

**ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI**

C.P. No.D-2987 of 2018

DATE ORDER WITH SIGNATURE OF JUDGE

Present:-

Mr. Justice Muhammad Ali Mazhar

Mr. Justice Agha Faisal

TCS Private Limited & others.....Petitioners

Versus

Pakistan Post & another.....Respondents

Date of Hearing: 31.05.2018, 06.06.2018, 08.06.2018,
13.06.2018, 20.06.2018 & 26.06.2018.

M/s. Anwar Mansoor Khan & Mir Muhammad Ali Talpur,
Advocates for the Petitioners.

Mr. Salman Talibuddin, Additional Attorney General for
Pakistan assisted by Mr. Abdullah & Ms. Alicheh Bashir,
Advocates.

Mr. Shaikh Liaquat Hussain, Assistant Attorney General.

Mr. Ateeq-ur-Rehman, Assistant Director (Law), Pakistan
Post.

Mr. Akbar Ali Dero, Post Master General, Karachi.

Muhammad Ali Mazhar, J: This petition has been brought to seek out declaration that Pakistan Post Office has no right and authority to go beyond Pakistan Post Office Act, 1898 hence they cannot enter into a partnership with a private entrepreneur. The petitioners have sought further declaration that the Pakistan Post Office has no authority to tender and form a company to run business in terms of Request For Proposal' (RFP) which is illegal and incapable of being acted upon.

2. The short-lived facts of this court case are that the Pakistan Post Office through an advertisement issued a 'Request For Proposal' (RFP) for Private Public Partnership. As per terms of tender document, the bidder was obliged to build in partnership with the Pakistan Post an infrastructure to operate the project for a defined 'Concession Period' and at the end of the 'Concession Period', transfer the assets to the implementing agency i.e. Pakistan Post Office.

3. The learned counsel for the petitioners in the beginning drawn our attention to fleeting profile of the petitioners. He argued that petitioner No. 1 to 5 are providing services in relation to courier and domestic services. The petitioner No. 6 & 7 are the associations representing around 850 companies and firms engaged in the business of courier, logistics and other related services. It was contended that the indenture of 'Request For Proposal' (RFP) shows that under the intended arrangement the Pakistan Post will be privatized. The functions of the Pakistan Post Department will be transferred to a private entity along with its assets for a concession period of 20 years commencing from the signing date of the Concession Agreement.

4. He further argued that under the "Scope of Work for Build, Operate, Transfer (BOT) of Pakistan Post Logistic Company", a new company is to be formed under the name and style of "*Pakistan Post Logistics Company*" to provide services including Urgent Mail Services (UMS), Urgent Mail Services-Cash on Delivery (UMS-COD), Express Mail Services (EMS), Fax Mail Service (FMS), and Supply Chain Management (SCM). The learned counsel argued that the proposed arrangement and concession agreement is in complete violation of the law including the Post Office Act,

1898 and the Pakistan Postal Services Management Board Ordinance, 2002.

5. It was further averred that a Pre-bid Investors Conference was held on 28.02.2018 wherein the CEO of the petitioner No. 1 participated and requested to allow some time to present his proposal. However, he was not allowed to present his proposal by giving him only a few minutes for such presentation, which time was not sufficient for presenting the detailed proposal. The CEO repeatedly informed the officials that he will require more time to present the proposal as his ideas were detailed, however, the time was not allowed and the conference was ended. It was apparent that the respondents did not want the petitioners to participate in the Bidding process by making it difficult for them. The correspondence in the form of chain of email is available at Annexure 'E' on Pgs. 575 to 589 of the court file.

6. The learned counsel further argued Pakistan Post Office is a Department as defined in Section 2(k) of the Post Office Act, 1898 which is empowered to carry the postal articles as defined in Section 2 (i) and the Post Office as defined in Section 2(h). The words "in course of transmission by post" and "delivery" have been defined in Section 3 of the Post Office Act, 1898. For the purposes of the Post Office Act, 1898, the words in the course of transmission by post would include the delivery of postal article to a "postman" or other person authorized to receive postal articles for the post, and such shall be deemed to be a delivery to a post office. Under Section 4 of the Post Office Act, 1898, Pakistan Post has an exclusive privilege of conveying letters, and such letters can only be conveyed by the Pakistan Post and no one else. The said privilege is also followed by a specific restriction under Section 5 of the Post

Office Act, 1898, which includes restriction on certain persons to carry “letters” as specified in Section 4. In the wake of monopoly, the Pakistan Post wants to intrude in the business of the citizens/Pakistani companies, that they would utilize the existing thousands of Post Offices, and employees of the Post Offices to enter into the Logistic Business.

7. The learned counsel further argued that Pakistan Postal Management Board Ordinance, 2002 only provides for the management of Pakistan Post Office Department by the Pakistan Postal Services Management Board as established under Section 3 of the said Ordinance. The powers and functions of the Board are listed in Section 11 of the Ordinance, 2002. The Board does not have authority to perform any function or exercise any power that is not provided in the said Section 11.

8. It was further contended that the respondents through RFP have attempted to curtail the competition. The intended partnership will have an effect of creating a monopoly and curtailing the competition in this sector which will be in violation of Article 18 of the Constitution of the Islamic Republic of Pakistan, 1973 wherein free competition has been encouraged. The rights of the petitioners guaranteed under Article 18, 24 and 25 have been violated as the foreign investor is being given preferential treatment over the local/domestic investors.

9. It was further contended that no approval or any permission of the Federal Government or of any authority under the Public Private Partnership Act, 2017, nor any policy approved by the Federal Government has been brought on record by the Respondents. Article 90 (1) of the Constitution of the Islamic Republic of Pakistan 1973

defines the Federal Government which is not the Prime Minister but consists of the Prime Minister and the Federal Ministers. In support of contention, the learned counsel for the petitioners cited following judicial precedents:-

2010 SCMR 1437 rel. at Pg. 1442 at “B”, 2008 SCMR 1148 rel. at Pg. 1151 at “F” & “G”. 2007 SCMR 307 rel. at Pgs. 312-313 at “B”., PLD 2005 SC 842 rel. at Pgs. 854-855 at “B”, 2001 SCMR 838 rel. at Pg. 842 at “B”, 2017 SCMR 683 – *Suo Motu Case No. 19 of 2016* – at Pg. 699 at “G” and Pg. 700 at “I”, PLD 2012 SC 132, PLD 2011 SC 997, PLD 2005 SC 193 and PLD 1975 SC 667

10. Quite the reverse, the learned Additional Attorney General conversed that Pakistan Post Logistics Company will be incorporated as a special purpose vehicle (SPV) regulated by the Securities and Exchange Commission of Pakistan. The project shall be implemented on a Build-Operate-Transfer basis (BOT) in three phases. It was further argued that under the terms of the Concession Agreement, the partner will develop, design, finance, construct, implement, insure, commission, test, manage, operate, maintain and upgrade existing services. With the resultant advancement in its present infrastructure and services, the scope of functions currently performed by Pakistan Post will be improved. The partner will also introduce Supply Chain Management defined as overseeing/coordinating the movement of materials, information and finances. The partner will launch, market, sell, operate and maintain these services, with an aim to attract corporate customers for Pakistan Post. The partner will pay to Pakistan Post, a minimum of PKR 327.468 million in each operational year of the project with a 5% increase in the guaranteed amount per annum. However the partner will only be entitled to share the revenue generated by PostLog during the operations stage of the Concession Period.

11. It was further contended that Pakistan Post presently performs courier, urgent, fax mail, and express mail/parcel delivery services (local and international) in addition to regular mail services. These are major revenue generating operations and it will continue to perform its current services including the Urgent Mail Service (UMS) and Mobile Money Order. All post offices, office and residential buildings, vehicles and train lines currently owned and operated by Pakistan Post shall remain functional. Under the scope of work, the partner will provide the requisite technology and investment, in order to introduce track and trace facilities, expand the existing network, develop business, generate revenue and better the management of operations presently performed by the Pakistan Post, i.e. Urgent Mail Service, Urgent Mail Service-Cash on Delivery, Express Mail Service; and Fax Mail Service.

12. To answer specific query raised by the court, the learned Additional Attorney General, argued that employees, assets, offices and resources of the Pakistan Post will be utilized in the course of the project at all times with the prior approval of Pakistan Post but the ownership of all assets and employment relationship with such employees shall remain with the Pakistan Post. No redundancy or retrenchment is at all envisaged and all existing employees shall continue in the service of Pakistan Post and will remain as civil servants on the same terms and conditions and subject to the same laws applicable thereto. He further confirmed that Pakistan Post shall bear the cost of all employees who may be assigned to assist the project and expressly clarified that no employee shall be transferred and such employees shall continue to be employees of Pakistan Post however during the Concession Period.

13. It was further averred that Pakistan Post is an attached department of the Federal Government. The definition of postal article includes anything transmissible by post intended to have a wide meaning. 'Post', 'mail', 'courier' and 'logistics services' demonstrate that these functions are synonymous whereas the meaning of 'courier' is a person whose job is to carry messages, packages etc., from one person to another and 'mail' is "a material (such as letters and packages) sent or carried in a postal system. Section 29 of the Pakistan Postal Services Management Board Ordinance 2002 does not derogate from or affect the Act; the 'Pakistan Post Office' shall be read as and constitutes a reference to the Board. The Board established under section 3 of the 2002 Ordinance may prepare plans for development of postal and other services including expansion of its functions and services and may also formulate policies pursuant to directives of the Federal Government as was done for entering into the procurement process.

14. The 2010 Policy was formed being part of framework for Pakistan Vision 2025, which envisages public-private partnerships (PPP) and the mechanism of its implementation. The Postal Reform Agenda, emanating from these policies and directives was thereafter approved by the Prime Minister and subsequently set to action under the Pakistan Post's Policy. The 2010 Policy was approved by the Economic Coordination Committee of the Cabinet on 26 January 2010, pursuant to Rule 17 of the Rules of Business with the aims to promote social and economic development through improvement in infrastructure and encouraging investment in PPP. Consequent upon approval of the Board in its meeting held on 19 April 2017, the DG Post Office established a Public Private Partnership Cell

(PPP Cell) which included members of the IPDF. The Pakistan Vision 2025 was approved by the National Economic Council pursuant to Article 156 of the Constitution of Pakistan 1973.

15. He further argued the court may not interfere in the policymaking domain of the Federal Government unless the policy is perverse, arbitrary, patently mala fide or in violation of the constitutional mandate. The petitioners have failed to demonstrate that these exceptions are applicable with respect to the policies relied upon. The petitioners have no locus standi, especially as they have raised no grievance. The subject matter has no public importance nor is the action taken by the Pakistan Post mala fide, illegal or detrimental to the public interest. The petition has been filed under the garb of public interest, but is intended only to delay and disrupt the implementation of the project as the petitioners seek to prevent a competitor from entering the market in which they provide services. The learned counsel cited the case of **Air India Ltd. vs. Cochin International Airport Ltd., (2000) 2 Supreme Court Cases 617, Dr. Akhtar Hassan Khan and others vs. Federation of Pakistan, 2012 SCMR 455, Watan Party vs. Federation of Pakistan, PLD 2013 S.C. 167.**

16. In rebuttal, Mir Muhammad Ali Talpur, Advocate for the petitioners argued that the meaning of "Post" and "Logistics" are different. The word "Logistics" is not defined in the Post Office Act, 1898. The word "Logistics" in business has a different connotation which includes much more than the management. It was further averred that the petitioners are private companies/firms and governed and derive their authority under their Memorandum &

Articles of Association whereas Pakistan Post is a Government Department which derives its authority and powers under the Post Office Act, 1898. The Pakistan Post can carry letters which the private courier service company cannot do. He referred to the judgment reported as **2004 MLD 1949 rel. at Para 25 at Pg. 1961 and Para 27 & 28 at Pg.1962**, wherein the question of privilege of Pakistan Post was considered. It was further contended that if the law allows it to enter into Public Private Partnership, it could only be to the extent as prescribed in their law i.e. Post Office Act, 1898. He further argued that no policy has been approved by the Federal Government. Under the PPP Act, the approval of the Authority is required and if it is being done under the Policy, the approval of the Federal Government is required. He added that the apex court has condemned selling of valuable national assets and also stayed the process of privatization of PIA.

17. Heard the arguments. A cautious scrutiny of the Pakistan Post Logistics document designed to submit "Request For Proposal" (RFP) makes obvious that Pakistan Post through a private sector participation intends to launch a project that would be implemented in public private partnership to optimize current courier and express parcel services by integrating with existing international system. In the Request for Proposal for Pakistan post logistics in Section-A, page 18 (file page-79), it is articulated that CPEC, essentially a logistics partnership will increase the demand for cost effective and reliable supply chain partners by the industry. CEP and logistics market is about to explore, Pakistan Post is offering its infrastructure, evolved in well over a century and reach spanning across the country and the world over. The proposed logistic partnership will enrich customer

experience but Pakistan Post will continuously monitor and track key performance metrics of the private partner and such performance metrics include but not limited to revenue growth, operating cost, reliability, transparency of services and customer complaints. The project will be implemented on the basis of Build-Operate-Transfer (BOT) methodology detailed in Pakistan Post Public Private Partnership Policy. The core strength of Pakistan Post includes 12085 post offices, 835 office buildings, 3315 residential buildings, 424 vehicles and train lines covering distance of 3500 KM. Robust treasury operations mandate to perform courier, express and logistics services domestically and internationally and mandate to perform Financial Services. The Request For Proposal further highlights that using nation-wide infrastructure, Pakistan Post is already providing mail, courier and express parcel services which include urgent mail service, cash on delivery, express mail service international and premier service arm and fax mail service. The service area intended to be launched on BOT basis would inter alia include customs clearance, supply chain management, warehousing, packaging, printing, transporting, sorting, tracking and delivering the consignment for which Pakistan Post will also offer its manpower, infrastructure, outlets, delivery and existing fleet for Less than Truck Load (LTL) consignments but the private operator will have to develop, acquire, construct, rent and arrange its own infrastructure and fleet wherever the need will arise.

18. The niceties and exactitudes of the project envisions that private partner shall bring investments to plug gaps in fleet, technology, training, management and manpower and operate and manage Express Post existing products and product line by offering supply chain and logistics solutions

from current 1000 outlets to 12085 postal outlets. Pakistan Post would offer non-exclusive rights to Express Post assets including revenue, dedicated outlets, manpower, fleet and technology to the concessionaire who will be expected to complement Pakistan Post's other products and services and create further value by adding new products and services. All the projects risk shall be exclusively borne by concessionaire except chain in line and force measure. The concession period shall be for 20 years. The concessionaire will have to achieve Financial Close within sixty days from signing of Concession Agreement for its commercial debts for the project the successor bidder will have to invest 30% of the remaining project cost as equity and will also arrange 70% of the remaining project cost as debt as guarantee payment to Pakistan Post during each year amounting to PKR.327.468 Million escalated at 5% per annum.

19. The most important aspect is with regard to Human Resource Management wherein it has been clearly pointed out no redundancy or retrenchment shall be effected and all existing employees shall continue. An eloquent standpoint has been taken that Pakistan Post shall not transfer any employee cost to the concessionaire. The partnership may request Pakistan Post to transfer any particular employees but such employees shall stay on the payroll of Pakistan Post and Pakistan Post shall reserve the right to withdraw the services of such employees and on expiry date of the agreement or its termination prior to the expiry date the concessionaire shall transfer all rights and interest including projects assets and intellectual property to Pakistan Post free from encumbrances in nominal consideration of PKR. In order to ensure safe implementation of the project, the concessionaire has to

setup special purpose vehicle for the sole purpose of implementing the project.

20. The documents available on record make it obvious that Pakistan Policy on Public Private Partnership (*Private Participation in Infrastructure for Better Public Services*) was approved by Economic Coordination Committee (ECC) of the Cabinet on January 26th, 2010. On 29th May, 2014 National Economic Council approved the manuscript of *Pakistan Vision 2025* in which one of the components was Public Private Partnership (PPP). The council decided to promote Public Private Partnership through a comprehensive policy regime that would be used for better infrastructure development and improving connectivity to facilitate Private Sector Growth. The record reflects that on 29th December 2015, a meeting was convened by the Prime Minister to review the reform Agenda of Pakistan Post. It was attended by the Secretary Communication who led Pakistan Post Team Members. In the meeting, D.G keeping in mind the dire strait of financial health, dwindling mail traffic and emergence of new opportunities in logistics proposed to introduce/launch Pakistan Post Logistic Company and Mobile Money Order. The Prime Minister approved the rebranding of Pakistan Post and emphasized the significance of transparency and integrity in the launch and execution of approved initiatives. In view of the approval, a reform agenda meeting was convened in the office of Director General Pakistan Post on 12.07.2016 for launching logistic company to be established under the provisions of Companies Ordinance on Public Private Partnership basis and consequent upon the approval of the Pakistan Post Postal Service Management Board in its 41st meeting held on 19.04.2017, the Director General and Chairperson was pleased to establish Public Private

Partnership Cell with the term of reference to conceive and develop PPP Project, evaluate project proposals, provide technical support to the PPP steering committee, develop operating guidelines, procedure and model document for project for approval by starring committee, develop bidding document, develop draft PPP agreement, advertise, evaluate and select preferred bidder/bidders and present it to PPP starring committee, evaluate, the type and amount of government support sought for a project, review bid evaluation report, prepare and regularly update on project and perform any other functions as may be assigned to it by steering committee.

21. On 01.08.2016, Pakistan Post invited Expression of Interest (EOI) for launching of Pakistan Post Logistics Company to develop a state of art logistics solution with a vision to reposition itself as the key player. However, on 17.02.2018 again a "Request For Proposal" was published in the newspaper for launching courier, express parcels and logistics services through public private partnership modality. As a rider, it was mentioned in the advertisement that in addition to the fresh bidders, the parties shown their interest pursuant to the issuance of Expression of Interest are also entitled to submit their proposals and all interested parties can obtain RFP documents free of cost.

22. At this juncture, we would like to refer to Public Private Partnership Authority Act, 2017 which was promulgated on 29th March 2017 to provide a regulatory and enabling environment for private participation in public infrastructure and related services through fair and transparent procurement processes and to promote domestic and foreign private investment in infrastructure to increase availability of public infrastructure, reduce

transaction costs, ensure appropriate regulatory controls, and provide legal and economic mechanisms to enable the resolution of contract disputes. In Section 2, clause (e), Company means “Infrastructure Project Development Facility” (IPDF), a corporate entity registered and operating under the provisions of the Companies Ordinance, 1984. Whereas in clause (g), “Implementing Agency” means any of the line ministries, attached departments, body corporate, autonomous body of the Federal Government or any organization or corporation owned or controlled by the Federal Government. Whereas according to clause (a), “Agreement” means a written agreement between an implementing agency and a private party for implementation of a project and any other agreement subsidiary or incidental to it. In order to effectively enforce the provisions of this Act, a public private partnership authority has been established under Section 3 whereas a board has been constituted under Section 6. According to clause (p) of Section 2, “Request For Proposals” means a publicly advertised tender inviting proposals for a project prepared in accordance with the provisions of this Act. This unquestionably manifests that on 17.02.2018, the Pakistan Post published a request for proposals of the project compliant to the conditions mentioned in the aforesaid Act. The functions and powers of the Authority are provided under Section 4, whereas, the functions and powers of the Board are provided under Section 8 of the ***Public Private Partnership Authority Act, 2017***. For the ease of reference both the sections are reproduced as under:-

- “4. **Functions and powers of the Authority:-** (1) Subject to the provisions of this Act, the Authority may take such measures and exercise such powers as may be necessary for promoting and helping realization of the concept and methods of public private partnership.
- (2). Without prejudice to the generality of the powers conferred by sub-section(1), the Authority may-

- (a) ensure that projects are consistent with national and sectoral strategies;
- (b) ensure value for money by conducting an analysis to evaluate projects. A public private partnership (PPP) arrangement yields value for money if it results in a net positive gain to society;
- (c) adhere to the principle of budget affordability in the context of medium term budgetary framework;
- (d) make assessment of fiscal risks;
- (e) advise and facilitate the implementing agency to identify, develop, structure and procure the projects;
- (f) prescribe and receive fee and charges;
- (g) standardize the contractual provisions and to develop the sector specific provisions of the model public private partnership agreements;
- (h) develop annuity, user-based and hybrid financial models for the projects;
- (i) ensure that public private partnership agreement is consistent with the provisions of this Act;
- (j) interact, collaborate and liaise with international agencies;
- (k) play the role of gatekeeper at all stages of project cycle such as planning, tendering, bidding and contract; and
- (l) notify, from time to time, a limit on the size of PPP projects that an implementing agency may undertake in relation to its annual spending”.

“8. Functions and powers of the Board.- (1) The general directions and superintendence of the Authority and its affairs shall vest in the Board which may exercise all powers, perform all functions and do all acts which may be exercised, performed or done by the Authority.

- (2) Without prejudice to the generality of powers given in subsection (1), the Board shall perform, *inter-alia*, which may include, the following, namely:-
 - (a) monitoring the implementation of public private partnership agreements, both in terms of the financial situation and the construction of physical assets and service delivery;
 - (b) approving relevant accounting policies and financial reporting standard and templates for contracting agencies;
 - (c) renegotiating, if necessary, public private partnership agreements or contracts;
 - (d) approve rules for the purposes of this Act;
 - (e) approve feasibility study, bid documents and proposal of a project;
 - (f) approve public private partnership agreement to be executed by the implementing agency;
 - (g) review and strengthen the institutional and regulatory framework for the effective implementation and operation of the public private partnership of the Federal Government;
 - (h) approve the yearly budget of the Authority; and
 - (i) establish viability gap fund and risk management unit, to perform such functions as it may prescribe”.

Whereas the responsibilities of the implementing agency are provided under Section 13 which is reproduced as under:-

- 13. Responsibilities of an implementing agency.- (1)**
The responsibilities of the Implementing Agency in relation to the planning, development, procurement, implementation, execution and monitoring of a Project shall be such as may be prescribed.
- (2) **Without prejudice to the generality of sub-section (1), the implementing agency, *inter-alia*, shall, for the purposes of this Act,-**
- (a) **identify, conceptualize, appraise and develop the project;**
- (b) **undertake or cause to be undertaken a feasibility study;**
- (c) **develop and issue or cause to be developed and issued a request for proposal including draft of the public private partnership agreement;**
- (d) **procure a project only through a competitive bidding process as prescribed; and**
- (e) **monitor and implement the project in accordance with the public private partnership agreement.**
- (3) **The implementing agency shall submit the bid documents and the project proposal for approval of the Board.**
- (4) **Once the project proposal is approved by the Board, the implementing agency shall procure the project in accordance with the provisions of this Act.**

23. The nitty-gritties of “Public Private Partnership Agreement” are provided under Section 25. In unison, Section 19 deals with the provisions for negotiating the rudiments of agreement with an indispensable stipulation that the implementing agency shall invite the successful Private Party for negotiation on partnership agreement in pursuit of the approval of project proposal by the Board and subject to the final approval of the Board, the implementing agency may execute the Public Private Partnership Agreement. On signing off, all moveable and immovable properties associated with the project shall vest in the public private partnership but the private party shall not create any lien, charge or encumbrance in favour of the lenders over the immovable properties of the implementing agency. According to the mandatory condition put down under Section 21, after expiry of the public private

partnership, all properties shall be transferred without any lien, charge and or encumbrance to the implementing agency.

24. The learned counsel for the petitioner vigorously articulated that the intended agreement amounts to privatization of Pakistan Post. So in order to thresh out the differentiation by dint of a comparative study encompassing an idea of privatization and public private partnership, we have also scanned the **Privatization Commission Ordinance, 2000** which disseminated to establish Privatization Commission for implementing privatization policy of Federal Government. The purpose of this Ordinance is to carry out a programme of privatization with transparent process and utilization of the proceeds of privatization for the retirement of Federal Government debts and for poverty alleviation. In the definition clause (i) of Section 2 the word “privatization” includes a transaction by virtue of which any property, right, interest, concession or management is transferred to any person from the Federal Government or any enterprise owned or controlled wholly or partially, directly or indirectly by the Federal Government. Under Section 3, a Commission has been established as a body corporate with the powers to enter into agreements and contracts. The functions and powers of the Commission are provided under Section 5 which inter alia includes to recommend privatization policy to the Cabinet, preparation of comprehensive privatization programme and provide overall directions for the implementation of privatization related activities including restructuring, deregulation and post-privatization matters in sectors designated by the Cabinet. However, the general management and administration of the Commission is vested in the Board constituted under Section 6 of the

Ordinance. Under Section 25, the Commission may carry out privatization through sale of assets; sale of shares through public auction or tender; public offering of shares through a stock exchange; management or employee buyouts by management or employees of a state owned enterprise; lease, management or concession contracts or any other method as may be prescribed.

25. A conscientious and an in-depth dissection of both the legislation makes it vivid that that Public Private Partnership Authority Act, 2017 postulates regulatory framework and regime to execute public private partnership in Pakistan whereas the Privatization Commission Ordinance, 2000 is meant for implementing privatization policy of the Federal Government and utilization of proceeds of privatization for the retirement of Federal Government debts and for poverty alleviation. Both laws have different premise and precincts without any overriding or overlapping effect but somewhat designed and premeditated to cater the need and handle two different situations in two different state of affairs so in our considerate outlook a request for proposal invited under the provisions of Public Private Partnership Authority Act, 2017 cannot be equated or tantamount privatization but it will straightforwardly amount to an agreement for public private partnership with certain terms and conditions expounded and explicated under the law in field.

26. Now, we aspire to mull over the provisions of Post Office Act, 1898. Under Clause (i) of Section 2 of the Post Office Act, 1898, an expression "postal article" includes a letter, postcard, newspaper, printed paper or small packet, parcel and every article or thing transmissible by post. In clause (k), expression "Post Office" means the department

established for the purpose of carrying the provisions of this Act into effect and presided over by the Director General. Sanguine to the controversy onboard, we consider it quite apt to reproduce Section 3, 4 and 5 of the Post Office Act, 1898 for the ease of convenience.

3. Meanings of “in course of transmission by post” and “delivery” For the purposes of this act,-

- (a) a postal article shall be deemed to be in course of transmission by post from the time of its being delivered to a post office to the time of its being delivered to the addressee or of its being returned to the sender or otherwise disposed of under Chapter VII:
- (b) the delivery of a postal article of any description to a postman or other person authorised to receive postal articles of that description for the post shall be deemed to be a delivery to a post office: and
- (c) the delivery of a postal article at the house or office of the addressee, or to the addressee or his servant or agent or other person considered to be authorised to receive the article according to the usual manner of delivering postal articles to the addressee, shall be deemed to be delivery to the addressee.

4. Exclusive privilege of conveying letters reserved to the Government:-(1) Wherever within [Pakistan] posts or postal communications are established by the [Federal Government], the [Federal Government] shall have the exclusive privilege of conveying by post, from one place to another, all letters, except in the following cases, and shall also have the exclusive privilege of performing all the incidental services of receiving, collecting, sending, dispatching and delivering all letters, except in the following cases, that is to say:--

- (a) letters sent by a private friend in his way, journey or travel, to be delivered by him to the person to whom they are directed, without hire, reward or other profit or advantage for receiving, carrying or delivering them;
- (b) letters solely concerning the affairs of the sender or receiver thereof, sent by a messenger on purpose; and
- (c) letters solely concerning goods or property sent [by sea or by land or by air] to be delivered with the goods or property which the letters concern, without hire reward or other profit or advantage for receiving, carrying or delivering them;

Provided that nothing in the section shall authorize any person to make a collection of letters excepted as aforesaid for the purpose of sending them otherwise than by post.

- (2) For the purposes of this section and Section 5, the expression "letters" includes postcards.

5. Certain persons expressly forbidden to convey letters.- Wherever within [Pakistan] posts or postal communications are established by the [Federal Government], the following persons are expressly forbidden to collect, carry, tender or deliver letters, or to receive letters for the purpose of carrying or delivering them, although they obtain no hire, reward or other profit or advantage for so doing, that is to say :-

- (a) common carriers of passengers or goods, and their servants or agents, except as regards letters solely concerning goods in their carts or carriages;

- (b) **owners and masters of vessels sailing or passing on any river or canal in [Pakistan], or between any ports or places in Pakistan, and their servants or agents, except as regards letters solely concerning goods on board, and except as regards postal articles received for conveyance under Chapter VIII [;and]**
- (c) **owners, pilots and other members of the crew of aircraft flying from or to any airports in Pakistan.**

27. In 2002, the Pakistan Postal Service Management Board Ordinance was promulgated to establish Pakistan Postal Service Board as a body corporate. The powers and functions of the Board are provided under Section 11 of the Ordinance which makes obvious that the Board shall have complete decision making power in matters relevant to all the administrative, operation and finance of the Pakistan Post Office Department provided that the Board to make decisions in important policy matters shall vest in the Federal Government. The Board has also certain powers and functions inter alia to manage and operate Pakistan Post Office Department; to frame overall market oriented postal policies and introduce flexible tariff regime in consultation with the Government; to conduct and assist research experiments or trials for the improvement of methods of postal facilities and other services being carried out by the Pakistan Post Office Department; to advise the Federal Government on matters relating to postal and other services being provided by the Pakistan Post Office Department; to seek contracts and provide postal services abroad and to perform such other functions as the Federal Government may from time to time assign. Under Section 17 the board may in a transparent manner, enter into joint ventures, concession contracts and management contracts for operation or expansion of its services or functions including outsourcing its services. However under Section 25, for furthering the functions and objectives of Pakistan Post Postal Services Management Board, the Federal Government may when it considers necessary issue

directives to the board on the matters of policy and such directives shall be binding on the board.

28. We have also looked through a number of lexicons to decipher the dictionary meaning of the words “courier” and “logistics” which are reproduced as under:

Black’s Law Dictionary.
Ninth Edition

Courier. A messenger, esp. one who delivers parcels, packages, and the like. In international law, the term denotes a messenger duly authorized by a sending state to deliver a diplomatic pouch.

Cambridge English Dictionary

Courier: A person or company that takes messages, letters, or parcels from one person or place to another.

Logistics: Logistics the careful organization of a complicated activity so that it happens in a successful and effective way.

Business Dictionary

[\[http://www.businessdictionary.com/definition/logistics.html\]](http://www.businessdictionary.com/definition/logistics.html)

Logistics

Definition: Planning, execution, and control of the procurement, movement, and stationing of personnel, material, and other resources to achieve the objectives of a campaign, plan, project, or strategy. It may be defined as the ‘management of inventory in motion and at rest.’

Chambers 21st Century Dictionary

Courier: 1. a guide who travels with and looks after, parties of tourists. 2 a messenger. 15c: French, from Latin currere to run.

Logistics: 1. the organizing of everything needed for any large-scale operation. 2. the control and regulation of the flow of goods, materials, staff, etc. in a business. 3. the art of moving and supplying troops and military equipment.

The Chambers Dictionary 10th Edition

Courier: a messenger, esp. one employed to deliver special or urgent messages or items; a state or diplomatic messenger; an official guide and organizer who travels with tourists; a title of certain newspapers.

Logistics: the art of movement and supply of troops; the handling of the practical detail of any large-scale enterprise or operation.

The Concise Oxford Dictionary
Ninth Edition

Courier: 1 a person employed, usu. by a travel company, to guide and assist a group of tourists. 2 a special messenger. (Middle English via French from Italian corriere, and from Old French coreor, both from Latin currere ‘run’).

Logistics: 1 the organization of moving, lodging, and supplying troops and equipment. 2 the detailed organization and implementation of a plan or operation.

WHARTON’S LAW LEXICON
Fifteenth Edition

Courier: an express messenger of haste; a travelling attendant.

The New Shorter Oxford English Dictionary. Volume 1

Courier: 1 A running messenger, a messenger sent in haste; a special messenger. Also in titles of newspapers. LME. b A messenger for an underground or espionage organization. E20. 2 Mil. A light horseman acting as skirmisher or scout. E16-E17. 3 A person employed on a journey to make the necessary travel arrangements, now esp. to assist and guide a party of tourists. L16.

Logistics: The organization of moving, lodging, and supplying troops and equipment; transf. the detailed organization and implementation of a plan or operation.

29. In a general business sense, logistics is the management of the flow of things between the point of origin and the point of consumption in order to meet requirements of customers or corporations. The resources managed in logistics can include physical items such as food, materials, animals, equipment, and liquids; as well as intangible items, such as time and information. Logistics management is the part of supply chain management that plans, implements and controls the efficient, effective forward, and reverse flow and storage of goods, services, and related information between the point of origin and the point of consumption in order to meet customer's requirements. The main fields of logistics can be broken down such as procurement logistics, distribution logistics, after-sales logistics, disposal logistics, reverse logistics, green logistics, global logistics, domestic logistics, concierge service, Ram logistics, asset control logistics, POS material logistics, emergency logistics, production logistics, construction logistics, capital project logistics and digital logistics. It also refers to the process of managing the flow of operations between the points of collection to the point of delivery. This includes all the mechanisms, warehouses, people and resources that are involved throughout the entire delivery process. Compared to courier services, logistics services are considered to be a safer option when it comes to shipping valuable goods. This is because it can

accommodate the transport of pallets and containers. Packages and items that are placed on a pallet are usually handled mechanically with forklifts. The provider of the logistics services handles processes such as inventory, shipping, packaging, warehousing and security functions for shipments. Whereas the couriers are distinguished from ordinary mail services by features such as speed, security, tracking, signature, specialization and individualization of express services, and swift delivery times, which are optional for most everyday mail services. As a premium service, couriers are usually more expensive than standard mail services, and their use is normally limited to packages where one or more of these features are considered important enough to warrant the cost. Courier services operate on all scales, from within specific towns or cities, to regional, national and global services. In the broader spectrum, the Courier Services involve the collection of small and medium sized parcels and their transfer to the delivery point. They are usually a bit pricier than the standard postal services. This is a standard service for the delivery of portable goods, shipments of smaller dimensions and lighter shipments, documents, and mail. The parcels transported through courier services can be easily handled and lifted by a person given their small dimensions and weight *whereas the Logistics Service is referred to as the general field of transportation services, which includes courier services too.* This also refers to the process of managing the flow of operations between the point of collection to the point of delivery which includes all the mechanisms, warehouses, people and resources that are involved throughout the entire delivery process.

Ref: <https://en.wikipedia.org/wiki/Logistics> and <https://en.wikipedia.org/wiki/Courier>.

30. The terminology Build-operate-transfer (BOT) is a method and technique in vogue to arrange financing for a venture or business enterprise by means of which a private entity attains a concession from public sector to put money into, design, build own and operate a project enumerated in the concession agreement. As a result of long-lasting arrangement, the fees are usually raised during the concession period. In the BOT structure, a private sector is delegated an authority to design and build infrastructure and operate and maintain these facilities for a certain period then transfer the project to the public administration at the end of the concession agreement. Normally, the government is the originator of the infrastructure project and decides if the BOT genre is suitable to live up the need. The concessionaire creates a special purpose vehicle (SPV) which is run through their own financial assistance. A BOT project is normally bring into play to grow a separate asset rather than a whole network.

31. If truth be told, though petitioners are vigorously opposing the arrangement of Public Private Partnership but at one fell swoop, they have shown their interest in the same partnership. In the pre-bid conference, the CEO of the petitioner No. 1 participated and requested for time to present the proposal but according to the learned counsel for the petitioners, he was not allowed to present his proposal. The learned counsel also pointed out some e-mails to show that the petitioners started their working on the RFP and interested to apply. The counsel further alleged that respondent did not want petitioners to participate in the bidding process by making it difficult for them. It was further argued that the obvious reasons of haste by respondent was to create difficulties for the

Pakistani Entrepreneurs and creating the RFP in a manner that it would become difficult for Pakistanis to participate in such a short time. It was further argued that RFP allowed very short period to submit financial as well as technical proposal and for arranging huge finance for a Pakistani investor, the 45 days period time was very short therefore the petitioners have approached this court as their fundamental rights guaranteed under Articles 18, 24 and 25 are being violated. On the contrary, the record reflects that the first advertisement inviting request for proposal was published in the newspaper on 17.02.2018 with the directions that the technical and financial bids as per provisions of RFP should reach on the given address on or before 30th March 2018 however vide another advertisement dated 28.03.2018 extension was allowed in last date for opening of bids up to 15th April 2018 which shows that much reasonable time was allowed to all interested parties to submit their proposals.

32. The learned counsel for the petitioner cited various judicial precedents for instance **Tehsil Nazim TMA, Okara vs. Abbas Ali & others (2010 SCMR 1437)**, **Government of the Punjab, Food Department & another vs. Messrs.' United Sugar Mills Ltd (2008 SCMR 1148)**, **Raja Hamayun Sarfraz Khan & others vs. Noor Muhammad, (2007 SCMR 307)** and **Khyber Tractors (Pvt.) Ltd. vs. Pakistan (PLD 2005 S.C. 842)** in which the apex court laid down the dictum that where law provided for doing of a particular act in a particular manner, then same would be done in such manner. It is elementary principle of law that if a particular thing is required to be done in a particular manner it must be done in that manner, otherwise it should not be done at all. The courts are required to do justice between the parties in accordance

with the provision of law. In our understanding, there is no equivocation to aforesaid well settled proposition of law enunciated in the aforesaid judicial precedents by the apex court. We are also of the same view that the respondents should strictly comply with all relevant provisions of Public Private Partnership Authority Act, 2017 before entering into concession agreement with private partner. In the **Suo Moto Case No. 19 of 2016, 2017 SCMR 683**, the court observed that the Sindh Coal Authority was established to explore, develop, process, mine and utilize coal in the Province of Sindh, however, instead of undertaking what the law mandates it to do, it undertook activities which the Act does not permit and that too without the approval of its Board. Here we would like to say again that arrangement for entering into public private partnership is to be done under the provisions of Public Private Partnership Authority Act, 2017 which generally applicable in all public private ventures hence the case of Sindh Coal Authority is distinguishable. The learned counsel for the petitioners also referred to **PLD 2012 S.C. 132, Muhammad Yasin vs. Federation of Pakistan, PLD 2011 S.C. 997, Watan Party vs. Federation of Pakistan, PLD 2005 S.C. 193, Arshad Mehmood vs. Government of Punjab and Government of Pakistan vs. Zamir Ahmad Khan, PLD 1975 S.C. 667**. The court held that Article 18 and the rights guaranteed by it are concerned with the economic life of the nation and its citizens. Article 18 of the Constitution assures the citizens the right to enter upon any "lawful profession or occupation" and to conduct any lawful trade or business. Reasonable restriction, however, does not mean prohibition or prevention completely. Though this is a well settled legal position but here again it does not attract simply for the reason that the intended partnership under the Public

Private Partnership Authority Act, 2017 does not in any case likely to affect or prejudice the rights of the petitioner to carry out their businesses nor any partial or impartial monopoly is being created. The petitioners shall continue to carry out their trade as they are carrying out right now. Ample time was provided in the advertisement for submitting the request of proposal by all interested parties so the petitioners at this stage cannot maintain that they were not provided fair opportunity to submit their proposal to participate. The learned counsel also referred to the case of **Messrs. Mustafa Impex, Karachi vs. Government of Pakistan, PLD 2016 S.C. 808** in which the apex court held that the Prime Minister and the Federal Ministers, which, in turn, means the cabinet. The cabinet is a composite concept and its components are the Prime Minister and the Federal Ministers. Together they constitute the cabinet. In this case the appellants had challenged withdrawal of exemptions from sales tax on the ground that notification was not issued by Federal Government rather by Additional Secretary who was not competent to do so. We are fortified by this judgment but here under a government policy, a public private partnership is intended under the provisions Public Private Partnership Authority Act, 2017 in which a request for proposal was published. Now the Authority and Board constituted in the aforesaid Act have to perform their duties and responsibilities envisioned under 4 and 8 of the Public Private Partnership Authority Act 2017 to examine and supervise/monitor the matter till finalizing the concession agreement and matter does not solely rests on government policy but pros and cons of the project and partnership agreement are to be threshed out under the aforesaid act. In last, the learned counsel referred to the case of **TCS (Private) Limited vs. Pakistan Post Office**

and another, 2004 MLD 1949, the court while dilating upon Post Office Act held that the duty to convey letters vests exclusively in the Federal Government. This exclusive privilege however, is only confined to letters and not all forms of postal articles. The expression "letter" has not been defined in the Post Office Act and therefore, one has to resort to its ordinary dictionary meaning. In Black's Law Dictionary it has been prescribed as a written communication that is usually enclosed in an envelope, sealed, stamped and delivered. In Chamber's 21st Century Dictionary, it is described as a written or printed message normally sent by post in an envelope. By virtue of section 4 (2) of the Post Office Act, it would include post cards. In our view this judgment is also distinguishable here. As discussed above, the arrangement is for public private partnership and not privatization of Pakistan Post. The privilege or exclusive right with regard to some postal articles would not affect when Pakistan Post department shall itself be a partner in the new company (special purpose vehicle) and work in a joint venture.

33. The learned Additional Attorney General in support of his contention referred to the case of **Air India Ltd. vs. Cochin International Airport Ltd., (2000) 2 Supreme Court Cases 617**. The court held that the award of contract, whether it is by a private party or by a public body or the State is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. But the State, its corporations, instrumentalities and agencies

are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the court can examine the decision making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. The learned Additional Attorney General next referred to the case of **Dr. Akhtar Hassan Khan and others vs. Federation of Pakistan, 2012 SCMR 455**, the apex court observed that the court has to guard against frivolous petitions as it is a matter of common observation that in the garb of public interest litigation, matters are brought before the court which are neither of public importance nor relatable to enforcement of a fundamental right or public duty. The public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or publicity seeking is not lurking. Some persons with vested interest indulge in the pastime of meddling with judicial process either by force of habit or from improper motives. Often they are actuated by a desire to win notoriety or cheap popularity. In last the learned counsel referred to the case of **Watan Party vs. Federation of Pakistan, PLD 2013 S.C. 167**, the apex court observed that we cannot assume the functions of policy making or determining the priorities of various development projects in the country, which are the exclusive domain and functions of the Federal and Provincial Government, as the case may be, who have their own ministries, departments, commissions and consultants, etc. for policy making, determining the priorities of various development projects

and its implementation. In our vision, the above judgments illustrate and expound the well settled theme and proposition vis-à-vis the powers of judicial review of the superior courts in the matter of government policies and the scope of public interest litigation but right now, the key question is whether the public private partnership can be entered into under the provisions of 2017 Act or not? The petitioners have not challenged any provision of Act 2017 but right through contending that Pakistan Post cannot carry out logistics business which is a misconceived notion.

34. It appears from the conduct of the petitioners that since they could not meet the deadline or could not submit their proposals or failed to arrange the finance within the stipulated time thus in order to disturb the entire process they have filed this petition. It is indeed incongruous notion that if the same partnership is entered into with the petitioners then it would be legal and lawful but if it is entered into with any other person, the petitioners will raise hue and cry. On this count alone, this petition seems to be motivated and aroused to protect and safeguard the self-interest of petitioners to avoid healthy competition in the field rather than the public interest. We are fortified by the judgment of apex court rendered in the case of Dr. Akhtar Hassan Khan (supra) that the public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or publicity seeking is not lurking. Some persons with vested interest indulge in the pastime of meddling with judicial process either by force of habit or from improper motives. Often they are actuated by a desire to win notoriety or cheap popularity.

35. The purpose of intended partnership does not reflect in any case that it is designed or calculated to damage or impair the business of other courier service/logistics companies already in field so the apprehension of the petitioners is misconstrued and misconceived that this partnership will upset or prejudice their fundamental right enshrined under Article 18 of the Constitution or create any monopoly. The Pakistan Postal Service Management Board has complete decision making power in matters relevant to all the administrative, operation and finance of the Pakistan Post Office Department including to enter into joint ventures, concession contracts and management contracts for operation or expansion of its services or functions including outsourcing its services. The RFP clearly provides that CPEC, essentially a logistics partnership, will increase the demand for cost effective and reliable supply chain partners by the industry. The CEP (courier, express and parcel) and logistics market is about to explore, Pakistan Post is offering its infrastructure, evolved in well over a century and reach spanning across the country and the world over, to the potential private partner. The argument that under the Post Office Act, the logistic, courier, express and parcel business cannot be undertaken is misconceived as there is no specific bar contained in the Act but as a government policy, the Pakistan Postal Service Management Board initiated the process which is being administered under the provisions of Public Private Partnership Authority Act. Let's assume for a while that under the mandate of Post Office Act such businesses are not included even then there is neither any bar nor any embargo can be imposed that Post Office cannot establish a new company or enter into a partnership to establish new business under the

government policy and the Board so that they may improvise and expand their services through rebranding which is their dire need to meet up the future challenges. This effort in our view is neither amount to violation of Post Office Act nor this will destruct or deface any privilege or exclusivity of the Post Office service under the Post Office Act when they would be the stakeholder and partner in a new company, they will enjoy same privilege. If a rigid interpretation of Section 4 and 5 of the Post Office Act, 1898 is taken into consideration it will otherwise expose the defilement of exclusivity and privilege of Pakistan Post by many private courier service companies.

36. As a result of above discussion, this Constitution petition is dismissed with pending applications. If the respondents are willing to establish a project under public private partnership, it is clarified that concession agreement of the project shall be processed, finalized and executed between the private party and implementing agency strictly in accordance with the provisions of Public Private Partnership Authority Act 2017 and the Authority and Board constituted in the aforesaid Act shall perform their duties and responsibilities with due diligence and transparency.

Karachi:-
Dated.03.8.2018

Judge

Judge