

SUPREME COURT OF AZAD JAMMU AND KASHMIR

(Appellate Jurisdiction)

PRESENT

Ch. Muhammad Ibrahim Zia, CJ.
Raja Saeed Akram Khan, J.
Ghulam Mustafa Mughal, J.

Civil Appeal No. 70 of 2015
(PLA Filed on 25.08.2014)

1. AJK Government of the State of Jammu and Kashmir through its Chief Secretary, having his office at New Secretariat Complex, Lower Chatter, Muzaffarabad.
2. Finance Department, Azad Govt. of the State of Jammu and Kashmir through its Secretary Finance, having his office at New Secretariat, Muzaffarabad.

.... APPELLANTS

VERSUS

1. Muhammad Siddique Khan, Project Director, 3.2 MW Sharian Hydro Electric Project, Presently serving as Director Mechanical, HEB, Muzaffarabad.

.... RESPONDENT

2. Azad Jammu & Kashmir Hydro Electric Board, Muzaffarabad through its Managing Director, HEB, Muzaffarabad.
3. The Secretary Electricity having his office at New Secretariat Complex, Lower Chatter, Muzaffarabad.
4. Accountant General, Azad Jammu & Kashmir, Muzaffarabad.

.... PROFORMA RESPONDENTS

(On appeal from the judgment of the High Court dated
26.06.2014 in Writ Petition No. 1645/2011)

FOR THE APPELLANTS: Raja Ikhlaq Hussain Kiani,
Additional Advocate-
General.

FOR RESPONDENT NO. 1: Miss Kokab Al Sabah
Roohi, Advocate.

Amicus Curiae: M/s. Raza Ali Khan, Syed
Nazir Hussain Shah
Kazmi, Raja Muhammad
Hanif Khan and Barrister
Humayun Nawaz Khan,
Advocates.

Date of hearing: 11.04.2017

JUDGMENT:

Ch. Muhammad Ibrahim Zia, C.J.— The subject-matter of the titled appeal by leave of the Court is the judgment of the High Court dated 26.06.2014 through which the writ petition filed respondent No. 1, herein, has been accepted.

2. The essential facts of the case are that a post of Project Director in 3.2 Mega Watt Sharian Hydro Electric Project was advertised in daily 'Mohasib' dated 06.08.2008. In pursuance, whereof, the appellant participated in the test and interview. In consequence to the test and interview, the appellant was recommended and appointed as Project Director vide notification dated 06.03.2009. He filed a writ petition

on various grounds before the High Court on 21.10.2011 for payment of Project Allowance from 06.03.2009 to 12.05.2011. The learned High Court, after necessary proceedings, accepted the writ petition and directed the respondents to make payment of project allowance in accordance with the advertisement, hence this appeal by leave of the Court.

3. During hearing of this appeal the legal proposition of public importance whether the writ petition is maintainable in the matters involving the contractual obligations, emerged. Keeping in the view the importance of the proposition, in addition to the counsel for the parties some eminent members of the Bar were also requested to assist the Court.

4. Raja Ikhlaq Hussain Kiani, Additional Advocate-General, the learned counsel for the appellants after narration of necessary facts submitted that the impugned judgment of the High Court is not consistent with the principle of law and justice. The respondent-petitioner has got no locus standi to file the writ petition. He is estopped by his conduct. He further argued that the writ petition has been filed for enforcement of the contractual obligations and

according to the celebrated principle of law the writ petition for enforcement of contractual obligations is not competent. He placed reliance on the case reported as *Azad Govt. & others vs. Neelum Flour Mills, Muzaffarabad* [1992 SCR 381] and submitted that the impugned judgment of the High Court be set-aside by accepting this appeal and consequently the writ petition be dismissed.

5. Miss Kokab Al Sabah Roohi, Advocate, the learned counsel for the respondent forcefully defended the impugned judgment of the High Court and submitted that it is quite consistent with the principle of law and justice. The respondent approached the High Court for protection of legal rights. It is not mere a contract between the parties but the matter is relating to the person performing functions in connection with the affairs of the Azad Jammu and Kashmir. In this case, sheer violation of law has been committed and the respondent has been deprived of his vested legal rights. Therefore, this appeal has no substance and the same is liable to be dismissed.

6. Mr. Raza Ali Khan, Advocate-General, on Court's direction argued the case. He submitted that

although there is no absolute bar for maintaining the writ petition involving contractual obligations, however, it depends upon the nature and facts of each case. If there is some violation of law or principle of law and detailed inquiry or recording of evidence is not required, the High Court may exercise the writ jurisdiction but in the case wherein the factual propositions are involved and recording of the evidence is required, the writ jurisdiction may not be exercised.

7. Syed Nazir Hussain Shah Kazmi, Advocate, the learned senior member of the Bar also argued the case. He referred to the cases reported as *Azad Government of the State of Jammu & Kashmir & others vs. Kashmir Timber Corporation* [PLD 1979 SC AJK 139].

8. While assisting the Court, Raja Muhammad Hanif Khan, Advocate, filed written notes and submitted that the writ jurisdiction is an extraordinary jurisdiction specially conferred upon the High Court. In the cases where the state or its instrumentalities, act in arbitrary and unreasonable manner the High Court may exercise the writ jurisdiction even in the matters of contracts. He referred to the cases reported as *Kerala State*

Electricity Board & others vs. Kurien E. Kalathil & others [AIR 2000 SC 2573], *State of U.P. and others vs. Bridge & Roof Co. (India) Ltd.* [AIR 1996 SC 3515], *Mumtaz Ahmed vs. Zila Council, Sahiwal through Administrator & others* [1999 SCMR 117], *Khadim Hussain vs. The State* [PLD 2010 SC 669] and *Sargodha Textile Mills Limited through General Manager vs. Habib Bank Limited through Manager and another* [2007 SCMR 1240].

9. Same like, Barrister Humayun Nawaz Khan, Advocate, while categorizing the writ petition submitted that according to the constitutional spirit in case of contract between the private parties the writ petition is not maintainable because the writ petition can only be filed against the person performing functions in connection with the affairs of the Government or state. The contractual rights regulated by the statutory provisions or contracts which are based upon law and established facts requiring no recording of evidence or complicated factual propositions, can be enforced while exercising the writ jurisdiction. He also filed the written arguments and referred to number of cases some of which are *Lahore Cantonment Cooperative Housing*

Society Limited Lahore Cant, through Secretary vs. Dr. Nusratullah Chaudhary & others [PLD 2002 SC 1068], *Mrs. M. N. Arshad & others vs. Miss Naeema Khalid & others* [PLD 1990 SC 612], *Gul Marjan Khan vs. Government of Punjab etc.* [NLR 1999 UC 558], *Pakistan (through the Secretary Cabinet Secretariat Karachi) vs. Moazzam Hussain Khan & another* [PLD 1959 SC 13], *Messrs Airport Support Service vs. Airport Manager Quaid-i-Azam International Airport Karachi & others* [1998 SCMR 2268], *Government of Pakistan through Secretary, Ministry of Defence Rawalpindi & others vs. Messrs Shoaib Bilal Corporation & 2 others* [2004 CLC 1104], *Messrs Pacific Multinational (Pvt.) Ltd. Vs. Inspector General of Police Sindh Police Headquarter & 2 others* [PLD 1992 Kar 283], *Messrs United International Associates through Managing Partner vs. Province of the Punjab & another* [1999 MLD 2745], *Messrs Ittehad Cargo Service vs. Messrs Syed Tasneem Hussain Naqvi & others* [PLD 2001 SC 116], *Shoukat Ali & others vs. Government of Pakistan (through Chairman Ministry of Railway & others)* [PLD 1997 SC 342] and *Province of the Punjab through Secretary Communication & Works, Government of*

Punjab, (Lahore) & 2 others vs. Messrs M. S. Chaudhary through Construction Company through Managing Partner [2002 YLR 1587].

10. We have considered the arguments of the learned counsel for the parties as well as the eminent lawyers who argued on Court's direction. The learned counsel for the appellants has relied upon the case reported as *Azad Government & others vs. Neelum Flour Mills, Muzaffarabad* [1992 SCR 381] wherein the division bench of this Court has observed as follows:-

"We have consequently heard detailed arguments on this aspect of the case. We have also heard the learned counsel at some length in so far as merits of the case are concerned. This Court has already laid down the law that contractual liability cannot be enforced through a writ petition in an unreported judgment *Mufti Nazir Hussain Vs. Azad Government* (Civil Appeal No. 49 of 1979 decided on 2-1-1980); *Mufti Nazir Hussain* a retired District Qazi was re-employed as District Qazi as a stop-gap arrangement necessitated because of the absence of permanent District Qazi who had proceeded to Saudi Arabia for higher studies. His services were terminated after some time, whereupon *Mufti Nazir Hussain* filed a writ petition in the High Court challenging the termination order. The main ground taken in the petition was that he had been re-employed on contractual basis that his service would continue till the return of the permanent incumbent from Saudi Arabia and his services therefore could not be terminated earlier. Violation of the principle of *audi alteram partem* was also made a

ground of attack in the impugned order. The writ petition was accepted and the termination order was quashed. The Azad Government challenged the order of the High Court before this Court. The learned Advocate-General contended before this Court that no writ petition could lie to enforce a contractual obligation. This Court came to the conclusion that by getting the impugned order vacated all that Mufti Nazir Hussain wanted was the enforcement of contractual liability through a writ petition. Muhammad Aslam, J. speaking for the Court observed as follows:-

'We find this objection quite forceful as there is no escape from the fact that such a writ petition for enforcement of service contract does not lie. It is well settled that for the enforcement of a contract or an agreement, relief cannot be allowed through a writ of mandamus and the superior Courts have refused to issue directions, as sought by the respondent herein, on the ground that proper remedy is available through a suit in the civil Courts. To cite a few authorities, we may refer to *The Chandpur Mills Ltd. V. The District Magistrate, Tippera* and another (PLD 1958 SC 267), *Pakistan V. Naseem Ahmad* (PLD 1961 SC 445), *Messrs Momim Motor Company V. The Regional Transport Authority, Dacca* (PLD 1962 SC 108), *M. Muzaffar-ud-Din Industries Ltd. V. The Chief Settlement and Rehabilitation Commissioner, Lahore & another* (1968 SCMR 11636), *Shamsahd Ali Khan V. Commissioner, Lahore* (1969 SCMR 122) and *Mir Rasoll Bux Khan Sundrani & Co. V. People's Municipality, Sakkur and others* (PLD 1975 Kar. 878). No doubt some of those authorities, as pointed out by the learned counsel for the respondent, pertain to agreements about property, but the principle

enunciated in them is the same; namely that the Courts, while exercising extraordinary writ jurisdiction, do not issue orders or directions for the enforcement of contractual obligations. 1. Pakistan, and (2) Administrator of Karachi V. Naseem Ahmad (PLD 1961 SC 445) contain almost and identical case where the police employees sought through writ of mandamus a direction from the High Court for their re-instatement on the basis of service contract. The High Court issued the writ for restoring the Government servants to their offices. Against this decision, the Government went in appeal before the Supreme Court where over-ruling the High Court's view, it was held 'a writ of mandamus does not lie to restore a Government servant to office.' In view of this state of law, and agreeing with the contention of the learned Advocate-General, we hold that the respondent herein could not seek his remedy as stated in the writ petition, through the extra-ordinary writ jurisdiction of the High Court and if so advised, he could seek his relief through a suit before a civil Court.'

Having due regard and respect to the judgment (supra), in our opinion, the matter has not been exhaustively attended. According to the constitutional provisions conferring the writ jurisdiction upon the High Court, the basic condition for exercising the writ jurisdiction is that the person performing functions in connection with the affairs of the Azad Jammu and Kashmir or the local authority is required to

be directed to refrain from doing that which is not permitted by law to do or to do that which is required by law to do; and declaring that any act done or proceeding taken by such person without lawful authority. The other condition is absence of adequate remedy provided by law for redressal of grievance of an aggrieved person. Thus, in the Constitution there is no specific provision expressly barring the exercise of writ jurisdiction regarding the matters involving contractual obligations and liabilities.

11. Commonly and generally the contracts are governed by the Contract Act, 1872, however, there may be some other special statutes dealing with the matters relating to the contracts, thus, the contracts are also made according to law and may be enforceable under the provisions of law. Section 37 of the Contract Act, 1872 may be referred and even the matters falling within the purview of this statutory provision are based upon law. Even in the matters relating to the property, under the constitutional provisions the making of contracts by the Government and the Council is also recognized. In this regard section 52-A of the Azad

Jammu and Kashmir Interim Constitution Act, 1974

reads as follows:-

52-A. *Power to acquire property and to make contracts, etc.*-(1) The executive authority of the Government and of the Council shall extend, subject to any Act of the appropriate authority to the grant, sale, disposition or mortgage of any property vested in, and to the purchase or acquisition of property on behalf of, the Government or as the case may be, the Council, and to the making of contracts.

(2) All property acquired for the purpose of the Government or of the Council shall vest in the President or, as the case may be, in the Council.

(3) All contracts made in the exercise of the executive authority of the Government or of the Council shall be expressed to be made in the name of the President or, as the case may be, the Council and all such contracts and all assurances of property made in exercise of that authority shall be executed on behalf of the President or, the Council by such persons and in such manner as the President or as the case may be, the Council may direct or authorize.

(4) Neither the President, nor the Chairman of the Council, shall be personally liable in respect of any contract or assurance made or executed in the exercise of the executive authority of the Government or, as the case may be, the Council, nor shall any person making or executing any such contract or assurance on behalf of any of them be personally liable in respect thereof.

(5) Transfer of land by the Government or the Council shall be regulated by law.”

12. The constitutional provisions of the Azad Jammu and Kashmir Interim Constitution Act, 1974, the Constitution of Islamic Republic of Pakistan, 1973 and the Constitution of India regarding exercise of writ jurisdiction by the High Court are almost identical. The careful appreciation of the constitutional provisions reveals that specifically, there is no absolute bar provided in the constitutional provisions relating to prohibition of exercise of writ jurisdiction regarding the matters arising out of the contracts. For proper appreciation of the scope of writ jurisdiction, we have made a thorough survey of the legal precedents of the apex and superior Courts of the sub- continent.

13. Some of the landmark pronouncements are as follows.

The apex Court of Pakistan in the case reported as *Zonal Manager UBL and another vs. Mst. Perveen Akhtar* [PLD 2007 SC 298] while dealing with this proposition has observed as follows:-

“4. We have carefully examined the above-noted contentions canvassed at bar by Mr. Sharifuddin Prizada, learned Advocate Supreme Court on behalf of petitioners, perused the available record as well as the

order impugned. A bare perusal of the order impugned would reveal that it has been passed in a casual and cursory manner without having gone through the nature of controversy and affording proper opportunity of hearing to the petitioner. It is also ignored that by now it is well-settled that "contractual rights and obligations have to be enforced through Courts of ordinary jurisdiction. The High Court in exercising its writ jurisdiction will be loath to interfere in matters arising out of contractual obligations. The normal remedy at law being a suit for the enforcement of contractual rights and obligations, the High Court will not grant relief under Art.199 merely for the purpose of enforcing contractual obligations notwithstanding the very extensive nature of the power of the High Court under that Article. (Muzafaruddin v. Chief Settlement Commissioner (1968 SCMR 1136) Momin Motor Co. V. R.T.A. Dacca (PLD 1962 SC 108), Muhammad Ramzan v. Secretary Local Government, Government of Punjab (PLD 1987 Lah 262), Pakistan Miniseral Development Corporation Ltd. V. Pak. WAPDA (PLD 1986 Quetta 181), Chandpur Mills Ltd. V. District Magistrate Tippera (PLD 1958 SC 267), Chattar Singh v. State of Punjab (AIR 1953 Punjab 239) Raghavendra Sing v. State of Vindhya Pradesh (AIR (39) 1952 Vindya Pradesh 13). We are conscious of the fact that "where rights are based on statute law or rules framed thereunder or when an obligation or duty vests in a public functionary or a statutory body, performing functions in relation to the affairs of the federation or a province are a local authority, constitutional jurisdiction can be attracted. In such situations even contractual rights and obligations may be enforced in constitutional jurisdiction. This, however, is subject to the important rider of corresponding absence of an adequate remedy."

In the case titled *Brig. Muhammad Bashir vs. Abdul Karim & others* [PLD 2004 SC 271], it has been observed that:

"12. Mr. Muhammad Zaman Bhatti, learned Advocate Supreme Court on behalf of official respondents failed to point out any such resumption order and could not explain satisfactorily how the respondents had failed to satisfy the conditions of allotment as contemplated in the notification dated 7.2.1968. The Deputy Collector/Collector had acted not only capriciously but in an arbitrary manner can be as a classic example of abuse of performed his duties in a casual and careless manner and his indifferent approach is highly condemnable. How the land could have been allotted in view of the status quo order passed by Member, Board of Revenue qua the said land which makes it abundant clear that the land in question was not "land available" for the purposes of allotment. The allotment was also in violation of Condition No.5 of the notification dated 7-2-19 as mentioned above. In view of the above glaring illegalities, highhandedness and arbitrariness of the revenue authorities the order dated 19-8-1995 has rightly been declared as unlawful. We are not persuaded to agree with Sardar Muhammad Ghazi, learned Advocate Supreme Court for appellant that the scope Article 199 is limited and such like controversy could not have been dilated upon and decided by the High Court while exercising Constitutional jurisdiction for the simple reason that record was crystal clear and accordingly the controversy being not ticklish and complicated could have been decided. It is well settled by

now that "Article 199 casts an obligation on the High Court to act in aid of law, protect the rights the citizens within the framework of the Constitution against the infringement of law and Constitution by the executive authorities, strike a rational compromise and a fair balance between the rights of the citizens and the actions of the State functionaries, claimed to be in the larger interest of Society. This power is conferred on the High Court under the Constitution and is to be exercised subject to Constitutional under the Constitutional limitations. The Article is intended to enable the High Court to control executive action so as to bring it in conformity with the law. Whenever the executive acts in violation of the law an appropriate order can be granted which will relieve the citizen of the effects of illegal action. It is an omnibus Article under which relief can be granted to the citizens of the country against infringement of any provision of law or of the Constitution, If the citizens of this country are deprived of the guarantee given to them under the Constitution, illegally or, not in accordance with law, then Article 199 can always be invoked for redress." (Ghulam Mustafa Khan v. Paksitan and others PLD 1988 Lah. 49, Muhammad PLD 1956 Kar, 538(FB) Hussain Khan v. Federation of Pakistan PLD 1956 Kar. 538 (FB), S.M. Yousuf v. Collector of customs PLD 1968 Kar 599 (FB). It is to be noted that "paramount consideration in exercise of Constitutional jurisdiction is to foster justice and right a wrong". (Rehmatullah v Hameeda Begum 1986 SCMR 1561, Raunaq Commissioner PLD 1973 SC 236), There is no cavil with the proposition that "so long as statutory bodies and executive authorities act

without fraud and bona fide within the powers conferred on them by the statute, the judiciary cannot interfere with them. There is ample power vested in the High Court to issue directions to an executive authority when such an authority is not exercising its powers bona fide for the purpose contemplated by the law or is influenced by extraneous and irrelevant considerations. Where a statutory functionary acts mala fide or in a partial, unjust and oppressive manner, the High Court in the exercise of its writ jurisdiction has ample power to grant relief to the aggrieved party". (East and West Stemaphsip Co. v. Pakistan PLD 1958 SC (Pak.) 41). In our considered view, technicalities cannot prevent High Court from exercising its Constitutional jurisdiction and affording relief which otherwise respondent is found entitled to receive."

In the case reported as *Nizamuddin & others vs. Civil Aviation Authority & others* [1999 SCMR 467], it has been held that:

"From the arguments advanced at the bar by both the sides it is clear that as no tender had been issued in respect of the sole shop in terminal No.2, therefore, the appellants had no basis these redress regarding the said shop. It is also to be noted that the appellants had not specified any shop in terminals Nos.1 and 3 against which they have preferential claim. Moreover it could not be shown that any shop was lying vacant so that the claim of the appellants could be considered about it. It appears that all those who had been successful in

obtaining shops in the disputed terminals have neither been impleaded nor it has been pleaded that the appellants had better claim against them. Keeping in view all these material defects hurdles in the way of the appellants in enforcing their right it was not possible for the High Court nor for this Court to give any relief to the appellants, therefore, all the submissions made at the bar would remain only of academic, interest. However, it can hardly be disputed by any one that for a society which claims to be organized civilized and law abiding it is imperative to standby its commitments, undertakings and to be honest and fair in its dealings, it is moreso for a Government respecting rule of law not to discriminate between its citizens and its functionaries cannot be allowed to exercise discretion at their whims, sweet-will or as they please; rather they are bound to act fairly, the perusal of all the precedent cases cited at the bar by the learned counsel for the appellants enjoins and enunciate with emphasis the above principle, therefore, there is no need to refer to each of them. The argument advanced by the learned counsel for the appellants that as the latest trend of superior Courts in our country and also elsewhere is to enlarge the scope of judicial review, therefore, availability of alternate remedy or matter involving contractual obligation should not pose hurdle in exercise of power of judicial review under Article 199, is too wide and sweeping to be adopted in every case. It is axiomatic principle of law that every case is to be adjudged on its own facts, circumstances and merits. If in a particular case both the parties admit the factual aspect which give rise to the dispute and the Court feels that the

matter is of such an urgent nature that the very remedy would get frustrated, if the aggrieved party is directed to seek redress through alternative remedy available under the law, then in that case it would be proper for the Court to entertain the writ petition. Similarly if through alternative remedy an of lower authority is to be impugned before a higher authority at whose behest the action is taken or is passed then that cannot be termed as an adequate and efficacious remedy so as to justify refusal of exercise of judicial review. If in every contractual matter giving rise to enforcement of contractual obligation of a dispute which can be redressed through other remedy available under the law writ petitions are entertained, then this would defeat that very purpose of law and which competent Courts are established and vested with jurisdiction under the law. Appellants could also not reasonably complain of discrimination or violation of Article 25 of the Constitution which provides equal treatment to persons placed under similar circumstances. The plaintiffs who resorted to legal remedy for the redress of their grievance and on the basis of certain settlement between them and the in those proceedings they were held entitled to same concession, cannot be equated with the appellants who remained silent spectators in the contest between the said two parties. Therefore, the disadvantage which was sought to be remedied through the Writ Petition was because of the appellants' own default and omission. The decision of the respondents in creating two classes in the tender for the purpose of some concession in the bid was because of the compromise in the suits be treated as arbitrary or perverse

classification, rather this classification is founded on sound and rational basis."

In the case reported as *Messrs Airport Support Services vs. The Airport Manager & others* [1998 SCMR 2268].

"...As was pointed out by Muhammad Afzal zullah, J., (as he then was) in *Rashid A. Khan v. West Pakistan Railway Board*, PLD 1973 Lahore 733, a distinction is to be made between an ordinary contract and a contract through the process of tender. In the latter case, any serious contravention of rules instructions may not be accepted as lawful and a public functionary may even be personally required to make good the loss attending upon such an illegality. The instant case, therefore, is distinguishable inasmuch as the contract was a result of private negotiations and, thus, not endowed with the sanctity attaching to a higher plane, when a contract follows upon a due, open and public process. This, in turn, should be caution enough to the officers of the C.A.A that all further contracts fully abide by institutional and public norms. Much the same was observed by the Indian Supreme Court in *Mahabir Auto Stores v. Indian Oil Corporation*, AIR 1990 Supreme Court 1031, where, in relation to contractual rights having a public element, it was stated that the manner, the method and the motive of a decision of entering or not entering into a contract by a public functionary was open to judicial review on the touchstone of reasonableness, relevance, fairplay, natural justice equality and non-discrimination, It seems to me that even

where no challenge is made to a public contract on such a yardstick the Court cannot be oblivious to the considerations when called upon to give effect to the same. More than this and anything beyond statements of principles need not, in view of the order proposed hereinbelow, be treated here."

On the same proposition from the High Court jurisdiction the cases which can be referred to are *Haji Amin vs. Pakistan Trading Corporation & another* [PLD 2009 Karachi 112], *Messrs Wak Orient Power and Light Limited vs. Government of Pakistan and others* [1998 CLC 1178 (Lahore)] and *Yousaf A. Haroon vs. Custodian of the Karachi Hotel* [2004 CLC 1967 (Karachi)].

The apex Court of India in the case reported as *Vencil Pushpraj v. State of Rajasthan* [AIR 1991 Supreme Court 536] observed that:

"17. We are, therefore, unable to accept the argument of the learned Additional Advocate-General that the appointment of District Government Counsel by the State Government is only a professional engagement like that between a private client and his lawyer, or that it is purely contractual with no public element attaching to it, which may be terminated at any time at the sweet will of the Government excluding judicial review. We have already indicated the presence of public element attached to the 'office' or 'post' of District Government Counsel of every category covered by the

impugned circular. This is sufficient to attract Article 14 of the Constitution and bring the question of validity of the impugned circular within the scope of judicial review.

18. The scope of judicial review permissible in the present case, does not require any ate consideration since even the minimum scope of judicial review on the ground of arbitrariness or unreasonableness or irrationality, once Art. 14 is attracted, is sufficient to invalidate the impugned circular later. We need not, therefore, deal at length with the scope of judicial review permissible in such cases since several nuances of that ticklish question do not arise for consideration in the present case.

19. Even otherwise and sans the public element so obvious in these appointments, the appointment and its concomitants viewed as purely contractual matters after the appointment is made, also attract Art. 14 and exclude arbitrariness permitting judicial review of the State action. This aspect is dealt with hereafter."

In the case reported as *Mahabir Auto Stores and others vs. Indian Oil Corporation and others* [AIR 1990 Supreme Court 1031], it has been held by the apex Court of India that:

"17. We are of the opinion that in all such cases whether public law or private law rights are involved, depends upon the facts and circumstances of the case. The dichotomy between rights and remedies cannot be obliterated by any straight jacket formula. It has to be examined in each particular case. Mr. Salve sought to urge that there are certain cases under

Article 14 of the arbitrary exercise of such "power" and not cases of exercise of a "right" arising either under a contract or under a Statute. We are of the opinion that that would depend upon the factual matrix.

18. Having considered the facts and circumstances of the case and the nature of the contentions and dealings between the parties and in view of the present state of law, we are of the opinion that decision of the State / public authority under Article 298 of the Constitution, is an administrative decision and can be impeached on the ground that the decision is arbitrary or violative of Article 14 of the Constitution of India on any of the grounds available in public law field. It appears to us that in respect of Corporation like IOC when without informing the parties concerned, as in the instant case of the appellant firm herein on alleged change of policy and on that basis action to seek to bring to an end the course of transaction over 18 years involving large amounts of money is not fair action, especially in view of the mono-polistic nature of the power of the respondent in this field. Therefore, it is necessary to reiterate that even in the field of public law, the relevant persons concerned or to be affected, should be taken into confidence. Whether and in what circumstances that confidence should be taken into consideration cannot be laid down on any straight jacket basis. It depends on the nature of the right involved and nature of the power sought to be exercised in a particular situation. It is true that there is discrimination (distinction) between power and right but whether the State or the instrumentality of a State has the right to function in public field or private fields is a matter which, in our opinion, depends upon the facts and circumstances of the situation, but such exercise of power cannot be dealt with by the State or the instrumentality of the State without informing and taking into

confidence, the party whose rights and powers affected or sought to be affected, into confidence. In such situations most often people feel aggrieved by exclusion of knowledge if not being taken into confidence.”

In the case reported as *Messrs Ittehad Cargo Service and others vs. Messrs Syed Tasneem Hussain Naqvi and others* [PLD 2001 SC 116], it has been observed as follows:-

“8. The first contention urged in support of the petitions was that the High Court had no jurisdiction to entertain the respondent’s writ petition as the contracts challenged therein were concluded contracts. We are afraid the contention cannot prevail as it tends to curtail the scope of judicial review by placing an uncanny on e Constitutional jurisdiction of the High Court to test the validity of grant of a concluded contract on the touchstone of well-settled and well-known grounds of challenge. No doubt a concluded contract commands respect and its sanctity is to be reserved as a matter of public interest/public policy but this does not mean that the order in respect of its grant is sacrosanct and unassailable. The High Court in exercise of its Constitutional jurisdiction is possessed of power to examine the validity of the order in regard to grant of a concluded contact and strike it down on the grounds of mala fide, arbitrary exercise of discretionary power, lack of transparency, discrimination and unfairness etc, provided the challenge is made promptly and contentious questions of fact are not involved. The view gets support from the following observations

made in Messrs Support Services v. The Airport Manager, International Airport, Karachi and others (1998 SCMR 2268):-

'Further a contract, carrying elements of public interest, concluded by functionaries of the State, has to be just, proper, transparent reasonable and free of any taint of mala fides, all such aspects remaining open for judicial review. The rule is founded on the premise 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. Deviation, 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, redress may be provided.'

The question was also considered in Messrs Pacific Multinational (Pvt.) Ltd. Inspector-General of Police, Sindh Police Headquarters and 2 others (PLD 1992 Karachi 283) and it was observed:

'There could be no cavil with the proposition that enforcement of a purely contractual obligation could not properly form the subject-matter of proceedings under Article 199 of the Constitution. However, it could not be ignored that the State had a

Constitutional obligation to act fairly even when performing an administrative function. Therefore, when a party complained before the Court that the State while awarding a contract to a party had acted in an unfair arbitrary manner or had discriminated against one of the parties contested for the award of the contract, such grievance could be looked to by superior Court in exercise of its power of judicial review under Article 226 of the Constitution and if the Court was satisfied that the Government while entering into a contract had acted arbitrarily or in an unfair manner or had discriminated between the parties before it in matter of awarding the contract, it could interfere and strike down such action.'

The apex Court of India in the case reported as *Kerala State Electricity Board and another vs. Kurien E. Kalathil and others* [AIR 2000 Supreme Court 2573], while considering the foreclosure of all other remedies by lapse of time, justified the grant of relief under the writ jurisdiction as follows:-

"12. Ordinarily, in view of aforesaid conclusions on the first contention, we would have allotted the appeal and directed dismissal of the writ petition (O.P 283 of 1995) without examining the second contention. However, despite holding that the dispute in question could not be agitated in a writ petition and thus the High Court wrongly assumed jurisdiction in the facts of the case not inclined in the exercise of

our power under Article 136 of the Constitution, to dismiss the writ petition of the contractor at this stage because that is likely to result in miscarriage of justice on account of lapse of time which may now result in the foreclosure of all other remedies which could otherwise be availed of by the contractor in the ordinary course. Those remedies are not efficacious at the present stage and, therefore, in view of peculiar circumstances of the case, we have examined the second contention and the factors which weighted with the High Court in granting relief.”

The apex Court of Pakistan in the case reported as *Lahore Cantonment Cooperative Housing Society vs Dr. Nsuratullah Chaudhary and others* [PLD 2002 Supreme Court 1068] has stated exception for exercise of writ jurisdiction. The disputed question of fact particularly referring to a contractual liability requires extensive recording of evidence. In fact, this principle is applicable to all the writs as according to general consensus of the Courts, the disputed questions of fact cannot be resolved in writ jurisdiction.

“5. It is an admitted fact that what was challenged before the High Court under Article 199 of the Constitution was the cancellation of a contract. Both the parties had serious allegations against each other and each had accused the other for violating the terms and conditions of the

contract. What were the terms and conditions and how were those violated practically by any of the parties involves not one but numerous questions of fact which required the recording of evidence. Such disputed questions of fact pertaining to contractual liability could not be dealt with by the High Court in Constitutional jurisdiction under Article 199 of the Constitution. In *Secretary to the Government of the Punjab, Forest Department, Punjab, Lahore through Divisional Forest Officer v. Ghulam Nabi* (PLD 2001 SC 415-430) this Court has already held that disputed questions of fact cannot be gone into while exercising jurisdiction under Article 199 of the Constitution.

6. In *Shah Wali v. Ferozuddin* (2000 SCMR 718-722-B) and in *Syed Asif Majeed v. A.D.C./© ASC (L), Lahore* (2000 SCMR 998-1000-D) this Court has resolved that factual controversies should not be entered into while exercising jurisdiction under Article 199 of the Constitution investigation into disputed questions of fact was deprecated in *Punjab Small Industries Corporation v. Ahmad Akhtar Cheema* (2002 SCMR 549-553). The crux of all these findings is that whenever there is a disputed question of fact particularly referring to a contractual liability, it requires the extensive recording of evidence and hence only a Civil Court is competent to do that. As the recording of evidence is not permissible in exercise of writ jurisdiction, the very entertainment of writ petition in the circumstances is totally unwarranted. In *Muhammad Mumtaz Masud v. House Building Finance Corporation* (994 SCMR 2287) and *Shamshad Ali Khan v.*

Commissioner, Lahore (1969 SCMR 122-123-A) this Court has already resolved and the same is once again reiterated that no writ can be filed to enforce contractual liability. In the instant case, the respondents had decidedly filed a writ petition in order to enforce contractual liability. In view of the known principles of law such contractual liability could not be enforced because with regard to the terms and conditions of the contract and regard to numerous acts and allegations of the parties nothing could have been resolved without the recording of evidence. We are of the considered opinion that the writ petition in hand was unlawfully entertained. This alone is by itself sufficient to set aside the impugned order.”

14. It is also worth mentioning that the contracts are also creation of law and are legally enforceable. In some cases, the violation of condition of contract amounts to violation of law as envisaged under section 37 of the Contract Act, 1872. The referred section reads as follows:-

“37. *Obligation of parties to contract:* The parties to a contract must either perform, or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provisions of this Act, or of any other law.

Promises bind the representatives of the promisors in case of the death of such promisors before performance, unless a

contrary intention appears from the contract.”

The Lahore High Court in the case reported as *Messrs Wak Orient Power and Light limited vs. Government of Pakistan and others* [1998 CLC 1178], observed that:

“12. It is clear that the trend of authorities has now changed and remedy of writ is permitted to be resorted to in cases involving contract between a private person and State/statutory functionary as it is considered to be more efficacious and speedy remedy as compared to a civil suit or arbitration proceedings.

13. We find that Supreme Court of Pakistan has in a later judgment, i.e., *Majlis-e-Intizamia v. Ghulam Muhammad Abid* (PLD 1975 SC 355) and upheld the view of High Court that a person whose lease was illegally cancelled by the Government could competently invoke writ jurisdiction. We respectfully follow this rule of law. As regards the presence of arbitration clause in the agreement, suffice it to say that arbitration proceeding were likely to take long time to conclude and in the circumstances of the present case, particularly so when the facts are not seriously disputed, we consider that remedy of writ is more efficacious and speedy and the petitioner cannot be denied due relief on the ground of availability of forum of arbitration. We may, with profound respect refer to the case of *Muhammad Ashraf Ali* (1986 SCMR 1096), wherein their lordships of Supreme Court have ruled that jurisdiction of High Court to intervene under Article 199 in a

contractual matter between a private person and statutory functionary like Cooperative Board was not altogether barred, despite the provision of arbitration clause in the contract.

14. In the present case, the petitioner does not seek enforcement of the terms and conditions of the contract but asserts its rights against the action of the State which is termed to be unlawful. The breach of contract complained of on the part of the State can be said to be breach of statutory obligation and, therefore, present writ petition is held to be maintainable. The objection raised in this behalf is overruled.

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20. We have perused the "I.A." to find out as to whether indeed there was condition for the opening of L/C in favour of "K.E.S.E." within specified time but could locate none. As regards the second/alternate mentioned in the impugned letter of termination of failure to keep alive "Performance Guarantee" for at least one month at all times, we find that this condition stood fulfilled at the time of issuance of letter of termination. Perusal of letter of the petitioner (Annexure "R") (supra shows that the performance Guarantee valid till 30th September, 1997 had been provided in favour of PPIB by the petitioner. It is significant to note that correctness of

contents of this letter has not been challenged by the respondents in their replies as well as during the course of arguments before us and as such the facts, mentioned therein, would be deemed to be stand admitted. As is evident the Financial Closing stood achieved in all respects except opening of letter of credit for which no period was fixed.

In such a situation there is left no option but to hold that the reasons given in the impugned letter about termination of "I.A." were non-existent.

No justification, whatsoever, was available for PPIB to revoke an agreement entered into between the petitioner and respondent No.1. It need hardly be stressed that solemnity of contracts has to be protected and honoured under the prevalent statutory law more so keeping in view the mandate of Holy Quran: A Muslim who has submitted to the will of Allah will honour the contract entered into by him. See following version from the Holy Qur'an:

ياايهاالدين آمنوا اوفوا بالعقود...."

"O You who believe; fulfil all obligations."

All obligations must be honoured, unless morally wrong. The Holy Prophet (S.A.A.W.) observed the conditions to treaty of Hudaibia although it meant that Abu Jandal, a new Muslim, had to be returned to the Quraysh envoy. Once a Muslim has given his word, or engaged in a legitimate contract, he must see it through.

The last messenger of Allah (peace be upon him) said, "The signs of a hypocrite are three: (i) whenever he

speaks he tells a lie, (ii) whenever he promises, he always breaks (his promise); and (iii) If you trust him he proves to be dishonest (If you keep something with him as a trust with him, he will not return it). (Abu Hurayrah-Sahib Al Bokhari 1.32).

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23. While exercising writ jurisdiction, which is essentially discretionary in nature, superior Courts in Pakistan will not hesitate a moment to refuse relief to a suitor seeking enforcement of contract against State or statutory Corporation, if the national interest is thereby likely to be endangered, in the least, despite the fact that the legalistic right of such suitor for issuance of appropriate writ stood established. Relief would also be refused if the contract is shown to be unconscionable/malafide/unreasonable or against public policy.

24. Likewise, a situation may arise where the Constitutional jurisdiction of this Court under Article 199 may be permitted to be involved by an aggrieved person for declaration of the act of representative of state/statutory Corporation, about entering into a contract with third party, to be without lawful authority, on the above grounds.

However, we find that there is no basis, whatsoever, to hold that such a situation has arisen in this case calling for refusal to declare the impugned termination of "I.A." to be bad in law."

15. In the light of above survey of constitutional and statutory provisions of law as

well as relevant legal precedents of the superior Courts of the sub-continent, it can safely be concluded as follows:-

- (i) there is no absolute bar for exercising writ jurisdiction regarding the matters arising out of the contracts or involving contractual obligations or liabilities;
- (ii) the extraordinary writ jurisdiction conferred upon the High Court is of paramount importance in the system of administration of justice for redressal of grievance if there is no other adequate remedy available under law;
- (iii) the determination of the adequacy and availability of the remedy depends upon the facts and nature of the case and the High Court is the sole authority to decide whether in view of the peculiar facts of the case the exercise of writ jurisdiction is justified or not. Mere availability of the alternate remedy should not be a hurdle in exercise of power of judicial review under section 44 of the Azad Jammu and Kashmir Interim Constitution Act, 1974, when the matter is of an urgent nature and if the aggrieved party is directed to seek redress through alternate remedy available under law the very remedy

would get frustrated, then it would be proper for the Court to exercise the writ jurisdiction;

- (iv) It is celebrated principle of law that the remedy of writ is not available against the private person and the writ jurisdiction can only be exercised when the person performing functions in connection with the affairs of Azad Jammu and Kashmir or local authority is party and remedy against him is sought in shape of writ of prohibition, mandamus, certiorari, habeas corpus or quo-warranto;
- (v) even the contractual rights and obligations may be enforced in the situation where the rights are based on statute, law or rules framed thereunder or when an obligation or duty vests in a public functionary or a statutory body, performing functions in connection with the affairs of the Azad Jammu and Kashmir or local authority;
- (vi) the acts of executive authority are subject to judicial review and where a statutory functionary acts mala fide or in a partial, unfair, unjust and oppressive manner, the High Court in the exercise of its writ jurisdiction has ample power to grant relief to the aggrieved party. Same is the

case in the matters involving the enforcement of fundamental rights, specially, equal treatment to a person placed under similar circumstances; and (vii) there is also consensus of the superior Courts in the light of enunciated principle of law that ordinarily the exercise of writ jurisdiction in the propositions requiring detailed inquiry or recording of evidence and intricated and complicated questions of facts, is avoided. On the touchstone of this principle the High Court may decline to exercise the writ jurisdiction in the matters of enforcement of contractual obligations or rights and liabilities arisen out of the contracts requiring detailed inquiry or recording of evidence.

In our considered opinion, for the above stated reasons, under the Constitution there is no specific or absolute bar in exercising writ jurisdiction in the matters of contractual obligations, liabilities or claims based upon the contracts, subject to hereinabove stated exception. Every case has to be judged and decided according to its own peculiar facts and circumstances, therefore, we hold that the principle of law laid down in *Neelum Floor Mills's*

case (supra) does not mean that there is an absolute bar of exercising writ jurisdiction in the matters involving the contractual obligations, liabilities or the matters arisen out of the contracts.

15. In view of the above, the argument of the counsel for the appellants that in this case the writ petition being relating to the enforcement of contractual obligation is not competent, has no substance, hence, stands repelled.

16. So far as the peculiar facts and circumstances of this case are concerned, no detailed inquiry is required and the proposition involved in this case can be determined on the basis of undisputed record. The appellants are persons performing the functions in connection with the affairs of Azad Jammu and Kashmir. The vacancy has been advertised and the respondent was selected through the process completed in furtherance of the advertisement. In the advertisement, the amount of project allowance is clearly mentioned. The notification of appointment of the respondent clearly contains the amount of

project allowance as Rs.30,000/- per month. The process of advertising the post, selection on merit and issuance of the appointment notification is based upon statutory rules and enforced policies, thus, in this state of affairs, the learned High Court has rightly exercised the writ jurisdiction. The impugned judgment does not suffer from any illegality or infirmity.

Therefore, finding no force this appeal stands dismissed with no order as to costs.

Muzaffarabad,
18.05.2017

CHIEF JUSTICE

JUDGE

JUDGE