relevant portion of such Judgments:—

Petitioner's citations

(d) 1999 SCMR 1072 (Gatron (Industries) Ltd. V .Government of Pakistan).

In this judgment the Hon' ble Supreme Court observed as under

”—Rule that invoking the constitutional jurisdiction was possible only after exhausting all other remedies, is a Rule of convenience and discretion by which the

Court regulates its proceedings—Said Rule is not a Rule of law affecting the Jurisdiction.

- (ii) PLD 1996 Karachi 68 (Kamran Industries v. Collector of Customs (Exports))

The learned Division Bench in the aforesaid judgment observed as under

"—Alternate remedy, when non-availing of, no bar— Where the impugned action is completely without Jurisdiction, and patently illegal it is not essential to avail the alternate remedy.

—Alternate remedy—Question involving in interpretation of fiscal rights— Rule pertaining to alternate remedy is not applicable in matters pertaining to interpretation of fiscal rights and instruments."

- (iii) 1990 MLD 126 (Gul Ahmed Textile Mills Ltd. v. Collector of Customs (Appraisal))

"—Availability of an adequate alternative- remedy no doubt bars the constitutional remedy under Article 199 of the Constitution and absence of such remedy is a pre requisite for the invocation of constitutional Jurisdiction. A satisfaction- however is to be reached by the Court that such projected adequate remedy is, in reality an adequate one, in the absence of being equally inexpensive, expeditious, beneficial, and efficacious. If that be not so, such cannot be an adequate remedy. The Rule on this very hypothesis is that where a serious question of interpretation of law is involved it is futile to continue to seek such Interpretation at the departmental level and that in order *to* save time and avoid duplication of procedural bottle-necks constitutional Jurisdiction may, directly, be resorted to. In the ultimate analysis, as to what the law is has always to be determined by the superior Courts. In relation to such a question departmental remedies can never be adequate within the meanings of the constitutional mandate. On similar reasoning is based the now too well-established rule that sub-constitutional, Tribunals can never Judges of their own jurisdiction.—"

- (iv) PLD 1963 SC 322 (Nagina Silk Mills v. Income Tax Officer)

"Notwithstanding section 67, Income Tax Act, 1922, which bars civil suit to set aside or modify an assessment made under the Act, the extraordinary writ

jurisdiction of the High Court can be invoked in challenging an income tax assessment on the basis that the officer concerned lacked jurisdiction to pass the Impugned order. The writ jurisdiction was conferred on the High Court by a constitutional provision and even if there be a conflict between such a provision and another statute, the Constitutional provision must prevail.

... Even where a particular statute takes away certiorari (and that result can only be achieved by express negative words) the English Courts have decided that certiorari may be granted where the " inferior Tribunal has acted without or in excess of jurisdiction for in such a case the tribunal has not brought Itself within the terms of the statute taken away certiorari."

- (v) 2007 MLD 770 (Hydri Ship Breaking Industries v. Sindh Government and others)
“..Alternate remedy—whether the alternate remedy available to petitioner, who are seeking constitutional remedy was adequate or not, depended on the special or particular circumstances of the individual case and it was precisely for that reason that in one case High Court could not entertain petition under its constitutional jurisdiction and in another case same could be entertained—in taking a decision whether alternate remedy in a given case was adequate or not, to enable the High Court to take the further decision relating to entertaining the constitutional petition, the Court, in the background of the particular facts of the case before it, would consider several factors— questions of speed and expenses of the alternate remedy could be considered—whether tile alternate remedy was as effective or efficacious as the constitutional remedy, was also a relevant factor— whether In the circumstances of the case alternate remedy or the constitutional petition would be title appropriate remedy, could also be a pertinent consideration.
- (vi) PLD 1992 Karachi 258 (Messrs S. Abdulla & Co. v. Collectors of Customs (Appraisement)

“... Constitutional Petition—competency—alternate remedies of appeal/revision not resorted to by the petitioner—Effect—Constitutional petition would be competent for, question Involved In petition was applicability or otherwise of

notification on which respondent had already taken decision that same was applicable—resort to appeal of revision, would, thus, have been a futile effort.

- (vii) PLD 1992 Karachi 283 (Messrs Pacific Multinational (Pvt) Ltd. v. Inspector-General of Police)

"....Petitioner contended that award of contract for purchase of helicopters to respondent by government, not only amounted to denial of legitimate right of petitioner to obtain such contract, but It also showed arbitrary and unfair exercise of discretion by government in selecting contracting party, resulting in loss to public exchequer—Petitioner's allegations did make out a case for consideration by court in exercise of its power under Art. 199 of the Constitution—Constitutional petition was, thus, maintainable in circumstances."

17. On the other hand learned Counsel for respondent No. 2/TCP has relied upon the following cases:-

- (i) 2011 PLC 258 (Mehmood-ul-Hassan v. Government of Sindh)

"...alternate remedy was available to petitioners under relevant provisions of Payment of Wages Act, 1936— All pleas which were taken by the petitioners before High Court could be taken before appropriate forum— When there was alternate remedy available to petitioners, constitutional petition was not maintainable and petitioners might avail the alternate remedy available to them under the law—Petition was dismissed in circumstances."

- (ii) 2011 PTD 647 (BP Pakistan Exploration and Production Inc. v. Additional Commissioner Karachi)

"....Where there is alternate remedy available, constitutional jurisdiction under Art. 199 of the Constitution cannot be invoked—While exercising constitutional Jurisdiction, High Court must be satisfied about non-availability of any other' adequate remedy provided by law to petitioners—Authority vested in High Court

under Art. 199 of the Constitution Is not meant to render alternate remedy redundant."

(iii) 2011 MLD 1484 (Muhammad Akbar Shah v. Federation of Pakistan and others)

"If all the litigants are permitted to take all sorts of their disputes to the High Court without first availing other remedies available to them under the law, it will not only unnecessarily increase the workload of the High Courts but would also defeat the provisions of law by which the said remedies have been made available. Such a spree on the part of the litigants would amount to abuse of the constitutional Jurisdiction, which is to be exercised by the High Courts in exceptional cases to provide Justice, which cannot be otherwise obtained by the aggrieved parties."

(iv) 2011 MLD 1876 (Messrs KSB Pumps Company Ltd. v. Government of Sindh)

"Though there is no absolute bar in entertaining grievances, of an aggrieved persons in exercise of writ Jurisdiction, however, such discretion, is to be exercised with circumspection and -as an exception and not as a" rule—In cases, where -there is Jurisdictional error, lack of authority and the alternate remedy is not efficacious, depending on facts and circumstances of each case, extraordinary jurisdiction can be invoked."

(v) 1989 SCMR 1892 (Pakistan Barmah Shell, Ltd. v. "Mrs. Nasreen If shad and others)

In this case it has been held that legislative intent must be given effect to and respected.

18. As far as the judgments cited by the learned Counselor the respondents are concerned, the judgment cited at Serial No. (i) in respect of Payment of Wages Act, 1936 and all issues arising out there from were liable to be lawfully adjudicated: whereas the petitioner's case was allegedly covered by Rule 48 ibid which deals with cases from a particular stage i.e. post bid stage. Thus, the application of such Rule is open only after an event i.e.

entertainment of the bid which is missing in the case in hand. As observed earlier the basic right to participate has been denied same is the case with case-law at Serial No. (ii) where efficacious remedy was available. The judgments mentioned at Serial Nos.(iii) and (iv) contains the answer itself as they suggest that there is no absolute bar and that the discretion is to be exercised with circumspection and it should not be applied as a rule. It further elaborates that if there is a jurisdictional error, lack of authority and that the alternate remedy is not efficacious, extraordinary jurisdiction can be invoked. Further the judgment at Sr. No. (v) pertains to Sindh Public Procurement Act, 2009 and 2010 which is quite different and distinct from the Public Procurement Regulatory Authority Ordinance/2002 and Public procurement Rules, 2004. The last case at Serial No.(v) pertains to a matter in which the Honorable Supreme Court has held that the legislative intent must be given effect to *and* respected while in the case in hand it is certainly not the intent to oust the petitioner from competitive business. It is not the intent that the petitioner should be condemned unheard. It is not the intent of legislature that their basic right to do business should be violated as prescribed in Article 18 of the Constitution of Islamic Republic of Pakistan and it is not the intent that petitioner should be discriminated. The intent of the Ordinance, 2002 and rules there under is that after allowing a person to participate, the complaints or grievances on merits are to be considered by committee but here before that stage could come the petitioner is ousted from participating in the tender/competitive business hence is discriminated.

19. If the action of the public functionary in awarding a contract lacks transparency, writ would lie as it has been their constitutional obligation to act fairly and justly while performing the administrative functions and if any unfair or arbitrary actions are complained of or discrimination is being agitated, such grievances can be dealt with in exercise of its power of judicial review under Article 199 of the Constitution if the Court otherwise is satisfied that the action complained of is arbitrary and unfair and the same can be struck down.

Somewhat similar view was also taken by a Division Bench in case of Reliance Consultancy v. Federation of Pakistan reported in 2010 CLC 1046 wherein the Division Bench observed that, *"had it been a case where the bid of the petitioner had been rejected for being not*

responsive and the bid of someone else had been accepted it would have been appropriate to enter into a question whether the bid of the bidder being treated as not responsive was Justified in the circumstances or not.

20. Similarly, in the case of Arif Builders and Developers v. Government of Pakistan (PLD 1997 Karachi 627) a similar view was taken by Mr. Justice (Retd.) Kamal Mansoor Alam, as he then was wherein it has been held as under:—

"There seems no doubt that the Government does not have unfettered powers to deal with its properties or to award contracts, licenses or other benefits, and unlike private individuals, it cannot arbitrarily pick and choose persons for bestowing favours. Its action should be based on a reasonable and rational procedure which is nondiscriminatory and aimed at, on the one hand, to provide equal opportunity to eligible persons and on the other to avoid loss to the exchequer. The discretion vested in the State functionaries must be exercised judicially and not arbitrarily and should be based on sound principle of Justice and fairness."

The observation of the learned Single Judge is of course persuasive and we uphold such observation.

21. The above discussion is made on the basis of "Administration of justice", however, we now deal with the rule 48 separately hereunder.

22. Sub-Rule (1) of Rule 48 of the Public Procurement Rules, 2004 deals with the constitution of a committee comprising of odd number of persons who would deal with the complaints of bidders that may occur prior to the entry into the force- of procurement contract. Hence the word "filing of bid" is not used purposely.

23. This rule has no application to the case in, hand since the stage discussed In sub-rule (1) has not reached for the petitioner as they were refused to participate in the subject tender on account of being defaulter and hence the occurrence of such complaint prior to the entry into force of the procurement contract does not arise. This rule prima facie reflects that it deals with the complaints of those bidders whose bids have been entertained

without any objection and hindrance which is not the case here when we deal with the petitioner's case. The stage prior to the entry into force of the procurement contract would come only when petitioner would have been allowed to participate.

24. Similarly sub-Rule (2) of Rule 48 discussed the stage of submission and entertainment of bid by procuring agency where after the aggrieved bidder could lodge complaint which stage has not reached for the petitioner. The petitioner had been refused and left out of the contest for all time to come by letter dated 7-6-2012 issued by General Manager (Legal) who too does not enjoy such, authority and power. The basic question of entitlement to participate in the bid was refused which situation is not met or dealt with in this sub-rule hence not applicable. Same is the case with sub-Rules 3, 4 and 5.

25. The above sub-rules clearly demonstrate that the complaints under this rule would be with regard to the issue after entering of petitioner in the contest of the bid and the issue after entering thereafter would then be, open for complaints under this rule accordingly. Thus basic right to participate in the bid was taken away by the letter issued by the General Manager (Law) Legal Division which is neither a procurement agency nor a committee constituted under the aforesaid rule.

26. The ratio of the above, Judgments cited, clearly demonstrate that there is no absolute bar. The Jurisdiction of the superior Courts cannot be ousted/taken away by these subordinate legislations. The constitutional petition challenges the illegality committed, by the respondent No.2 whereby the petitioner for all time to come has been ousted to participate in the tenders which is their main business concern. The petitioner in this petition seeks a declaration that the categorization of the petitioner as a defaulter and the action taken by the respondent No.2 on that basis is perverse, arbitrary and unjustified and hence they have been deprived to participate in the tenders for all time to come. This situation is not dealt with by the Rule 48 *ibid*. In this case the procurement agency itself formulated a Committee under Rule 48 of Public Procurement Rules, 2004 as such *prima facie* it does not provide efficacious and alternate remedy. We accordingly hold that under the circumstances this writ petition is maintainable.

27. Since we have decided the issue of the maintainability in favour of the petitioner we would now revert back to the arguments raised by counsel for the parties on merits of the case.

28. The prime questions which were addressed by learned counsel for the petitioner are that they were excluded from participating in tender on three propositions;—

- (i) That petitioner is a defaulter.
- (ii) That the claim of the respondent No.2/TCP is far above than what had been decided by the Arbitral Tribunal and
- (iii) That the history of the petitioner id such that it was excluded from participating in the subject bid.

29. In order to resolve the controversy we would first highlight the crucial letter issued by respondent No.2/TCP dated 21-5-2012. In the opening Para the respondent No. 2/TCP has categorically highlighted the issue of alleged defaulters as under:—

"However, the sugar mills who defaulted with the TCP are not eligible to participate in the tender unless they clear their dues before tender opening date. Detailed specifications /requirements are indicated in tender Document containing tender terms and conditions."

30. Similarly under the terms and conditions of the subject tender dated 21-5-2012 it has been highlighted as condition No. 14(f) as under:—

"the sugar mills who have defaulted with TCP in terms of any previous/past contracts shall not be allowed to participate in this tender unless they clear all the dues before the tender opening date."

31. The award that has been placed as Annexure D/1 deals with the issue of past history regarding which parties opted for Arbitration to resolve their dispute by appointing one Arbitrator each and which resulted in passing of a unanimous award. At page 15 of the award, the Arbitral Tribunal also declares that, "none of the parties had committed breach

of contract".

32. On 22-5-2012 the petitioner addressed, respondent NO. 2/TCP that pursuant to tender for purchase of 200,000 metric tons dated 22-5-2012 the petitioner has a right to participate and further requested for assurance that they are allowed to do so.

33. In terms of letter dated 5-6-2012, the respondent No.2/TCP addressed the petitioner that since the petitioner had not preferred any objection against the Award dated 26-4-2007, therefore, in view of the admitted/unappealed Arbitral Award an amount of Rs.4.625 Million dated 23-1-2012 has been encashed by TCP towards partial payment/adjustment of their claim.

34. Subsequently, on 5-6-2012 the respondent NO.2/TCP has again addressed the petitioner that since it has been established that the petitioner (Messrs Adam Sugar Mills Ltd.) are TCP's defaulter and in consideration of TCP's policy to safeguard its interest from defaulting parties in the future it has been decided that Messrs Adam Sugar Mills Ltd. Being a defaulter cannot be allowed to participate in future tenders for the purchase of sugar or otherwise. This letter is attached as annexure P-2 to the petition. By this letter which is issued by the General Manager, Legal Division, for the first time the right to participate was unconditionally denied to the petitioner as previously this right was denied conditionally i.e. subject to clearance of dues before tender opening date. It is pertinent to point out that the tender, opening date was 7-6-2012 and this letter was issued 48 hours before the opening of the tender. Be that as it may, on 6-6-2012 the petitioner sent an additional Pay Order No.6571059 dated 6-6-2012 of the balance amount of Rs. 1,311,400 to satisfy/discharge the outstanding amount in terms of the Award. In addition to the above another letter of the same date was addressed by the petitioner to the Chairman Trading Corporation of Pakistan with following contentions:—

"That we have sent to you the balance amount Rs. 1,311,400 which clears the whole award amount as such we do not come in the category of defaulter hence your letter under reply is uncalled for and now we are fully entitled to participate in the current tender dated 7-6-2012.

Under the circumstances you are requested to allow us to participate in the present tender for purchase of 2 lacs M.T. sugar otherwise we will take appropriate legal action in this regard."

35. On the opening date of the tender i.e. 7-6-2012 the respondent No.2/TCP returned the said pay order/demand draft dated 6-6-2012 amounting to Rs. 1,311,400 in respect of the balance arbitral award amount .with the observation that since the petitioner is a defaulter of TCP and in order to safeguard its interest it has already been decided that mill (petitioner) being defaulter cannot be allowed to participate in the tender unless all claim of respondent No. 2 are settled in a bona fide manner. In this letter again they, wrote conditional participation of petitioner and on the other hand returned the pay order of the balance amount outstanding against the petitioner in terms of Unanimous award. We are unable to understand that at one hand respondent No. 2 is asking for settlement of outstanding amount and on the other hand returning the pay order of the balance outstanding amount in terms of Award.

36. We have observed that in the correspondence as well as in the counter affidavit and the reply to the memo of petition, it is a consistent approach of the respondent NO.2/TCP that unless the dues were-cleared before the tender opening date, the defaulted parties are not allowed to participate in the bidding process of the said tender. Such stance was highlighted in Para 4 of the counter-affidavit to the memo of petition, which is as under:—

"That the contents of Para 4 of the petition are a matter of record. It is submitted that participation in the subject tender was Conditional and those "sugar mills who defaulted with the. TCP are/were not eligible to participate in the tender unless they clear their dues before tender opening date". The petitioner having defaulted with the respondent No.2 was rightly excluded from participating In the subject tender, pursuant to die said condition."

37. To declare petitioner as a defaulter a very heavy burden is upon the respondent NO.2/TCP which they have not discharged. The petitioner cannot be adjudged as a defaulter by respondent No.2 either before or after the litigation. Even in case reported

as 2006 PCr.LJ 263 passed by learned Single Judge of Lahore High Court, the F.I.R. No. 126 of 2005 against the petitioner regarding previous case which was agitated by respondent No.2 as (history) was quashed. The original claim of TCP was rightly disputed and eventually it comes out to be Rs.5,936,400 as against their claim of Rs. 196,624,577 and the unanimous award that was passed by the Arbitral Tribunal on 26-4-2007 was placed, before the Sindh High Court.

38. In one of the Judgment cited i.e. Messrs Huffaz Seamless Pipe Industries v. Allied Bank of Pakistan Limited (2001 CLC 713) it has been observed as under:-

"It is pertinent to note that the amount being claimed, by the defendant has not been finally determined or adjudicated by a competent Banking Court. Apprehension of the plaintiff that the mark-up have been wrongly and maliciously calculated and that huge penalties have been imposed cannot be ruled out at this, stage. What amount the plaintiff is liable to pay is yet to be determined by a competent Banking Court It is to be noted that the Banking Courts are reluctant in granting, liquidated damages in favour of Banks. Learned counsel for the defendant was not able to satisfy this Court as to the definition of the term "Willful default"

It is desired that the defendant-Bank before forwarding the name of the plaintiff as defaulter to the State Bank of Pakistan, will consider all the above noted facts."

39. Thus, the ratio of the above Judgment tends to support the contention of learned counsel for the petitioner that the petitioner cannot be adjudged as defaulter by respondent No.2/TCP. In view of above submissions and judgments cited we are inclined to observe that under the facts and circumstances of the case the petitioner on payment of outstanding dues in terms of the Award on 6-6-2012 cannot be termed as a defaulter and hence cannot be ousted to participate in the subject tender process. The act of ousting the petitioner to participate in the tender lack authority and jurisdiction and violative of Articles 18 and 25 of Constitution of Islamic Republic of Pakistan and hence such acts and decisions are amenable to writ Jurisdiction and the petitioner has rightly challenged arbitrary and unjustified decision through this constitutional petition.

40. Apart from these observations and stand taken by respondent No.2/TCP the prime document which set out the terms and conditions is the purchase order dated 21-5-2012 and the terms and conditions of the subject tender of the same date, particularly term 14(f) and the opening paragraph of the purchase order. Since this is their own term and condition that before participating they should clear their outstanding dues and since we have observed above that the outstanding amount on the basis of which they could be ousted and considered as a defaulter has been paid and for a balance portion the petitioner attempted to pay before the opening date of the tender, which -was returned by respondent No.2, In our opinion the petitioner could hardly be considered as a defaulter of TCP to participate in the subject tender. We, hardly see any substance in the arguments of the learned counsel for respondent No.2/TCP that since their claim is much more than the amount decided by the Arbitral Tribunal, the petitioner ought to have deposited entire claim. Until and unless the Award amount is modified or changed the prima facie amount is the one mentioned in the Award.

41. We are of the view that the terms and conditions on the basis of which the subject tender was issued do not cover such history and it is not under the terms and conditions of tender that the mill owners were asked to pay all outstanding amounts, thus the defence of respondent No.2/TCP regarding history, also fails. More particularly, the default, if any, pertains to the grower which is also as per their own submission is sub judice. Needless to mention that in terms of the purchase order dated 21-5-2012 and the terms and conditions' set out of the same date, it is the stand of the respondent No2/TCP that all those sugar mills who defaulted with foe TCP are not eligible to participate, hence the alleged outstanding as far as the growers are concerned is beyond the ambit of the terms and conditions of the subject tender. It is quite surprising that since 2004 they have been pursuing the aforesaid Issue in respect of tender of 12000 metric tons, however, they have not made any attempt to determine the status of the petitioner until 7-6-2012. The alleged historical issue pertains to 2004 and' till date the respondent No.2/TCP has not blacklisted the petitioner, if at all law permits.

42. We may observe that the Trading Corporation of Pakistan being a public functionary/procuring agency was obliged to procure such service by means of open competitive biddings in fair and transparent manner and the discretion that these public authorities may enjoy, cannot be exercised in an arbitrary and capricious, manner. It has been established that the open competitive bidding is invariably the best method for ensuring the transparent and unobjectionable process.

43. In view of the above observations and legal points raised we categorically hold that this writ petition is maintainable, the petitioner has been wrongly ousted from participating in the subject tender and their categorization as a permanent defaulter is not sustainable under the law. We accordingly, allow this petition as the petitioner is found entitled to participate in the bid and is also found entitled for required quota of 10,000 Metric Tons for which petitioner has submitted its bid. We may however clarify that the rest of the quota of 190,000 metric tons shall not be disturbed in terms of this judgment and the principle of last in first out should be followed. The pending applications also stand disposed of.

MH/A-68/K

Petition allowed.
