

**SUPREME COURT OF AZAD JAMMU & KASHMIR**

[Appellate Jurisdiction]

**PRESENT:**

Raja Saeed Akram Khan, A.C.J.  
Ghulam Mustafa Mughal, J.

Civil Appeal No.131 of 2016  
(PLA filed 29.06.2016)

M/S Ideal Engineering Constructors through its  
Managing Director Engineer Muhammad Iqbal s/o  
Abdullah, r/o Ward No.2 Gujrat Road, Bhimber.

.... APPELLANT

*VERSUS*

1. Azad Jammu and Kashmir Government through its  
Chief Secretary, New Secretariat, Muzaffarabad.
2. Chief Secretary, New Secretariat, Muzaffarabad.
3. Secretary Works New Secretariat, Muzaffarabad.
4. Chief Engineer Highways South, New Secretariat,  
Muzaffarabad.
5. Superintending Engineer Highways Circle, Kotli.
6. Executive Engineer PWD Highways Division,  
Mirpur.
7. Mohammad Rizwan Chaudhary, Chief Executive  
Seven Star and Co.Hall Road, Mirpur.
8. Mohammad Irfan, Proprietar Irfan Construction  
Company Dhandhar Khurd, District Bhimber.
9. Hashim Khan s/o Zaid Ullah Khan, Chachian Road,  
Fazalabad Khan Colony, Mirpur.
10. Ishtiaq Mahmood s/o Mohammad Shafi Proprietor  
Shafi Builders House No.68-K, Sector B/4, Mirpur.
11. Ajmal s/o Mohammad Sadiq r/o Sector F/2,  
Mirpur.
12. Ch. Sajid Ali s/o Mohammad Shafi r/o Sector B/4,  
Mirpur.

13. Hafiz Mahmood r/o Kanaili Chaksawari, Teshil and District Mirpur.

..... RESPONDENTS

(On appeal from the judgment of the High Court, dated 24.06.2016 in Writ Petition No.Nil/2016)

FOR THE APPELLANT: Mr. Khalid Yousaf Chaudhary, Advocate.

FOR PRIVATE RESPONDENTS: Mr. Khalid Rasheed Chaudhary, Advocate.

FOR OFFICIAL RESPONDENTS: Raja Saadat Ali Kiani, Addl. Advocate-General.

Date of hearing: 13.06.2017

**JUDGMENT:**

**Ghulam Mustafa Mughal, J.**—The captioned appeal with the leave of the Court, arises out of the judgment of the High Court dated 24.06.2016, whereby the writ petition filed by the appellant, herein, was dismissed in limine.

2. The relevant and necessary facts for disposal of the captioned appeal are that the Executive Engineer Highways Division, Mirpur issued an advertisement in daily "Ausaf" on 09.03.2016, inviting tenders for

project namely "Completion of Remaining Construction Work/Up-gradation of existing dual carriage way from Bohar Chowk to Mirpur Bypass, Zero Point, District Mirpur". In response to the said advertisement, the appellant and others offered their bids and participated in tendering process. As per record, he was declared lowest bidder and recommended for award of the Contract by Superintending Engineering Highways, vide letter dated 14.05.2016. It is claimed that the Chief Engineer without recording any reason and hearing vide order dated 16.05.2016 on the application of private respondents, herein, cancelled the whole bidding process and issued order for re-tendering of the project whereupon another proclamation was issued on 19.05.2016 by the Executive Engineer Highways Division in daily "Kashmir Express". The appellant, herein, challenged the above act of the respondents through a writ petition before the Azad Jammu and Kashmir High Court on 01.06.2016. The learned single Judge of the High Court sought comments from the respondents. Meanwhile, Muhammad Rizwan Chaudhary & others, private respondents herein, filed an application for impleading them in the line of the

respondents as well as hearing under Rule 37 of the Azad Jammu and Kashmir High Court (Procedure) Rules, 1984. It was stated in the application that the whole bidding process has been conducted in a fraudulent manner with connivance of the officials of the department. When the matter was brought into the notice of Chief Engineer Highways, Muzaffarabad, he cancelled the tendering process and directed the XEN Highways, Mirpur for re-advertisement of the project. It was stated that in compliance with the order of the Chief Engineer the project has been re-advertised and due to prohibitory order passed by this Court (High Court) the process has been kept in abeyance. The learned High Court on this application issued notices to the other side and after hearing the intervenors dismissed the writ petition in limine through the impugned judgment.

3. Mr. Khalid Yousaf Chaudhary, the learned Advocate appearing for the appellant argued that the procedure adopted by the learned High Court for disposal of the writ petition is contrary to the rules and no reasonable opportunity was provided to the appellant before disposing of the writ petition in limine.

The learned Advocate further argued that among others the appellant, herein, participated in the selection process in response to the advertisement issued by the official respondents in Daily "*Ausaf*" on 09.03.2016 and as per comparative table prepared by the official respondents, herein, the appellant was declared lowest bidder and was recommended for allotment of the work by the Superintending Engineer Highways vide letter dated 14.05.2016. The learned Advocate argued that astonishingly without assigning any reason or hearing the appellant another proclamation was issued on 19.05.2016 whereby the earlier bidding process was cancelled and fresh tenders were invited for the same project by the Executive Engineer, Mirpur. The learned Advocate argued that the cancellation order has been passed by the Chief Engineer on the application of private respondents without assigning any reason and providing an opportunity of hearing to the appellant, hence, the order dated 16.05.2016 passed by the Chief Engineer is arbitrary illegal and is nullity in the eye of law. The learned Advocate argued that after declaring the lowest bidder, the appellant cannot be deprived from the award of the contract. The learned Advocate

contended that it was necessary to record reasons for rejection of the bid which was requirement of the law as per the Public Procurement Rules, 2004. He referred to and relied upon rules 33 and 34 of said rules and contended that it was necessary for the Chief Engineer to provide the appellant at least an opportunity of hearing but the appellant has been condemned unheard. The learned Advocate argued that as the appellant has been discriminated and a right of trade has been curtailed by the arbitrary exercise of powers by the Chief Engineer hence the whole action may be declared illegal and without lawful authority and a direction for award of contract may be given to the respondents. He submitted that the learned High Court has also not attended the controversy in its true perspective and has disposed of the petition in limine without admitting it for regular hearing, although very crucial law points regarding interpretation of right of trade and PPRA rules were involved in the case. The learned Advocate placed reliance on the case reported as *Muhammad Mushtaq vs. Muhammad FiazAbbasi & others* [1994 SCR 95] and rules 33 and 34 of the Public Procurement Rules, 2004.

4. Conversely, Mr. Khalid Rasheed Chaudhary, the learned counsel appearing for the private respondents contended that the whole process was conducted by the Executive Engineer with the connivance of the appellant in a secret manner and the fact of the matter is that the recommendation was obtained fraudulently by the appellant which has rightly been cancelled by the competent authority. The learned Advocate referred to an application filed on 29.03.2016 by the private respondents and submitted that in view of earlier proclamation issued on 09.03.2016 the respondents applied for issuance of tender documents of the advertised project. The Executive Engineer on 31.03.2016 intimated the respondents that the tender process has been cancelled but even then recommended the appellant for allotment of the work and deliberately kept the respondents out of the competition. The learned Advocate argued that the writ petition has rightly been dismissed by the learned High Court because ill-gotten gains and fraudulent orders cannot be protected in exercise of the writ jurisdiction. The learned Advocate argued that the writ petition was filed for enforcement of the contractual obligations

which cannot be entertained in exercise of writ jurisdiction and has rightly been dismissed by the learned High Court on this ground. The learned Advocate argued that no vested right stood accrued in favour of the appellant because one of the conditions of the advertisement was that the authority may reject the tender without assigning any reason. The learned Advocate argued that after accepting this condition the appellant, herein, has participated in the tendering process, therefore, now he cannot take inconsistent position. He supported his submissions by placing reliance on the cases reported as *A.K Trading Corporation vs. Messrs. Z.H. Construction and two others* [1997 SCR 336], *AKLASC & others vs. AJ&K Government & others* [1999 SCR 418], *Azad Govt. & others vs. Mrs. Jamshed Naqvi & others* [2014 SCR 13], *AJ&K Government and others vs. Dr. Muhammad Amin* [2014 SCR 258] and *AJ&K Govt. & others vs. Mohi-ud-Din Islamic University and others* [2014 SCR 382].

5. We have heard the learned Advocates for the parties and gone through the record. A perusal of the record reveals that a proclamation was issued by the Executive Engineer Highways, Mirpur on 09.03.2016 in



daily "Ausaf" whereby the tenders for the project "Completion of Remaining Construction Work/Up-gradation of existing dual carriage way from Bohar Chowk to Mirpur Bypass, Zero Point, District Mirpur" were invited. As per the record, the appellant herein applied for tender documents on 19.04.2016 which were accordingly issued to him and some other companies. He submitted his bidding documents and offer on 20.04.2016. It appears that on opening of the bids the appellant, herein, was declared as lowest bidder and he was recommended for award of the work by the Superintending Engineer Highways vide letter dated 14.05.2016. Meanwhile, the private respondents, herein, moved an application to the Chief Engineer and pointed out some illegalities in the bidding process. On move of the application by the private respondents the tendering process was cancelled and the order for re-tendering of the project was issued on 16.05.2016.

6. The contention of Mr. Khalid Yousaf Chaudhary, Advocate, that after accepting the bid the appellant herein was declared the lowest bidder and was recommended by the Executive Engineer for award of the work but the Chief Engineer cancelled the

process without providing a right of hearing and assigning reason, is devoid of any force in the circumstances of this case. Ordinarily, when an order is passed by a public functionary then it is enjoined upon him to record reasons for his decision. Under the Azad Jammu and Kashmir Delegation of Financial Powers Rules, 1984 it is provided that when a lowest bid is rejected then the authority has to record the reasons for rejection of the same. It appears that the respondents, herein, have been deliberately kept out of the competition with the connivance of the official respondents. They tried to participate in the tendering process by moving an application on 29.03.2016 to the Executive Engineer PWD Highways Division, Mirpur. On this application it was written as under:

"ٹینڈر منسوخ کر دیئے گئے ہیں متعلقہ ٹھیکیدار کو آگاہ کر دیں۔"

Despite that the tendering process was completed and the recommendation for allotment of the work in faovur of the appellant was made on 14.05.2016. It proves that the tendering process has not been completed in an open and transparent manner which is the requirement of law. It is sufficiently proved from the record that the respondents have been denied

the right of competition which was their fundamental right. In a case titled *Shaukat Ali and others vs. Government of Pakistan and others* [PLD 1997 SC 342] the apex Court of Pakistan while dealing with an identical matter has pleased to observe as under:

“4. We may observe that since Pakistan is founded on the basis of religion of Islam, efforts should be made to bring about an egalitarian society based on Islamic Concept of fairplay and social justice. The State functionaries like Railways are expected to act fairly and justly, in a manner which should not give to any one any cause of complaint on account of discriminatory treatment or otherwise. While discharging official functions, efforts should be made to ensure that no one is denied to earn his livelihood because of the unfair or discriminatory act on the part of any State functionary. It is hoped that the petitioners who had been earning livelihood for considerable long period on the basis of licences granted by the Railways, will be treated fairly.”

7. It is well settled principle of law that fraud vitiates the most solemn proceeding and a person cannot be allowed to reap the fruit of his own fraud. The contention of Mr. Khalid Yousaf Chaudhary is correct that no reason has been assigned by the Chief Engineer for re-tendering of the process but the order of the Chief Engineer appears to have been passed in

the public interest and keeping in view the emergent nature of the project.

8. Mr. Khalid Rashid Chaudhary, Advocate, counsel for the appellant has rightly contended that after accepting the condition that the authority is competent even to reject the fair tendering process without assigning reason, the appellant herein cannot come with volta face and say that the respondents were not legally competent to cancel the recommendations made in favour of the appellant. In a case titled *Fawwad and Fareen Enterprises Ltd. Vs. Director of Industries, Government of Sindh and others* [PLJ 1983 SC 230], in identical circumstances it was opined as under:-

“9. As already pointed out the government had unequivocally reserved the right to reject any tender and, therefore, the petitioners cannot claim the grant of the contract on the basis of their tender being the lowest if the concerned authority in the government chose to reject their tender in its discretion. In *Rehmat Ali v. Revenue Board West Pakistan, Lahore* (1973 SCMR 342) in a somewhat similar situation, this Court held that where the conditions of auction gave discretion to the government authority to confirm or not to confirm the auction, and the authorities concerned came to the conclusion that the auction in favour of the petitioners should not be confirmed, the mere fact of giving highest bid did not create any legal title in favour of the petitioners in the property subjected to

auction and no right to file a Writ Petition arose in such a case.”

9. The contention of Mr. Khalid Rasheed Chaudhary, that the contractual obligations cannot be enforced in the writ jurisdiction is correct and the case law referred to and relief upon by him is also to the same effect but recently this Court in the case titled *Azad Govt. & others vs. Muhammad Siddique Khan & others* [C. Appeal No.70/2015 decided on 18.05.2017], has taken the view that when the contract is executed by the public functionary and such a public functionary has arbitrarily taken any action against the fundamental rights of the state subjects, then the Court is competent to examine his acts notwithstanding the fact that the matter relates to contractual obligations. The relevant part of the referred judgment is as under:-

“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 intricately 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."

10. The contention of the learned Advocate for the appellant that the High Court has dismissed the writ petition in a hasty manner is correct but notwithstanding the reasons assigned by the High Court for dismissal of the writ petition filed by the appellant herein in limine, we dismiss the writ petition in limine on the ground that the appellant, herein, has not moved Court with clean hands and ill-gotten gains cannot be protected in exercise of constitutional jurisdiction.

The upshot of the above discussion is that finding no force this appeal stands dismissed.

JUDGE

ACTING CHIEF JUSTICE

Mirpur,  
14.06.2017