JUDGMENT SHEET

ISLAMABAD HIGH COURT, ISLAMABAD,
JUDICIAL DEPARTMENT

Writ Petition No.4749/2016
Qazi Mustafa Kamal and others
Versus
DG FIA and others.

Petitioner by:	Mr. Ajmal Raza Bhatti, Mr. Shahid Awan Bajwa, and Muhammad Shoaib Sheikh, Advocates for petitioners
Respondent No.3 by:	Mr. Muhammad Nazir Jawwad, Advocate
	Ms. Amera Batool, Advocate for Syed Sarfraz Hussain Naqvi/Contractor
State by:	Syed Sarfraz Ali Khan, State Counsel
	Kashif Riaz Awan, SI, FIA/ACC, Islamabad
Date of Decision:	03.05.2017

MOHSIN AKHTAR KAYANI, J:- The petitioners through this writ petition have prayed for quashment of FIR No.06, dated 26.01.2016, U/Ss 109, 409, 419, 420, 468, 471, 34 PPC r/w Sec.5(2) 1947 PCA, P.S. FIA/ACC, Islamabad.

2. Brief facts of the instant case are that, Pakistan Television Corporation, PTV Headquarter, Islamabad ("PTVC") invited applications from the firms/civil contractors registered with Pakistan Engineering Council ("PEC") for construction of Re-broadcasting Stations ("RBS"), at Neelam Valley, AJK. The PTVC Management after scrutiny of the record, awarded the contract of project of RBS, worth Rs.7,32,43,593/-, to M/s Inter City (Pvt.) Ltd. ("M/s Inter City") on 25.06.2009. During the inquiry, it was found that M/s Inter City is not registered with the PEC, which is sheer violation of PERA Rules for getting a contract. The PEC registration certificate was sent to PEC for verification, who declared it as fake/bogus through PEC letter No. PEC/Const/C-2/962 dated 21.03.2014. In order to obtain the contract, Syed Sarfraz Hussain Naqvi and Ishtiaq Ali Bukhari impersonating as Director of M/s Inter City and others, submitted a fake/forged PEC certificate to PTVC Management, while on the other hand, the record received from Securities and Exchange Commission of Pakistan revealed

that Shujja Hussain and Azhar Mehmood are actual Chief Executive and Director M/s Inter City instead of Syed Sarfraz Hussain Naqvi and others, therefore, PTV Officials in connivance and complicity with the Management of fake firm M/s Inter City, caused huge loss to national exchequer and misused their authorities with common intention, committed criminal breach of trust, criminal misconduct, forgery, cheating and concealment of facts for wrongful gains. In addition to above, Assistant Director (Technical) FIA/Engineering conducted site verification at Neelam Valley, AJK and submitted the technical report regarding the poor/substandard and defective construction work. Furthermore, Syed Sarfraz Hussain Naqvi and others without authorization and illegally awarded the above said contract to other contractors, hence, on inquiry conducted by FIA, the instant FIR has been lodged.

3. Learned counsel for petitioners contend that instant case has been registered with *mala fide* intention as the petitioners, who are PTV Officials, have nothing to do with the scrutiny of tender documents, rather it is the duty of a firm hired by the PTVC through a contractor, M/s Unicon International Consultants ("Unicon"); that the counsel for PTV, Mr. Muhammad Nazir Jawad, ASC, narrated before the Court that there is no loss to the public exchequer as the subject contract awarded to Syed Sarfraz Hussain Naqvi/Contractor (owner of M/s Inter City) is a running contract in nature while keeping in view the severe climatic situation at site, i.e. Neelum Valley AJK, such as heavy snowfall, land sliding, heavy rain, floods, poor and dilapidated infrastructure as well as critical situation with arch rival India, the enemy of Pakistan, being border area, i.e. Line of Control, all these elements could not permit to keep pace of construction work at the site as all construction material such as graded steel, cement and other ancillary and akin material duly approved by the concerned authorities are not available in entire AJK; that FIA officials with malafide intention, foisted/planted a person, namely Muzammil Hussain, an Attorney of the Contractor, who has animosity against the Contractor, and in order to settle scores against him, filed a complaint, which in-fact, is a private dispute between the Contractor and

sub-contractors, on the basis of which, FIA authorities have registered the instant FIR which is not permissible under the law; that there is no possibility of conviction of petitioners as the scrutiny of the standard documents has only been carried out by the Unicon under their terms of agreement dated 07.05.1983, whereas the said firm is responsible for the preparation and scrutiny of standard documents and they have been paid for the said job at the rate of 2% of the contract awarded to any other contractor; that the Unicon scrutinized the document and declared the contractor as qualified one and declared him prequalified for the said tender and as per the terms of agreement, submitted a comparative chart/analysis before the Tender Committee, whereupon by considering the same, the services of the Contractor have been hired.

4. Conversely, learned counsel for State as well as Deputy Director (Legal) FIA have argued the case on the ground that the petitioners have an alternative remedy under section 265-k Cr.P.C. before the learned trial Court as the *Challan* has already been submitted and this Court cannot proceed to shorten the process referred in the Cr.P.C.; that the petitioners are already facing trial, therefore, in view of the recent judgments of the Apex Court, quashment petition is not maintainable.

5. Arguments heard, record perused. .

6. From the perusal of record it has been observed that, consequent upon Inquiry No.RE-129/2013, it has been alleged in the FIR that PTVC, for construction of RBSs at Neelum Valley, AJK, invited applications from civil contractors who are registered with PEC. The PTVC management after scrutiny of the record, awarded the contract of project of RBSs of worth Rs.7,32,43,593/- (Seven Crore, thirty two Lacs, forty three thousand, five hundred and ninety three rupees) to M/s Inter City on 25.06.2009. During the inquiry, it has been revealed that M/s Inter City was not registered with the PEC, which is sheer violation of PERA Rules for getting a contract. The PEC Registration Certificate, submitted by M/s Inter City, as per letter No.PEC/Const/C-2/962 dated 21.03.2014, has been found bogus and fake, resultantly, caused huge loss to

national exchequer and misused their authorities with common intention, committed criminal breach of trust, criminal misconduct, forgery, cheating and concealment of facts for wrongful gain, while on the other hand, record received from Securities and Exchange Commission of Pakistan revealed that Shujja Hussain and Azhar Mehmood are actual Chief Executive and Director of M/s Inter City. Assistant Director (Technical), FIA/Engineering conducted site verification at Neelam Valley, AJK and submitted the technical report regarding the poor/substandard and defective construction work. Furthermore, the Contractor and others unlawfully and illegally hired subcontractors. It has further been revealed that the PTVC and Tender Committee have awarded the contract to M/s Inter City in connivance with them and caused the huge loss, hence, FIR No.06, dated 26.01.2016 U/Ss 109, 409, 419, 420, 468, 471/34 PPC read with Sec.5(2) 1947 PCA, P.S. FIA/ACC, Islamabad was registered against Syed Sarfraz Hussain Naqvi and Ishtiaq Ali Bukhari as impersonating M/s Inter City and Ahmad Khan (Controller Admin Personal PTV), Asghar Ali (Controller Engineering Projects PTV), Abdul Ghaffar (Controller Audit PTV), Naveed-ul-Haq (Controller Engineering Projects PTV), Khalid Mahmood Ch. (CEC PTV), Perwaiz Wilbert (RE, PTV HQ), Rana Muhammad Nasir (RE PTV HQ) and Muhammad Niwaz Ch.

7. Petitioners, who are PTV officials, after obtaining post-arrest bail, filed the instant quashment petition in the instant matter. The main ground raised in this instant petition is that, petitioners who are PTV officials, could not award contract unless a firm conducts scrutiny of documents and provides comparative analysis chart while in the instant matter, PTVC hired Unicon, comprising of architects, engineers and planning consultants, and the same firm being a partnership firm is registered under Partnership Act in Pakistan.

8. PTVC vide agreement dated 07.05.1983 entered into an agreement with Unicon for performance of certain work whereby, the Unicon, under the terms and conditions of the agreement, despite scrutiny of the tender documents is also responsible for the overall consultation of project and construction work.

Furthermore, upon hiring of the said services, they have been paid through "Article-V Remuneration" which is reproduced as under:-

1. The Corporation agrees to pay the architectural/Engineering Consultants fee as follows:-

a)	*Non-repetitive works (3½% spread over):*	
	i. Schematics, architectural and structure drawings, preparation & scrutiny of tender documents.	*3% (Three Per Cent)*
	ii. Top site supervision.	*½% (Half Per Cent)*
b)	*Repetitive works (2% spread over):*	
	i. Schematics, Architectural and structural drawings, preparation & scrutiny of tender documents.	*2% (Two Per Cent)*
	ii. Top site supervision.	*½% (Half Per Cent)*

It has further been revealed that the scope of work attached with the said agreement is referred in Clause-B, which is as under:-

> *"(b) Preparation of complete plans and details of all architectural, structural, electrical, plumbing and mechanical work and services for the building, including specifications, bill of quantities and tender documents inclusive of examination of tender documents received and preparation of comparative statements."*

Similarly, as per scope of Clause-5 (Supervision of Construction), it imposes certain duties on the firm referred as under:-

> *"(a) In order to ensure a true interpretation of the drawings, the Architectural/Engineering Consultants shall be periodically represented at the construction site by persons who will supervise the construction work. These persons shall assist in making interpretation of the drawings, and in this way endeavour to prevent construction errors.*
>
> *(c) The Architectural/Engineering Consultants will assist the Corporation, in selecting contractors best suited to accomplish the work.*
>
> *(e) The Architectural/Engineering Consultants or their representative in consultation with the Corporation shall notify the contractor of deficiencies in the construction and shall take steps to condemn the work which does not conform to the approved drawings and specifications."*

It has further been observed from the record that Unicon, regarding prequalification of contractors, has issued a letter to PTVC HQ for construction of RBS's in Neelam Valley, AJK. The document dated 16.06.2008 further reveals that the document received in the Unicon office has been scrutinized and returned in original for the reference to the PTVC. The record further reveals that Unicon prepared a comparative prequalification of contractors for development work whereby Unicon, on the basis of their evaluation on technical terms and others assignments, scrutinized nine different firms/companies and awarded marks on the threshold set as, Article of Memorandum/Partnership Deed, list of job completed in AJK/NWFP in last 5 years, Works in Hand, Technical Staff with Qualifications, Tools/Plant Bank Certificate, I.T. Registration, No Litigation Certificate and PEC Registration, whereupon M/s Inter City secured highest marks amongst the other firms, however the most surprising factor referred in this record is that, Unicon awarded 8 marks to M/s Inter City for the category of PEC Registration.

9. Learned counsels for petitioners have also relied upon the "Construction and Works-in-Progress Accounting Manual" of PTVC, wherein the duties of the Unicon have been referred under Clause-2 (Appointment of Architects & Engineering Consultants) and the same is hereby reproduced as follow:-

> *"2.01. Decision to undertake construction work shall normally be taken by the Board of Directors, which usually delegates its powers to the Managing Director. After this basic decision is taken, it will be necessary in some cases to appoint Architects/Engineering Consultants for the purpose of preparing designs, drawings and tender documents in respect of the proposed works. Managing Director will decide whether or not any consultant has to be appointed. If no consultants are appointed, the Corporation will supervise its own work. Since the professional charges of such consultants are generally standardized, the selection of consultants will be guided by the following considerations:-*
>
> *a) Experience in similar works;*
> *b) The standing of the Consultants and their known Integrity;*
> *c) Qualifications and experience of personnel employed and associated by them, whether local and/or foreign."*

Similarly, they have been assigned with the specialized tasks for prequalification of contractors under Clause-2.06, which is reproduced as under:-

> *"2.06: The Architects/Engineering Consultants shall receive application and submit their report to the Managing*

Director through Chief Engineer to enable him to finalize a list of pre-qualified contractors. The Corporation shall inform all the contractors individually whether or not they have been pre-qualified."

Under Clause-3.07 and Clause-3.09 of the said manual, the following certain duties are also assigned to the tender awarding committee:-

"3.07. On the specified date and time, tenders shall be opened by the above referred committee either in Headquarter or at Station and Sales Offices, as the case may be. When cost estimates are in excess of Rs.1,00,000.00, tender shall be opened at Head Office. If consultants are engaged, they shall also remain present.

3.09. If more than one tenders are received, a comparative statement will be prepared in the form enclosed as Annexure-A. The Officers responsible for opening tenders shall sign the statement and forward it to the Consultants if any, together with all the tender documents received for their comments. The consultants will examine and forward the tender documents in original along with their recommendations to the Chief Engineer, who in turn will transmit the same with his comment to the competent authority as defined in Annexure-F, for final acceptance. When no consultants are engaged, Tender Committee will scrutinize and submit its recommendations to the competent authority."

Even the said manual further reveals that the Architects/Engineering Consultants, in terms of their agreement with the Corporation, are expected to supervise the construction work and also to take the measurement at agreed intervals and record them in the Measurement Books as adopted by Public Works Department. Among other things, they are also charged with the responsibility of scrutinizing/certifying the bills of the contractors for payment. The petitioners' counsel has also relied upon document dated 31.07.2008 issued by Unicon to prequalified firms, wherein firms which have been given prequalification status for the construction of RBS's at Jura, Athmuqam, Karan, Sharda, Kel and Dhadhnial (Neelum Valey, AJK) have been informed that tenders of these works will be issued from 1st August to 10th August, 2008 on payment of Rs.5,000/- per RBS (non-refundable) and they have been informed to collect the tenders from Unicon on any working day from 9am to 5pm.

10. The above referred details have confirmed the stance of the petitioners that the entire process of awarding of any contract is initially based upon the scrutiny of Unicon, a firm of Architects/Engineering Consultants hired by PTVC under an agreement, who given a prequalification status on the basis of their evaluation criteria, which is available on record, wherein nine companies have been scrutinize and finally M/s Inter City has been given maximum marks with 8/8 marks in the category of PEC registration.

11. In view of above factors, the FIA authorities have inquired the matter and finally under their investigation, they have also recorded the statement of Muhammad Sarwar Shahid, Controller Finance, PTV HQ, who narrated the role of Engineering Division and Consultants for Award of Civil Work Job and Engineering Division regarding civil work payments to contractors and Finance Division role to disburse the payment of civil work, wherein as per the defined roles, following duties have been notified by the said Controller on record, which are as under:-

> *"vi) All the applications then sent to the consultant for scrutiny and recommendation.*
> *vii) The consultant prepare the scrutiny report and evaluate of the pre-qualification is based on fixed marks to various heads such as work done since formation of firms, work done during last five years and work in hand and enlistment with Government/Semi Government Organization, etc.*
> *xiii) All the tenders sent to the consultant for technical scrutiny and recommendations."*

12. As of aforementioned details, procedures under the PTVC Manual and the agreements, it has clearly been demonstrated from the record that it is the duty of Unicon, who have given a prequalification status to M/s Inter City at the initial stage and afterward qualified for the contract which was awarded by the petitioners being the members of the Tender Awarding Committee. Furthermore, during the course of inquiry conducted by FIA authorities, the document which was placed before the committee with the status of confirmed registration of PEC, it is revealed through PEC letter No.PEC/Const/C-2/962 dated 21.03.2014 that the document submitted is bogus/fake, whereas Syed Sarfraz Hussain Naqvi

and Ishtiaq Ali Bukhari impersonated as Director of M/s Inter City, and prepared the forged/fake certificate of PEC and submitted to PTV Management in connivance with Unicon. During the course of hearing, I have called the Investigation Officer and Additional Director (Law) FIA, whereupon it has been revealed that the Inspector who has investigated the matter, has not performed his duties in accordance with law rather he entertained initial application filed by the sub-contractors of M/s Inter City, who had a dispute with principal and as a result of said dispute, he filed an application to the FIA authorities, whereupon the inquiry was conducted by the Investigation Officer, who under some relationship with sub-contractor, initiated the entire proceedings and finally the instant case was registered.

13. The Deputy Director (Law) and other officials of FIA categorically confirmed that report U/S 173 Cr.P.C. could not be made out against the petitioners as they have no role in the scrutiny of the documents and it is the duty of Unicon, who in connivance with M/s Inter City, have prequalified the said company in order to award them a contract. Therefore, the Additional Director (Law) has confirmed that the Investigation Officer is under suspension and facing inquiry regarding his own conduct in the instant matter.

14. During the course of hearing, I have also called the contractor of contract, awarded by the PTVC, who appeared before the Court and confirmed that, he, at the time of awarding of contract, had not obtained any license from PEC rather M/s Inter City has obtained the license No.40951, Category C-Six, on 30.08.2010, issued by PEC. As a result of said admission, it is evident from the entire record that M/s Inter City, in any manner, is not entitled to get the contract rather the entire situation has been managed by Unicon in connivance with M/s Inter City and their directors, Syed Sarfraz Hussain Naqvi and others, who were facing trial before the Court of Special Judge (Central), Islamabad. It has further been revealed that PTVC, even after knowing the entire fraud, has not initiated any proceedings against the contractor. The entire circumstances clearly portrays that because of a personal dispute between the contractor and sub-contractor, instant

criminal case against the staff of PTVC has been registered whereupon they are facing the agony of trial, despite the fact that they, under the agreement executed between PTVC and Unicon, were not responsible to scrutinize the documents submitted by M/s Inter City. Furthermore, learned counsel for the PTVC, Mr. Muhammad Nazir Jawwad, has put his appearance and stated before the Court that due to certain conditions, such as, extreme weather and security issues in Neelam Valley (AJK) and Line of Control, it was not possible to award the contract to any other firm. He further stated before the Court that the tentative loss has been secured as the contract is still running and the same has not been completed, whereas the PTVC has retained the security of the contract, i.e., Rs.5,145,349/- and the alleged loss estimated by the FIA is Rs.4,900,000/-, hence PTVC can cover the estimated loss, in view of the statement of learned counsel for PTVC referred above, it can safely be concluded that PTVC is not interested to terminate the contract.

15. With the able assistance of Deputy Director (Law) and Additional Director (Law) of FIA, and for what has been discussed above, it has finally been concluded that all the petitioners are, *prima facie*, innocent in the above mentioned case and facing the agony of trial only due to inefficiency of Investigation Officer of the FIA, who has submitted a final report U/S 173 Cr.P.C. before the Special Judge (Central), Islamabad.

16. In view of above, petitioners, who are employees of PTVC and members of the Tender Awarding Committee, whose role is only to award the contract on the basis of comparative analysis submitted by the Unicon, the Consultants Architect/Engineers firm, who has scrutinized the parties at the prequalification stage, hence Unicon and its Directors are solely responsible for the prequalification of all the contractors, including M/s Inter City, who in connivance with Unicon has submitted a fake and factitious certificate of PEC and has also submitted the fake scrutiny report, as a result of the said fraud committed by the Unicon and M/s Inter City, the contract has been awarded to M/s Inter City, in result whereof public exchequer has suffered a loss, even today the contract is

running and PTVC is not interested to terminate the same. Therefore, all the members of the PTVC Tender Awarding Committee are, *prima facie*, not involved in the instant matter, however at this stage when *Challan* has been submitted before the competent Court, it has been settled by the Apex Court, that parties in order to seek their remedy U/S 249-A Cr.P.C. or U/S 265-K Cr.P.C., should approach the Court of first instance. Reliance is placed upon ***PLD 2010 SC 969 (Muhammad Abbasi vs. SHO Bhara Kahu and others)*** wherein it is held that:-

> *"It is worth mentioning that challan has already been submitted and cognizance taken by the learned Court and in this view of the matter the alternate as provided under section 249-A, Cr.P.C. would be more efficacious, appropriate and beneficial. It may not be out of place to mention here that question of guilt or innocent cannot be decided by the learned High Court in exercise of Constitutional jurisdiction as such a function fall within the jurisdictional domain of Court concerned by whom the entire evidence is to be scrutinized which cannot be done in exercise of Constitutional jurisdiction."*

17. In view of above situation, this petition stands disposed of with direction to the petitioners to submit an application U/S 265-K Cr.P.C. before the Special Judge (Central), Islamabad, if so advised.

18. If the petitioners are willing and choose to adopt this alternate method for redressal of their grievance before Special Judge (Central), Islamabad, it is expected from the Court seized with the matter to decide such application within period of 30 days after hearing the parties in accordance with law.

(MOHSIN AKHTAR KAYANI)
JUDGE

Khalid Z.

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