ORDER SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P.No.4907 of 2022
M/s Zohongding International Engineering Co. Limited
Versus
National Highway Authority and others

Date of Hearing: 26.01.2023
Petitioner by: Mr. Irfan Farooq, Advocate
Respondents by: Mr. Ahmed Abbas, Advocate for respondents No.1 and 2 / N.H.A.
Mr. Asim Khan, Director (Legal), N.H.A.

Through the instant writ petition under Article 199 of the Constitution the petitioner, M/s Zohongding International Engineering Co. Limited, has impugned letter dated 23.11 2022 from the National Highway Authority (**"N.H.A."**) whereby the petitioner was informed about the decision taken by the Grievance Redressal Committee (**"G.R.C."**) to dismiss the petitioner's complaint against its disqualification from participating in the tender bidding process for the award of the contract for Dualization and Improvement of Existing N-50 from Yarik – Sagu – Zhob; Package-I: Yarik – Sagu (50 KM) (**"Contract"**). The petitioner had filed an appeal against the said decision of the G.R.C. before the Public Procurement Regulatory Authority (**"P.P.R.A."**) under Rule 48(7) of the Public Procurement Rules, 2004 (**"the 2004 Rules"**). The said appeal has not been entertained by P.P.R.A. for the reason that it was not accompanied with the requisite fee under Regulation 7 read with Schedule-II of the Redressal of Grievances Regulations, 2021 (**"the 2021 Regulations"**). The petitioner has also prayed for this Court to restrain the N.H.A. from proceeding with the tender bidding process until a decision is taken by P.P.R.A. on the petitioner's pending appeal.

2. The record shows that vide advertisement dated 20.07.2022 published by the N.H.A., eligible parties were invited to submit their proposals for pre-qualification for the award of the Contract. In response to the said advertisement, the petitioner submitted its pre-qualification documents. During the pre-qualification process, the

petitioner was informed that it had not pre-qualified. Against the said decision, the petitioner filed a complaint before the G.R.C. constituted by the N.H.A. Vide letter dated 23.11.2022, the N.H.A. informed the petitioner that the G.R.C. had dismissed its complaint. The decision of the G.R.C. is appealable in terms of Rule 48(7) of the 2004 Rules, which provides to a party aggrieved by the decision of a G.R.C. the remedy of an appeal before P.P.R.A. For the purposes of clarity, Rule 48(7) is reproduced herein below:-

> ***"Any bidder or party not satisfied with the decision of the GRC, may file an appeal before the Authority within thirty days of communication of the decision subject to depositing the prescribed fee and in accordance with the procedure issued by the Authority. The decision of the Authority shall be considered final."***

3. The petitioner has filed an appeal before P.P.R.A. on 06.12.2022, but till date the said appeal has not been taken up for hearing whereas the N.H.A. is proceeding with the procurement process.

4. The instant writ petition was filed on 29.12.2022. On 30.12.2022, this Court issued a notice to P.P.R.A. directing it to depute an officer to attend the Court on the next date of hearing and explain as to why the petitioner's appeal had not been decided.

5. On 23.01.2023, Dr. Muhammad Aslam Waseem, Director General (Legal), P.P.R.A., tendered appearance and submitted that although the petitioner had filed an appeal against the G.R.C's decision dated 23.11.2022, the said appeal could not be registered or taken up for hearing due to non-payment of the requisite fee in terms of Regulation 7 read with Schedule-II of the 2021 Regulations, according to which, the petitioner has to deposit a fee for an amount equivalent to 0.2% of the procurement value. Given the procurement value of the project in the instant case, he submitted that the fee for filing an appeal before P.P.R.A. would not be less than Rs.5 million.

6. Regulation 7 of the 2021 Regulations provides that the appellant shall append with every appeal a demand draft / pay order of a non-refundable fee as per Schedule-II of these Regulations. Furthermore, it provides that P.P.R.A. shall not entertain any appeal which is filed without the prescribed fee. Schedule-II to the said

Regulations requires the payment of Rs.5,00,000/- as the fee for filing an appeal where the contract or procurement is up to the limit of Rs.250 million. The said Schedule requires 0.2% of the procurement value not exceeding Rs.5 million to be the fee for filing an appeal where the contract or procurement exceeds the limit of Rs.250 million.

7. The petitioner had filed a fee of Rs.5,00,000/- along with its appeal filed before P.P.R.A. which is not entertaining the appeal as it considers that the fee in this case should be 0.2% of the procurement value which would come to an amount not exceeding Rs.5 million.

8. The vital question that needs to be answered is whether this Court should decline to assume jurisdiction due to the availability of the remedy of appeal under Rule 48(7) of the 2004 Rules against the decision of the G.R.C. It is well settled that the invocation of jurisdiction under Article 199 of the Constitution is not available in cases where the remedy of statutory appeal is available and such remedy is effective and adequate. Given that an appellant before P.P.R.A. is required by Regulation 7 read with Schedule-II of the 2021 Regulations to deposit a disproportionately high fee for filing an appeal under Rule 48(7) of the 2004 Rules, I am of the view that such an appeal cannot be considered to be an effective and adequate remedy which is as equally efficacious as invoking the Constitutional jurisdiction of this Court. The availability of the remedy of an appeal under Rule 48(7) of the 2004 Rules before P.P.R.A. against the decision of G.R.C. cannot be considered to be a bar against the petitioner's right to file a Constitutional petition before this Court against the decision of the G.R.C. because I find the quantum of the fee for filing an appeal specified in Regulation 7 read with Schedule-II to the 2021 Regulations to be highly arbitrary, onerous and excessive. In holding so, reliance is placed on the following case law:-

i) In the case of Eastern Rice Syndicate Vs. Central Board of Revenue (PLD 1959 S.C. 364), the Hon'ble Supreme Court *inter alia* examined Section 188 of the Sea Customs Act, 1878 (which

provided a right of an appeal to a person aggrieved by a decision or order passed by an officer of Customs to the Chief Customs authority) and Section 189 (which provided *inter alia* that where the decision or order appealed against relates to any duty or penalty leviable in respect of any goods, the owner of such goods, if desirous of appealing against such decision or order, shall, pending the appeal, deposit in the hands of the Customs Collector the amount demanded by the officer passing such decision or order). The Hon'ble Supreme Court held *inter alia* that the grant of an appeal by such a law was merely nugatory.

ii) In the case of Chenab Cement Product (Pvt.) Ltd. Vs. Banking Tribunal, Lahore (PLD 1996 Lahore 672), the Full Bench of the Hon'ble Lahore High Court held *inter alia* that if the right of appeal provided by statute is inadequate or is available under such conditions which has the effect of denying the right of appeal, the Constitutional jurisdiction is allowed to be invoked to afford relief to an aggrieved person in order to do justice. In the said case, it was ruled that the proviso to Section 9 of the Banking Tribunals Ordinance, 1984 which required the deposit of the decretal amount for an appeal to be entertained placed an unreasonable restriction on the right of appeal and could not, therefore, be upheld.

iii) In the case of Hameed Ahmad Ayaz Vs. Government of Punjab (PLD 1997 Lahore 434), the petitioner had challenged before the Hon'ble Lahore High Court the *vires* of Section 2 of the Punjab Finance Act, 1996 whereby Article 1 of the First Schedule to the Court Fees Act, 1870 was amended causing an enhancement in the maximum limit of the Court fees from Rs.15,000/- to Rs.34,000/-. The petitioner had challenged the said amendment *inter alia* on the ground that the enhancement in the rate of Court fees was violative of Article 37(d) of the Constitution which obligated the State to ensure inexpensive and expeditious justice. It was held *inter alia* that the demand

for the payment of an enhanced Court fee was wholly foreign to and militated against the Injunctions of Islam. The Hon'ble Lahore High Court disposed of the petition with the direction to the concerned officers of the Lahore High Court and all the subordinate Courts to accept plaints, written statements, pleadings, set offs or counterclaims, memoranda of appeals or cross-objections filed with Court fees affixed on such documents payable under the Court Fees Act, 1870 by ignoring amendments therein made through the Finance Act, 1996. Paragraph 7 of the said judgment, which is most instructive, is reproduced herein below:-

> ***"7. In an Islamic State like Pakistan the obligation to do justice stands all the more accentuated. The Allah Almighty and His Holy Prophet have repeatedly emphasized the need to do justice to all manners of people without any fear and favour and without regard for the status, caste or creed of the suitor. If a citizen is prevented from approaching a Court of law on account of his inability to pay the court-fee, surely the command of Allah Almighty and His Holy Prophet stands violated. The court-fee act is a vestige of our colonial inheritance. Though we are celebrating 50th year of independence unfortunately nothing substantial has been done to remedy this situation. On the other hand it is a matter of shame and regret that the State is resorting to methods like enhancement in court-fee to earn profit from administration of justice."***

iv) **In the case of <u>Government of Andhra Pradesh Vs. P. Laxmi Devi (AIR 2008 SC 1640)</u> the Indian Supreme Court, while upholding the vires of the proviso to Section 47A of the Indian Stamp Act which provided that *"no reference shall be made by the registering officer unless an amount equal to fifty per cent of the deficit duty arrived at by him is deposited by the party concerned"* held as follows:-**

> ***"29. In our opinion in this situation it is always open to a party to file a writ petition challenging the exorbitant demand made by the registering officer under the proviso to Section 47A alleging that the determination made is arbitrary and/or based on extraneous considerations, and in that case it is always open to the High Court, if it is satisfied that the allegation is correct, to set aside such exorbitant demand under the proviso to Section 47Aof the Indian Stamp Act by declaring the demand arbitrary. It is well settled that arbitrariness violates Article 14 of the Constitution vide***

Maneka Gandhi Vs. Union of India AIR 1978 SC 597. Hence, the party is not remedy-less in this situation."

v) In the case of Hardevi Asnani Vs. State of Rajasthan (2011 (14) SCC 160), it has been held by the Indian Supreme Court that the High Court can entertain a petition permitting bypassing of the remedy of appeal requiring pre-deposit only after examining and satisfying itself that the case is an exceptional one involving genuine hardship. In the said case, the validity of proviso to Section 65(1) of Rajasthan Stamps Act, 1998 was challenged. It was found that the amount determined to be payable by the petitioner was exorbitant thus the condition to deposit 50 percent of the amount for an appeal to be entertained was held to be onerous on facts but the provision was not struck down. The writ petition was entertained as an exception.

9. Unlike the case-law referred to herein above, where the condition for the deposit of a portion of the amount determined by an original forum to be payable by the appellant for an appeal to be entertained was held to be unreasonable, in the instant case the amount that the petitioner is being required to pay by P.P.R.A. for the entertainment of its appeal against the decision of the G.R.C. is not an amount that has been adjudged against the petitioner by any forum but a simple fee. It is not a mechanism for the realization of Government dues under any decision. In other words for instance where an original forum determines that a party is to pay a certain tax, and such party is required to deposit a certain percentage of the amount so determined for its appeal to be entertained, upon the dismissal of the appeal the amount deposited would go towards partially discharging the party's tax liability. In this case, the amount that an appellant is required to pay for the entertainment of its appeal goes to the coffers of P.P.R.A. not in discharge of any liability of the appellant but as a non-refundable fee for processing the appeal. This makes the petitioner's case for maintaining the instant petition on a

far better footing than that of the petitioners in abovementioned cases.

10. The appeal fee at the rate prescribed in Schedule-II to the 2021 Regulations is so disproportionately high that it partakes the characteristics of a tax rather than a fee. The amount so collected does not go into the Federal Consolidated Fund but enriches P.P.R.A. Neither the 2004 Rules nor the 2021 Regulations give discretion to P.P.R.A. to suitably exempt or suitably reduce the amount payable as an appeal fee by an appellant. The imposition is confiscatory in nature since there is no power of refund even if P.P.R.A. reverses a perverse and groundless decision of a G.R.C. In this way an appellant is deprived of the fee that he would have to pay to P.P.R.A. for having an order of a G.R.C. reversed. The imposition is shocking to one's conscience and infracts Wednesbury principles of unreasonableness and the doctrine of proportionality.

11. It is open to the legislature to impose an accompanying liability upon a party on whom a right of appeal is conferred or to prescribe conditions for the exercise of such right. A right of appeal is a creature of a statute and there is no reason why the legislature while granting the right cannot impose conditions for the exercise of such right so long as the conditions are not so onerous as to amount to unreasonable restrictions rendering the right almost illusory. The onerous and oppressive condition for depositing an appeal fee in the amount set out in Schedule-II to the 2021 Regulations has indeed made the remedy of an appeal under Rule 48(7) of the 2004 Rules to be illusory.

12. Since Dr. Muhammad Aslam Waseem, Director General (Legal) on behalf of P.P.R.A. has taken a clear position that the petitioner's appeal against the G.R.C.'s decision dated 23.11.2022 cannot be entertained unless a minimum amount of Rs.5 million is deposited, I am constrained to hold that such a right of appeal is not just illusory but would operate as an instrument of oppression on appellants taking a genuine grievance against decisions of G.R.C.s. constituted by procuring agencies. Such a cumbersome right of appeal cannot

be regarded as a remedy equally efficacious to invoking the Constitutional jurisdiction of this Court. Therefore, it would be apposite to decide this petition on merits.

13. It is not within the scope of these proceedings to determine whether the person paying the appeal fee receives any service referable to such a fee; whether there exists any *quid pro quo* for the levy of the appeal fee; and whether there is a nexus, if any, between the person liable to pay the appeal fee and the benefits that may emanate out of the provisions of Regulation 7 read with the Schedule-II to the 2021 Regulations.

14. The vires of Regulation 7 or Schedule-II to the 2021 Regulations have not been challenged by the petitioner. Since this Court stands shorn of *suo moto* jurisdiction it cannot embark upon examining its vires. In the presence of the said Regulations, this Court cannot direct P.P.R.A. to entertain the petitioner's appeal without the submission of the fee of Rs.5 million. Be that as it may, what this Court will do is to decide the petition on merits despite the availability of the remedy of an appeal under Rule 48(7) of the 2004 Rules which has been made most cumbersome by Regulation 7 read with Schedule-II to the 2021 Regulations. For this purpose the matter is being adjourned to <u>23.02.2023</u>.

15. It may be mentioned that during the hearing before this Court on 26.01.2023, the Director (Legal), N.H.A. produced the G.R.C.'s decision dated 23.11.2022 on the petitioner's complaint. This decision shows that the petitioner's representative had attended the proceedings dated 21.11.2022 before the G.R.C. through video-link. A copy of this decision, which sets out the reasons for the petitioner's disqualification, had not been provided earlier to the petitioner. Now that these reasons have been brought to the fore, the petitioner may consider suitably amending the petition. The N.H.A.'s letter dated 23.11.2022, which has been impugned in the instant petition, does not set out the reasons for the G.R.C.'s decision but is a simple intimation to the petitioner as to the rejection of its complaint by the G.R.C.

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Through the application for interim injunction, the applicant / petitioner seeks the suspension of the operation of the N.H.A.'s letter dated 23.11.2022. At this stage, I am not inclined to halt the tender bidding process, but all steps taken henceforth in the said process shall be subject to the final outcome of the instant petition.

(MIANGUL HASSAN AURANGZEB)
JUDGE

Qamar Khan* ***APPROVED FOR REPORTING***

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