IN THE SUPREME COURT OF AZAD JAMMU AND KASHMIR
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE KHAWAJA M. NASIM
MR. JUSTICE RAZA ALI KHAN

CIVIL APPEAL No. 186 OF 2024

Civil Misc. No. 128 of 2204
(Against the judgment dated 27.09.2024 passed by the High Court, in writ petition No. 319 of 2024).

Abdul Shakoor son of Muhammad Ashraf owner of Mirpur Open MRI Poli Clinic Center for Advance Diagnostic Medical Facilities situated at Adalat Plaza near DHQ Hospital Mirpur.

…Appellant

VERSUS

Health Department of Azad Jammu and Kashmir and others.

…Respondents

Appearances:

For the Appellant:	Ch. Khurram Saif Ali, Advocate.
For the Respondents:	Mr. Ahmed Saad, Asst. Advocate-General and Mr. Kamran Riaz Khan, Advocate.
Date of hearing:	22.11.2024

JUDGMENT:

***Raza Ali Khan, J*:-** This appeal, by leave of the Court is addressed against the judgment of the High

Court dated 27.09.2024, whereby the writ petition filed by the appellant, herein, was dismissed in limine.

2. The facts of the case are that the appellant, herein, filed a writ petition before the High Court, asserting his ownership of the Mirpur Open MRI Poli Clinic Center, a facility providing advanced diagnostic medical services, including Magnetic Resonance Imaging (MRI), Computed Tomography (CT), OPG, and EEG. The appellant contended that he enjoys a commendable reputation in the relevant field and conducts his operations in strict compliance with the applicable rules and medical ethics. It was alleged that private respondent No. 7 had been granted authorization through an approval/agreement to install only a CT Scan Machine within the premises of Divisional Headquarters Teaching Hospital, Mirpur. However, contrary to the terms of the memorandum of understanding (MOU) and the approval/agreement, the private respondent has setup/installed OPG and EEG machines and was allegedly planning to install an MRI machine as well. The appellant further averred that upon becoming aware of these infractions, he approached the official respondents to ascertain the authority under which the private respondent had installed the OPG and EEG machines despite the limited scope of the approval. However, the official respondents allegedly failed to furnish any plausible response. The appellant additionally urged that the Divisional Headquarters Teaching Hospital, being a government hospital, could not lawfully permit commercial activities by private entities within its premises under the approval/agreement dated 30.06.2024. Such actions, were ultra vires the authority of the official respondents. The learned High Court, after

hearing arguments from the parties, dismissed the writ petition in limine, imposing costs, through its judgment dated 27.09.2024.

3. Ch. Khurram Saif Ali, Advocate for the appellant, submitted that the impugned judgment of the High Court is contrary to law, the rules, and the facts of the case. He argued that the official respondents, through a notification dated 18.10.2018, had got vacated the hospital premises from M/s Voxel Abbottabad under the pretext of compliance with the Public Private Partnership Act, 2014, but subsequently allocated the same premises to private respondent No. 7 through an order dated 30.06.2022, in blatant violation of the earlier notification and this critical aspect has been ignored by the High Court. He further contended that even if the order dated 30.06.2022 is deemed lawful, it only authorizes for the installation of a CT Scan machine, and the installation of additional machines, such as OPG and EEG, by the private respondent lacked the legal basis. Additionally, he argued that the writ petition was dismissed primarily on the ground that an earlier writ petition (No. 592/2022) on the same subject matter was dismissed on 28.09.2022, but the appellant being neither a party to that petition nor aware of its outcome. He concluded by praying for acceptance of appeal.

4. Conversely, Mr. Ahmad Saad, learned Assistant Advocate-General, and Mr. Kamran Riaz Butt, Advocate for the respondents, staunchly supported the impugned judgment, asserting that it is lawful and requires no interference by this Court. They contended that the private respondent installed the CT Scan machine within the hospital premises with the permission of the Secretary Health, Azad Jammu & Kashmir, to

provide affordable diagnostic services to the public, and no illegality was committed in this regard. They further argued that the writ petition filed by the appellant before the High Court was hit by laches and, therefore, not maintainable. Upon being queried by the Court regarding whether the notification issued in favor of respondent No. 7 was adhered to the Azad Jammu and Kashmir Public-Private Partnership Act, 2014 ("***Act, 2014***"), the learned counsel for the respondents conceded that the proceedings have not been conducted in accordance with the said Act.

5. We have heard the learned counsel for the parties at length and meticulously examined the record made available for our perusal. The learned counsel for both sides advanced comprehensive arguments, primarily revolving around the factual matrix of the case. However, during the course of proceedings, the Court specifically inquired whether the process regarding the issuance of the notification in favor of respondent No. 7 was conducted in compliance with the provisions of the Act, 2014. Both the learned counsel unequivocally conceded that no proceedings were undertaken in accordance with the said Act. This admission is profoundly concerning. On the one hand, the official respondents, through a notification dated 18.10.2018, got vacated the hospital premises from the possession of one M/s Voxel Abbottabad, citing the necessity of conducting future proceedings strictly under the framework outlined in Act, 2014 and on the other hand, the same premises was subsequently allocated to respondent No. 7, without any adherence to the provisions of Act, 2014 or the stipulations enumerated in the earlier notification. This stark inconsistency not only

contravenes the express terms of the notification dated 18.10.2018, but also undermines the statutory mandate of the Act, 2014, which governs public-private partnerships within the territorial jurisdiction of Azad Jammu and Kashmir. The learned High Court, while rendering the impugned judgment, appears to have entirely disregarded this pivotal aspect of the case. The apparent violation of statutory requirements and the official respondents' own stated commitments was neither addressed nor deliberated upon. Instead, the writ petition was dismissed in limine, accompanied by the imposition of costs. Such an approach, in our considered view, overlooks a fundamental irregularity in the administrative process.

6. Section 13 of the Act, 2014, provides the procedure for selecting private parties for public-private partnership projects. It specifies that, following the approval of a project proposal by the relevant Committee, the responsible Government agency must conduct a competitive public tendering process comprising two stages; i.e. pre-qualification and bidding. Furthermore, the Act prohibits Government departments or agencies from engaging in direct negotiations with any individual or entity unless the competitive public tendering process has been fully exhausted. The relevant provisions is reproduced hereunder: -

> **13. Selection of the Private Party**. –(1) After the approval of the project proposal by the Committee, the Government agency shall select a private party for the project through competitive public tendering two-stage process of pre-qualification and bidding.
>
> (2), The Government department or any agency shall not enter into direct negotiations with any

person without exhausting of the process of competitive public tendering.

7. An examination of the relevant provisions unequivocally demonstrates that Government agencies or departments are bound by law to conduct a transparent pre-qualification and competitive public tendering process before entering into any agreement with a private entity. Direct negotiations are expressly prohibited unless the prescribed procedure under Section 13 of the Act, 2014, has been fully adhered to. However, in the present case, it is apparent that no such procedure was followed, and the requirements of pre-qualification and competitive bidding were entirely disregarded. This lack of compliance with statutory obligations undermines the fairness and legality of the process, rendering the notification issued in favor of respondent No. 7 legally unsustainable. No government property can be handed over to a private entity without prior approval from the government and a transparent bidding process. This principle is clearly enunciated in ***2011 SCR 299***, a case concerning the allotment of the premises of DHQ Hospital Mirpur to a private medical store for the purpose of selling medicines to hospital patients. In this instance, the writ petition filed by the respondent challenging the allotment was accepted. Subsequently, the appeal filed before this Court was dismissed. This decision underscores the critical requirement of adhering to transparency, fairness, and due procedural compliance in the handling and transfer of government properties to private entities, ensuring accountability and preventing arbitrary actions. It was argued that public property must be managed in fair, just transparent and reasonable manner, free from mala-fide intent or discrimination. Decision concerning public property must

not be made behind the close doors or in collaboration with specific entities in a manner that undermines fair competition. Infractions in disposal or lease of public property cannot be excused on the basis of purported public benefit. Any deviation from fiduciary duties, such as loyalty, prudence and reasonableness owed by State functionaries to the public must be unequivocally rejected. Accordingly, once a breach of trust or violation of law by a public institution is established the Courts must act to address such breaches without regard to identity or antecedents of petitioner. Additionally, the learned High Court, while passing the impugned judgment, overlooked this fundamental aspect of the case. The failure to address such a significant deviation from statutory requirements raises serious concerns regarding the legality of the actions taken by the official respondents. The dismissal of the writ petition, accompanied by the imposition of costs, further compounds the issue, as it disregards both the legal framework established by the Act 2014 and the facts of the case.

Ordinarily, when a writ petition is dismissed *in limine*, the matter is remanded to the High Court for a decision on merits after the writ petition is admitted for regular hearing, however, in cases involving significant legal propositions or where the circumstances so demand, the Supreme Court possesses ample authority to decide the matter with finality while bypassing the remand process. This principle has been firmly established in the precedents such as *PLJ 1986 SC AJK 99*, *2019 PLC (CS) 33*, *2016 SCR 114*, and *2000 SCR 331*. Therefore, in view of the above, while exercising inherent powers conferred to this Court under Article 42-

A, of the Azad Jammu and Kashmir Interim Constitution, 1974 read with Order XLIII of Supreme Court Rules, 1978, the writ petition is admitted for regular hearing and while accepting this appeal, the impugned judgment of the High Court is set-aside. Consequently, the writ petition is accepted and the notification dated 30.06.2024, is hereby set-aside. The official respondents are directed to initiate a fresh process in strict compliance with the provisions of the Act, 2014, ensuring a fair and transparent competitive opportunity for all interested parties. This process must be completed within a period of three months from the date of communication of this order. However, till the conclusion of this process, respondent No. 7 shall not be disturbed or removed from the premises of DHQ Hospital Mirpur. No order as to costs.

JUDGE JUDGE

Muzaffarabad,
02.12.2024