

SUPREME COURT OF AZAD JAMMU AND KASHMIR
[Appellate Jurisdiction]

PRESENT:

Mohammad Azam Khan, C. J.
Ch. Muhammad Ibrahim Zia, J.
Raja Saeed Akram Khan, J.

1. Civil Appeal No.97 of 2016
(PLA Filed on 05.04.2016)

Sardar Ilyas Alam, Construction Company through its Chief Executive, Sardar Ilyas Alam, having his office at Dhulli Road, District Bagh.

....APPELLANT

VERSUS

1. Meer Muhammad Ashraf & Company Government Contractor and General Order Suppliers through its representative Director Meer Muhammad Aftab having his office at Eid-Gah Road, New Degree College, Muzaffarabad.
2. Azad Government of the State of Jammu & Kashmir through its Chief Secretary having his office at new Secretariat, Muzaffarabad.

3. Chief Secretary, Azad Govt. of the State of Jammu & Kashmir having his office at New Secretariat, Muzaffarabad.
4. Additional Chief Secretary, Development. having his office at New Secretariat, Muzaffarabad.
5. Department of Physical Planning and Housing through its Secretary having his office at New Secretariat, Muzaffarabad.
6. Department of the Planning and Development, through its Secretary having his office at New Secretariat, Muzaffarabad.
7. Chief Engineer Public Works Health Engineering Azad Govt. of the State of Jammu & Kashmir, having his office at Old Secretariat, Muzaffarabad.
8. Superintendent Engineer, Public Works, Public Health Engineering, Azad Govt. of the State of Jammu & Kashmir, having his office at Old Secretariat, Muzaffarabad.
9. Executive Engineer, Public Works, Public Health Engineering, Azad Jammu & Kashmir, having his office at Old Secretariat, Muzaffarabad.

10. Chief Engineer, Water Supply, PHED, having his office at District Complex, Muzaffarabad.
11. Committee for Securitizing the Tendering Process of Water Supply Scheme, Public Health Engineering Sector, through its chairman Ilyas Abbasi, Secretary Communication and Works Department, having his Office at new Secretariat, Muzaffarabad.
12. Zulfiqar Hussain Shah, Chief Engineer PP&H (South) (Member Committee) having his office at District Complex, Muzaffarabad.
13. Mr. Shamim Akhtar, Director, MDA (Member Committee), having his office at District Complex, Muzaffarabad.
14. Sardar Javed Ijaz, Superintending Engineer, PP&H (Member/Secretary Committee), having his office at District Complex, Muzaffarabad.

....RESPONDENTS

15. Mubashir Aziz Qadri, Government Contractor, having his office at District Complex, Muzaffarabad.

16. Imtiaz Hussain, Government Contractor, Bhimber.
17. Mehmood Hussain Abbasi, Government Contractor having his office at District Complex, Muzaffarabad.
18. Ex-Committee of Scrutinizing Tendering Process of Water Supply Scheme through its Chairman Malik Israr Ahmed, chief Engineer, Power Development Organization, having his office at Upper Chatter, Muzaffarabad.

....PROFORMA-RESPONDENTS

[On appeal from the judgment of the High Court dated 28.03.2016 in Writ Petition No.149 of 2016]

FOR THE APPELLANT-COMPANY:	Raja Amjid Ali Khan, Advocate.
FOR RESPONDENT NO.1:	Kh. Attaullah Chak, Advocate.
FOR THE GOVERNMENT:	Mr. Mansoor Pervaiz Khan, Advocate-General.

2. Civil Appeal No.99 of 2016
(PLA Filed on 12.04.2016)

1. Azad Government of the State of Jammu & Kashmir through its Chief Secretary having his office at New Secretariat, Muzaffarabad.
2. Chief Secretary, Azad Govt. of the State of Jammu & Kashmir having his office at New Secretariat, Muzaffarabad.
3. Department of Physical Planning and Housing through its Secretary, having his office at New Secretariat, Muzaffarabad.
4. Chief Engineer Public Works Health Engineering Azad Govt. of the State of Jammu & Kashmir, having his office at Old Secretariat, Muzaffarabad.
5. Executive Engineer, Public Works, Public Health Engineering, Azad Jammu & Kashmir, having his office at Old Secretariat, Muzaffarabad.

....APPELLANTS

VERSUS

1. Meer Muhammad Ashraf & Company, Government Contractor and General Order Suppliers through its representative Director Meer Muhammad Aftab, having his office at

Eid-Gah Road, New Degree College,
Muzaffarabad.

.... RESPONDENT

2. Sardar Ilyas Alam, Construction Company through its Chief Executive, Sardar Ilyas Alam having his office at Dhulli Road, District Bagh.
3. Additional Chief Secretary, Development having his office at New Secretariat, Muzaffarabad.
4. Department of the Planning and Development, through its Secretary having his office at New Secretariat, Muzaffarabad.
5. Superintendent Engineer, Public Works Public Health Engineering, Azad Jammu & Kashmir having his office at Old Secretariat, Muzaffarabad.
6. Chief Engineer Water Supply, PHED, having his office at District Complex, Muzaffarabad.
7. Committee for Securitizing the Tendering Process of Water Supply Scheme, Public Health Engineering Sector through its Chairman Ilyas Abbasi, Secretary,

Communication and Works Department, having his office at New Secretariat, Muzaffarabad.

8. Zulfiqar Hussain Shah, Chief Engineer PP&H (South) (Member Committee) having his office at District Complex, Muzaffarabad.
9. Mr. Shamim Akhtar, Director, MDA (Member Committee), having his office at District Complex, Muzaffarabad.
10. Sardar Javed Ijaz, Superintending Engineer, PP&H (Member/Secretary Committee), having his office at District Complex, Muzaffarabad.
11. Mubashir Aziz Qadri, Government Contractor having his office at District Complex, Muzaffarabad.
12. Imtiaz Hussain, Government Contractor, Bhimber.
13. Mehmood Hussain Abbasi, Government Contractor having his office at District Complex, Muzaffarabad.
14. Ex-Committee for Scrutinizing Tendering Process of Water Supply Scheme through its Chairman Malik Israr Ahmed Chief Engineer,

Power Development Organization, having his office at Upper Chatter, Muzaffarabad.

....PROFORMA RESPONDENTS

[On appeal from the judgment of the High Court dated 28.03.2016 in Writ Petition No.149 of 2016]

FOR THE APPELLANTS: Mr. Mansoor Pervaiz Khan, Advocate-General and Raja Amjid Ali Khan, Advocate.

FOR RESPONDENT NO.1: Kh. Attaullah Chak, Advocate.

Date of hearing: 03.05.2016

JUDGMENT:

Raja Saeed Akram Khan, J.— The titled appeals by leave of the Court have been directed against the judgment of the High Court dated 28th March, 2016, whereby the writ petition filed by respondent No.1, herein, in both the appeals, has been accepted. Since both the appeals arise out of the same judgment,

therefore, these are being disposed of through this single judgment.

2. Precise facts of the case are that the Executive Engineer Public Health Engineering Department through advertisements published in the newspapers invited tenders for construction of Greater Water Supply Schemes for district Neelum and Hattian Bala. The said advertisements were cancelled on 03.08.2015 and 17.08.2015. A consolidated advertisement on 22.08.2015, was later on issued calling for the tenders for above referred schemes. After necessary proceedings, the work was allotted to the appellant, Sardar Ilyas Alam Construction Company. Due to some complaints, an inquiry was ordered by the Chief Secretary through notification dated 06.10.2015, to scrutinize the tendering process. The said notification was later on withdrawn on 30.11.2015 and a fresh notification dated 16.12.2015 was issued for

conducting the inquiry in the matter. Respondent No.1, herein, challenged the notifications dated 30.11.2015 and 16.12.2015, before the High Court by way of writ petition. The learned High Court while accepting the writ petition set aside all the proceedings conducting for awarding the contract for Improvement and Up-gradation of Water Supply Scheme, Authmuqam and Greater Water Supply Scheme, Hattian Bala vide impugned judgment dated 28.03.2016, which is the subject matter of these appeals by leave of the Court.

3. Raja Amjid Ali Khan, Advocate, the learned counsel for the appellants, in both the titled appeals argued that the impugned judgment is against law and the facts of the case which is not sustainable in the eye of law. He contended that respondent No.1, in support of the claim that he approached the concerned officials on 13.08.2015, and moved written

application for obtaining the tender forms, however, the same have not been provided to him, failed to bring on record any evidence, but the learned High Court has not considered this aspect of the case. He further added that the tender notice was cancelled on 17.08.2015 and fresh notice was issued on 22.08.2015 but respondent No.1, herein, did not apply for obtaining the tender forms in response to the fresh advertisement published in the newspapers on 22nd August, 2015. In this way, respondent No.1, does not come within the definition of aggrieved person, but the learned High Court erred in law while not taking into consideration this important aspect of the case. He contended that the learned High Court while passing the impugned judgment has travelled beyond the pleadings as respondent No.1, herein, only challenged the notifications dated 30.11.2015 and 16.12.2015, before the High

Court, but the learned High Court issued the direction for re-advertisement of the projects. He contended that the learned High Court while passing the impugned judgment mainly relied upon the report of the second inquiry committee without adhering to the fact that the first committee headed by the Chief Engineer PWD has already held that the tendering process was carried out in accordance with the relevant rules. In such scenario, it was improper to constitute second committee headed by another Chief Engineer. Even otherwise, the Chief Secretary has not equipped with the powers to constitute such like committees, therefore, the committee constituted by the Chief Secretary has rightly been dissolved vide notification dated 30.11.2015. He contended that the same tendering process for 5 projects was adopted including the subject matter of appeal and the other three projects are near to completion and

no one has raised any objection regarding the non-transparency, but this aspect of the case escaped the notice of the High Court.

4. Mr. Mansoor Pervaiz Khan, the learned Advocate-General while adopting the arguments advanced by Raja Amjid Ali Khan, Advocate, submitted that the learned High Court failed to consider the bona fide of the official respondents as they constituted three committees to scrutinize the matter. He further added that the learned High Court fell in error while not taking into consideration that the allegation in respect of non-advertisement of tender notice in the renowned newspapers having wide circulation, cannot be levelled without impleading the Information Department as party.

5. On the other hand, Kh. Attaullah Chak, Advocate, the learned counsel for respondent No.1, herein, strongly controverted the arguments advanced by the learned counsel for

the appellants. He submitted that the impugned judgment is perfect and legal which does not warrant any interference by this Court. He contended that the tendering process was bogus, secret and illegal, therefore, the learned High Court was fully justified to set aside the same. He added that the report of inquiry committee clearly shows that the whole tendering process was conducted in a non-transparent manner. In continuation of the arguments, he submitted that Pakistan Engineering Council Instructions have been adapted by Azad Jammu and Kashmir Government vide notification dated 14.02.2009. It has clearly been mentioned in Instruction No.2, of the said instructions that notice should be published to give the bidder 42 to 154 days for submission of the tenders. Moreover, in Instruction No.6 it has been provided that the date for receipt of bids and opening of bids shall

be the same. In the case in hand, both the referred instructions have not been followed by the official respondents. He forcefully submitted that the contention of the learned counsel for the appellants that respondent No.1, has not applied for issuance of tendering documents is not correct as the whole proceedings were kept secret. Although, bids were invited through advertisements made in "*Daily Ausaf*" on 23.08.2015 and "*Muzaffarabad Heights Muzaffarabad*" on 22.08.2015, but copies of both the newspapers were not available in the market as all the copies were bought by the appellant-company. In this way, nobody came forward to participate in the tendering process except only four selective contractors.

6. We have heard the arguments of the learned counsel for the parties and gone through the record along with the impugned judgment. The perusal of the record shows that the tenders

were invited for the projects in question, i.e. Greater Water Supply Schemes, district Neelum and district Hattian Bala. After conducting the necessary proceedings, the work was allotted to the appellant, Sardar Ilyas Alam Construction Company. Respondent No.1, herein, moved an application to the Chief Secretary, the copy of the same was also sent to the Secretary Physical Planning and Housing, for cancellation of the tendering process, on the ground that the same has been made illegally against the prescribed procedure and the relevant rules. The relevant portion of the application is reproduced here which reads as under:-

"گزارش خدمت ہیکہ مندرجہ بالا عنوان میں درج واٹر سپلائی ہاء کے ٹینڈرز Xen پبلک ہیلتھ PWD مظفرآباد کے دفتر میں ہونے ہیں۔ کچھ عرصہ قبل 14-08-2015 تک واٹر سپلائی اٹھمقام کے ٹینڈر فارم جاری ہونا تھے مگر یہ کہہ کر ٹینڈر منسوخ کر دیا گیا کہ ابھی فارم تیار نہیں ہیں۔

اب دوبارہ یہ ٹینڈر انتہائی خفیہ رکھ کر اپنے کسی منظور نظر ٹھیکیدار کو محکمہ کے آفیسران الاٹ کرنا چاہتے ہیں اور ٹینڈرز فروخت کرنے کے لئے ٹینڈرز اوپن کرنے کی تمام کارروائی کہاں پر ہو رہی ہے کسی کو معلوم نہیں۔ اتنے بڑے کام کے ٹینڈرز نوٹس غیر معروف اخبارات میں شائع کروائے گئے ہیں اور جس دن مشتہر ہوئے اس دن کے اخبارات مارکیٹ سے غائب کر دیئے

گئے۔ اس تمام کارروائی سے یہ صاف ظاہر ہوتا ہے کہ یہ کام محکمہ کے بعض آفیسران ملی بھگت سے کمیشن لے کر کسی خاص ٹھیکیدار کو غیر قانونی طریقے سے الاٹ کرنا چاہتے ہیں۔"

On the aforesaid application, the Secretary Physical Planning and Housing constituted a committee consisting of Chief Engineer PHE, XEN PHE and SDO PHE, to examine the matter vide order dated 16.09.2015. The record reveals that the said committee submitted a tentative report on 28.09.2015, while observing that the tendering process has been made in a transparent manner according to law and the rules. The total findings recorded by the said committee read as under:-

"درج ذیل سکیم ہاء کے جملہ ٹینڈرز مہتمم صاحبان نے پاکستان انجینئرنگ کونسل کے سٹینڈرڈ فارم اور رولز کے مطابق طلب کئے۔ موصولہ دستاویزات کا تفصیلی جائزہ لیا گیا اور ٹینڈرنگ پراسیس کو تحت ضابطہ عمل میں لایا گیا۔ لہذا ٹینڈرنگ پراسیس سے متعلقہ جملہ دستاویزات بعد از چھان بین بغرض مزید و مناسب کارروائی ارسال خدمت ہیں۔"

On 06.10.2015, the Chief Secretary constituted a committee consisting of Chief Engineer HEP, PDO, Director Structure CDO, Superintending

Engineer PEH, Muzaffarabad and Chief PP&H, P&DD, to scrutinize the tendering process of five water supply schemes of Public Health Engineering in which the projects in dispute were also included. It will be relevant to observe here that the argument of the learned counsel for the appellants that the learned High Court relied upon the report of the second inquiry committee without adhering to the fact that the first committee headed by the Chief Engineer PWD had already held that the tendering process was carried out in accordance with the relevant rules and it was improper to constitute second committee headed by another Chief Engineer; has no weight. The appellant-company has not challenged the constitution of the second committee at the relevant time at any forum, even during the inquiry of the said committee they remained mum, when the committee submitted its report against the

interest of the appellant-company, then they raised such objections which have no value in the eye of law.

6. It is spelt out from the record that the second committee constituted by the Chief Secretary submitted a detailed report on 26.10.2015. The learned High Court has reproduced the findings recorded in the inquiry report of the second committee, therefore, there is no need to reproduce the same again, however, we deem it proper to reproduce here the concluding part of the report which reads as under:-

“Conclusion:-

i. The tender notice for the procurement of contract for water supply scheme Hattian was initiated without the technical sanction, approval of bidding documents and tender notice which is violation of

PPRA rules and PEC guidelines/PWD code.

ii. Shifting of PHE component for execution/tendering of water supply schemes from Haveli and Neelum to Bagh and Muzaffarabad respectively is not justified as scheme was originally prepared by concerned XEN Haveli and Neelum. Moreover, during the execution it would be very difficult to supervise the schemes in far flung areas from Bagh and Muzaffarabad Divisions. Therefore, it seems malafide and it has no justification.

iii. S.E. PHE Muzaffarabad circle well in time indicated the different shortcoming/irregularities in the tendering process of water supply scheme Hattian but XEN Muzaffarabad did not pay any attention to that. Moreover, neither the Chief Engineer nor the Secretariat PP&H took any notice of the issues raised by the S.E PHE (Annex-Z).

iv. The constitution of different committees for tendering of water

supply scheme in the presence of regular/relevant incumbent S.Es/Eens has no justification as it results in disturbance of chain of command of department leading to manipulations.

v. The copies of advertisement, Approvals of technical sanction given by the Chief Engineer were never sent to the concerned S.E PHE Muzaffarabad.

vi. The original bids were not provided to committee despite written and verbal requests which prima facie implies that PP&H Department is deliberately concealing the fabricated tendering process.

vii. Tender documents were issued to already selected three/four contractors in all the tendered out water supply projects.

viii. The Bid Evaluation Report with blank spaces and fictitious entries completely fabricated.”

After going through the supra conclusion drawn by the committee, it clearly postulates that the

tendering process of both the projects has been conducted in a non-transparent manners. The record further postulates that para-wise comments have been filed separately before the High Court by the respondents, therein. Respondents No.3 and 4, therein, i.e. Additional Chief Secretary (Development) and the Department of the Planning and Development while filing para-wise comments, have fully supported the findings of the second inquiry committee. In such state of affairs, in our estimation, when it was brought on record that the proceedings for the allocation of contracts have been made in a non-transparent manner then no option was left with the Court except to set aside such proceedings.

7. It may be observed here that serious illegalities/irregularities have been pointed out in the tendering process, therefore, the discussion on the other points; whether the Chief Secretary

has the powers to constitute such like committees or not; whether in presence of the report of first inquiry committee the other committee could be constituted or not; mere would remain of academic nature. However, we reaffirm the findings recorded by the learned High Court that although the notification for constitution of Committee by the Chief Secretary has been withdrawn but details provided by the said committee cannot be overlooked. It may also be observed here that whenever such like situation arises, the Courts always intervene being custodian of the rights of the people. Same proposition came under consideration of this Court in a case titled *M/s Chinar Power (Pvt.) Limited Muzaffarabad v. Azad Govt. & others* (civil appeal No. 142 of 2014 decided on 04.07.2014) wherein it has been held that:

“10. After discussing the above said points it seems that whole process was not made in the transparent

manner. It is the project of national interest and it is very unfortunate aspect of the case that the Government functionaries are not carrying this and make all the effort to award the contract to the persons of their own choice. In such like eventualities the Courts cannot close the eyes and vigilant about the rights of the peoples. Moreover, the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism.”

In another case titled *Messers Friends Technical Engineering Association, Muzaffarabad and other v. Barrister Syed Iftikhar Ali Gilani & others* (civil appeal No.305 of 2014, decided on 18.04.2016), while dealing with the proposition this Court has held that:

“13. We have reached the conclusion that basic document, i.e., notification dated 12.12.2012, was

issued without lawful authority and the same is *void ab initio*, thus, although there is no need to discuss the point whether the authority adopted the measures in a transparent manners or not; however, as this point is also of public importance, therefore, we intend to discuss the same. To examine the point we have gone through the record. It is spelt out from the record that after issuance of notification dated 12.12.2012, the investors, contractors, companies and firms enlisted in any Govt./semi-Govt./autonomous Organization of Pakistan or Azad Jammu and Kashmir and registered with AJ&K Local Government Board in A-class category, were invited through proclamation alleged to have been published in "*Daily Sada-i-Chinnar*" and "*Daily Jammu and Kashmir*", to submit their bids for installation of weighing apparatus. The version of the respondents before the High Court as well as this Court is that the

advertisements are bogus and fabricated. It appears from the record that the learned High Court requisitioned the said newspapers from Information Department of the Azad Jammu and Kashmir and found that no such advertisements were published in the original newspapers clippings and also recorded the findings in this regard in the impugned judgment. Despite this, the appellants have not placed on record the original newspapers even before this Court. In such scenario, the version of the respondents seems genuine. Even otherwise, the tax was imposed the whole of Azad Jammu and Kashmir, whereas, the alleged advertisements were published in local newspapers which itself shows that all this has been done with some ulterior motive. Moreover, the record further reveals that in pursuance of said advertisement, only three companies belonging to the same area got themselves registered and participated in the bidding process

and nobody other than those came forwarded to compete. Thus, it cannot be said that the process was initiated in a transparent manner rather all these acts show that the Government officials joined hands to complete their personal vendetta and they invent the mechanism to collect the money from public at large while giving the plan a cosmetic touch of public private partnership. It is the project of national interest, but the whole process has not been conducted in a transparent manner which is very unfortunate, whenever such situation exists, the Courts are always intervened being custodian of the rights of the people.”

After minutely appreciating the record and going through the impugned judgment along with the case law referred to hereinabove, we are of the unanimous view, that the learned High Court has not committed any illegality while setting aside the proceedings of allocation of the contracts and directing the concerned authorities

to re-advertise the projects as such like contracts which are based on non-transparency, cannot be allowed to remain in field.

In the light of above discussion, we do not find any substance in both the titled appeals, therefore, these are hereby dismissed with no order as to costs.

JUDGE CHIEF JUSTICE JUDGE

Muzaffarabad

___ .06.2016