

ORDER SHEET
THE HIGH COURT OF SINDH, KARACHI
 Suit No. 600 of 2023
 along with
 Suit No. 728 of 2023

Dated: _____ Order with signature of Judge(s)

Suit No. 600 of 2022

1. For hearing of CMA No. 6573 of 2023
2. For hearing of CMA No. 7410 of 2023
3. For hearing of CMA No. 7411 of 2023
4. For hearing of CMA No. 9342 of 2023
5. For hearing of CMA No. 9343 of 2023

Suit No. 728 of 2023

1. For hearing of CMA No. 7405 of 2023

Date of Hearing : 15 August 2023, 16 August 2023, 23 August 2023, 28 August 2023, 29 August 2023, 30 August 2023, 4 September 2023 and 5 September 2023

Master Management (Private) Limited : the Plaintiff in Suit No. 600 of 2023 represented by **Mr. Abbas Rasheed Razvi, Advocate** and who was assisted by **Nabeel Ahmed Khan, Advocate** and **Shoaib Ali Khatyan, Advocate** and the Defendant No. 1 in Suit No. 728 of 2023 through **Mr. Zarar Qadir Shoro, Advocate**

Federation of Pakistan : the Defendant No. 1 in Suit No. 600 of 2023 and which was not represented.

Pakistan Civil Aviation Authority : the Defendant No. 1 In Suit No. 600 of 2023 and the Defendant No. 2 in Suit No. 728 of 2023 through **Mr. Khalid Mehmood Siddiqui, Advocate** along with **Muhammad Farooq Afzal Joint Director Legal**

Lakhani Enterprises (Private) Limited : the Defendant No. 3 in Suit No. 600 of 2023 and the Plaintiff in Suit No. 728 of 2023 through **Mr. Haider Waheed, Advocate**

ORDER

MOHAMMAD ABDUR RAHMAN, J. By this order I will be disposing of **four applications** bearing **CMA No. 6573 of 2023** being an application

under Order XXXIX Rule (1) and (2) read with Section 151 of the Code of Civil Procedure, 1908 which has been maintained by Master Management (Private) Limited in Suit No. 600 of 2023; **CMA No. 7410 of 2023** being an application under Order XXXIX Rule 4 read with Section 94 of the Code of Civil Procedure, 1908 which has been maintained by Lakhani Enterprises (Private) Limited in Suit No. 600 of 2023; **CMA No. 7411 of 2023** being an application under Order VII Rule 11 read with all enabling provisions of the Code of Civil Procedure, 1908 which has been maintained by Lakhani Enterprises (Private) Limited in Suit No. 600 of 2023; **CMA No. 9342 of 2023** being an application under Order XXXIX Rule (1) and (2) read with Section 151 of the Code of Civil Procedure, 1908 which has been maintained by Master Management (Private) Limited in Suit No. 600 of 2023; and **one application** bearing **CMA No. 7405 of 2023** being an application under Order XXXIX Rule (1) and (2) read with Sections 94 and 151 of the Code of Civil Procedure, 1908 that has been maintained by the Plaintiff in Suit No. 728 of 2023.

2. The dispute in Suit No. 600 of 2023 and Suit No. 728 of 2023 is regarding a tender that has been issued by the Pakistan Civil Aviation Authority (hereinafter referred to as the "CAA") for the Establishment, Operation and Management of the facility that is available at the Jinnah International Airport, Karachi known as "CIP Lounge facility inside International Departure (DFS Corridor) and Transit Restaurant/ Snack Bar at Level – III/ Mezzanine & Domestic Departure Area" (hereinafter referred to as the "CIP Lounge").

3. It is common ground that Master Management (Private) Limited (hereinafter referred to as "Master Management") had, pursuant to a License Agreement dated 4 April 2018, been awarded by the CAA the right to Establish, Operate and Manage the CIP Lounge. It is also

admitted as between the parties that the term of that License Agreement has expired on 12 March 2023.

4. On account of the imminent expiry of the term of the License Agreement dated 4 April 2018, the CAA issued a publication for fresh bids for the Establishment, Operation and Management of the CIP Lounge in two newspapers on 15 March 2023 on the basis of a “Single Stage Two Envelope Process” in consonance with provisions of Sub-Rule (b) of Rule 36 of the Public Procurement Rules, 2004. That as per this process each participating bidder would be obliged to submit two bids known colloquially as a “Technical Bid” and a “Financial Bid”. In the first stage the CAA would open the envelope of each of the bidders containing the “Technical Bid” and which would be evaluated by the CAA as against a Technical Evaluation Criteria. A bidder who secured at least 80% marks as against that criteria would thereafter qualify for having the second envelope containing their “Financial Bid” opened and where after the “most advantageous bid” would be accepted.

5. The terms of the advertisement dated 15 March 2023 issued by the CAA directed that the bid would be a “**single stage, two envelope bid**” and for which bids were to be submitted before 3 April 2023 at 11.00 am and to be opened at 11.30 am on the same date. As per clause 5 of the advertisement if a bidder was a defaulter of **CAA dues** the bidder would be technically ineligible to participate in the Bid. Bid Documents were issued and sub-clause (b) of Clause 3 reiterated the same prohibition. Pursuant to such an advertisement, while four bid documents were issued by the CAA, only Master Management and Lakhani Enterprises (Private) Limited (hereinafter referred to as “Lakhani Enterprises”) submitted their bids before 11:00 am on 3 April 2023 and which were considered by the CAA.

6. The envelopes containing Master Management and Lakhani Enterprises "Technical Bids" were each opened on 3 April 2023 and against which 100% marks were awarded to both Master Management and Lakhani Enterprises. Despite the award of 100% marks to each of the bidders, surprisingly, the Technical Evaluation Report made certain "comments" as against each of them and which are summarised as under:

- (i) comments were made as against Master Management that they had disputed the payment of Advance Tax under Section 236 A of the Income Tax Ordinance, 2001 and which showed authority as owing by Master Management to the CAA; and,
- (ii) comments were made as against Lakhani Enterprises that their previous experience, as identified in their bid should be verified.

7. Apparently, after the opening of the Technical Bids on 7 April 2023 a letter was written to Lakhani Enterprises on the same date requesting for information to be provided by Lakhani Enterprises so that their experience could be verified. Such a verification was provided by Lakhani Enterprises on 10 April 2023 and an Evaluation Report was issued on 19 April 2023.

8. The clarification requested by the CAA of the Technical Bid of Lakhani Enterprises was the cause of some alarm to Master Management, who instituted Suit No. 600 of 2023 and on 2 May 2023 maintained **CMA No. 6573 of 2023** being an application under Order XXXIX Rule (1) and (2) read with Section 151 of the Code of Civil Procedure, 1908 alleging therein that the clarification of the technical bid was not legally permissible and on which application "ex parte ad-interim" injunctions restraining the

Financial Bids from being opened were passed by this Court and as a consequence of which the Financial Bid has to date not been opened.

9. After the institution of Suit No. 600 of 2023 on 10 May 2023 a letter was issued a letter to the COO/ Airport Manager Jinnah International Airport by the ADI Ds Commercial (South) to the COO Airport Jinnah International Airport expressing the rebuke of the Director General CAA for seeking such a clarification and inquiring as to why the need for a clarification was sought regarding the technical bid of Lakhani Enterprises if 100% marks had been awarded to Lakhani Enterprises at the time when the Technical Evaluation was assessed.

10. As Lakhani Enterprises had not been impleaded as a Defendant in Suit No. 600 of 2023 they maintained an application under Order 1 Rule 10 of the Code of Civil Procedure, 1908 and which was granted on 15 June 2023. They had also maintained **CMA No. 7410 of 2023** being an application under Order XXXIX Rule 4 read with Section 94 of the Code of Civil Procedure, 1908 seeking the modification of the interim order dated 2 May 2023 and have also maintained **CMA No. 7411 of 2023** being an application under Order VII Rule 11 read with “all enabling provisions” of the Code of Civil Procedure, 1908 pleading therein for the rejection of the Plaintiff in Suit No. 600 of 2023 on three grounds which can be summarised as under:

- (i) Master Management had not approached the “Grievance Redressal Committee of the CAA before instituting Suit No. 600 of 2023;
- (ii) Lakhani Enterprises having correctly been evaluated as per the Technical Evaluation Report as technically qualified, no cause of action had accrued in favour of Master Management to institute Suit No. 600 of 2023; and

- (iii) the Plaintiff having been disqualified from participating in the Bid lacked the requisite locus standi to maintain Suit No. 600 of 2023.

11. Thereafter on 13 June 2023, the CAA were “awoken from their slumber” nearly 40 days after the passing of the interim order in Suit No. 600 of 2023 and three months after the expiry of the License Agreement, they sent a Vacation Notice to Master Management citing the expiry of the term of the License Agreement and directed Master Management to vacate the CIP Lounge. The eviction of Master Management from the CIP Lounge was affected by the CAA on the same date.

12. Master Management confronted this situation by maintaining **CMA No. 9342 of 2023** in Suit No. 600 of 2023 seeking for the restoration of their possession of the CIP Lounge.

13. Lakhani Enterprises had conversely maintained Suit No. 728 of 2023 seeking a declaration that Master Management should be disqualified from the tender of the Establishment, Operation and Management of the CIP Lounge on account of the Technical Committee having incorrectly declared Master Management as qualified despite it having financial owing's to the CAA and which should have resulted in Master Management having been disqualified from placing a bid in terms of the advertisements dated 15 March 2023 and also seeking a declaration for the blacklisting of Master Management. Lakhani Enterprises has also maintained **CMA No. 7405 of 2023** being an application under Order XXXIX Rule (1) and (2) read with Sections 94 and 151 of the Code of Civil Procedure, 1908 in Suit No. 728 of 2023 seeking to restrain Master Management from occupying the CIP Lounge and also seeking injunctive relief to restrain Master Management from continuing to

participate in the tender of the Establishment, Operation and Management of the CIP Lounge.

14. As there were cross suits and cross applications in both Suit No. 600 of 2023 and Suit No. 728 of 2023 all the listed applications were heard together. However, as is procedurally warranted, **CMA No. 7411 of 2023**, being an application under Order VII Rule 11 of the Code of Civil Procedure, 1908, that had been filed by Lakhani Enterprises in Suit No. 600 of 2023, necessarily should be decided prior to all the other applications listed in Suit No. 600 of 2023.

15. Mr. Haider Waheed at the outset of the arguments on **CMA No. 7411 of 2023** had initially contended that as Master Management had an alternate efficacious remedy before a “Grievance Redressal Committee” under Rule 48 of the Public Procurement Rules, 2004 and as such this suit was not maintainable and was liable to be rejected. However when pressed by the Court with the proposition that unlike Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 no such bar existed in Section 9 of the Code of Civil Procedure, 1908 he chose to modify his argument and relied on the decision of the Supreme Court of Pakistan reported as **Searle IV Solution (Pvt.) Ltd. and vs. Federation Of Pakistan and Others**¹ wherein while considering the express and implied bar to the jurisdiction of this Court under that provision it was held that:

“ ... 7. In order to appreciate the minutiae of the issue of maintainability of the civil suits filed by the appellants against the decisions of the taxing authorities/Assessing Officer under the special law of the Customs Act, it would be advantageous to reproduce the pivotal provisions viz. section 217(2) of the Customs Act which bars the cognizance of the same by the civil courts under section 9 of the C.P.C. as well as Section 9 (*ibid.*) itself:

"Section 9 of the C.P.C:

9. The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

Section 217(2) of the Customs Act:

¹ 2018 SCMR 1444

Section 217. (2) No suit shall be brought in any civil court to set aside or modify any order passed, any assessment made, any tax levied, any penalty imposed or collection of any tax made under this Act."

There is not an iota of doubt that section 9 of the C.P.C. provides that the civil courts shall have jurisdiction to entertain any suit in relation to any civil matter except when the same is expressly or impliedly barred by the law. A plain reading of section 217(2) reflects that the jurisdiction of the "civil courts" has in fact been barred for any assessment made, any tax levied, any penalty imposed or collection of any tax made "under the Act". The two operative terms to determine such a bar of jurisdiction, therefore, are "civil court" and "under this Act". The gist of the contentions of the counsel for the appellants boils down to just one aspect; that the actions of the statutory authorities being challenged are not made "under the Act" and hence the ouster clause does not apply. This is where the exceptions carved out from the bar to jurisdiction of the civil courts under the various judgments of this Court come into play. The judgments in Punjab Province v. The Federation of Pakistan (supra) Burmah Oil Company's case (supra), Abdul Rauf's case (supra), Jamil Asghar v. The Improvement Trust (supra), Mian Muhammad Latif's case (supra), Hakeem Hafiz Muhammad Ghaus' (supra) Chalna Fibre v. Abdul Jabbaru (supra), Samiullah's case (supra), Azra Masood's case (supra) and Hamid Hussain's case (supra) categorically provide exemptions to such a bar to jurisdiction. An articulate illustration of these exceptions can be found in the judgment of Hakeem Hafiz Muhammad Ghaus' case (supra) in the following words:

"It is also well-settled law that where the jurisdiction of the Civil court to examine the validity of an action or an order of executive authority or a special tribunal is challenged on the ground of ouster of jurisdiction of the Civil court, it must be shown (a) that the authority or the tribunal was validly constituted under the Act; (b) that the order passed or action taken by the authority or the tribunal was not mala fide; (c) that the order passed or action taken was such which could be passed or taken under the law which conferred exclusive jurisdiction on the authority or the tribunal; and (d) that in passing the order or taking the action, the principles of natural justice were not violated"...

8. ... Although the appellants have also relied on the exception where an action/order is tainted with mala fide, no proof or tangible argument in this regard has been raised besides blowing smoke of the allegedly prevalent corruption in the Customs Department. Therefore we conclusively hold that the appellants do not fall within the ambit of the exceptions carved out by the judgments of this court with respect to a bar to the jurisdiction of civil courts. However, this does not mean that a wrong interpretation of the law cannot be corrected thus leaving the aggrieved remedy-less; as correctly highlighted in the impugned judgment, the grievance redressal mechanism in the Customs Act as well as other taxing statutes and the hierarchy of appellate forums created thereunder are remedies available to the person/entity aggrieved by an adverse order of the Assessment Officer/Customs Officer, and only after the exhaustion of the same should the Division Bench of High Court be approached under section 196 of the Customs Act."

On this basis Mr. Haider Waheed contended that while Master Management has made general allegations of mala fide as against the CAA it has neither appended or raised any "proof or tangible argument" in respect of the mala fide and as such there being a "Grievance Redressal Committee" under Rule 48 of the Public Procurement Rules, 2004 and which Master Management could have and did not approach within the seven days of announcement of the Technical Evaluation Report as

mandated by Rule (2) of the Public Procurement Rules, 2004, this Suit clearly cannot be maintainable before this Court. He relied on three decisions of a single judge of this Court reported as **Adamjee Insurance Company Limited vs. The Assistant Collector (P&A) Government of Pakistan**,² **Pakistan Petroleum Limited vs. Pakistan Through Secretary Revenue Division And Ex-Officio Chairman, Federal Board Of Revenue, Islamabad**³, **Syed Zain ul Abideen Versus Federal Board Of Revenue, Islamabad**⁴ and of a learned Single Judge of the Islamabad High Court reported as **Muhammad Azam Khan Niazi vs. General Manager, SNGPL, Islamabad**⁵ in support his contention.

16. Mr. Abbas Rasheed Razvi, Advocate has appeared on behalf of Master Management and alleged that there was mala fide in the workings of the CAA and which had compelled them to institute the Suit No. 600 of 2023. He contended that as Master Management had not received any notice or intimation as to when the Financial Bids would be opened it raised some concern. However, when the Plaintiff were made aware of the correspondence as between CAA and Lakhani Enterprises whereby the CAA sought clarifications from Lakhani Enterprises regarding their expertise and despite which Lakhani Enterprises had been awarded 100% marks against the technical evaluation criteria the same clearly indicated that there was apparent mala fide as between CAA and Lakhani Enterprises. He contended that the exchange of communications as between the CAA and Lakhani Enterprises clearly indicated that the CAA were allowing Lakhani Enterprises an opportunity to improve on their bid and which was specifically prohibited under Rule 31 read with Sub-Rule (b) of Rule 36 of the Public Procurement Rules, 2004 and which was also in violation of Sub-Clause (a) of Clause 1 of the Bid Document. Mr. Abbas Rasheed Razvi further contended that the award of 100% marks to

² 2021 PTD 281

³ 2022 PTD 1742

⁴ PLD 2021 Sindh 130

⁵ 2019 CLC 1998

Lakhani Enterprises as clearly shown in Technical Evaluation Reports without Lakhani properly substantiating their experience clearly shows the bias of the CAA in favour of Lakhani Enterprises. He thereafter proceeded to challenge the evaluation of the Technical Bid of Lakhani Enterprises by arguing that as Lakhani Enterprises had obtained its NTN on 8 July 2020 it was not possible for it produce bank statements for three years and as this was a consideration to be taken into account by CAA in evaluating the Technical Bid it was not possible for Lakhani Enterprises to be awarded 100 % marks in the Technical Evaluation and which he contends was deliberately overlooked by the CAA. Each of these circumstances he contended had been clearly identified in the plaint of Suit No. 600 of 2023, which clearly amounted to mala fide and which allowed Master Management to maintain Suit No. 600 of 2023 before this Court. In this regard he relied on the decision reported as **Mardan Ways Sng Station vs. General Manager SNGPL**⁶ to argue that a bar of the jurisdiction under Section 9 is only applicable if the authority acts within the jurisdiction accorded to it under its enabling statute. He next relied on the decision of this Court reported as **Seamax Marine Services vs. Ministry of Maritime Affairs**⁷ where a learned Single Judge of this Court while considering a matter where a letter of grievance had been filed and despite of which a “Grievance Redressal Committee” had not been constituted by the Procuring Agency had held that in such circumstances the implied bar of Rule 48 of the Public Procurement Rules, 2004 would not be applicable. He finally relied on a judgment reported as **Muhammad Jamil Asghar vs. Improvement Trust**⁸ wherein the Supreme Court of Pakistan had held that a court’s jurisdiction under section 9 of the Code of Civil Procedure, 1908, where mala fide was evident, could not be taken away.

⁶ 2022 SCMR 584

⁷ PLD 2022 Sindh 521

⁸ PLD 1965 SC 698

17. Regarding Master Management's own Technical Evaluation, Mr. Abbas Rasheed Razvi contended that while there is a dispute as to the jurisdiction of the CAA to act as a collecting agent regarding the collection of Advance Tax under 236 A of the Income Tax Ordinance, 2001 such a payment is not an owing to the CAA to disqualify Master Management from participating in the bid and which fact has been recorded in the Master Management in Technical Evaluation Report.

18. On the assumption that Suit No. 600 of 2023 was maintainable all the counsel also presented their arguments on the applications relating to injunctions maintained by Master Management in Suit No. 600 of 2023 bearing **CMA No. 6573 of 2023**, **CMA No. 9342 of 2023** and an application for modification of the ex-parte ad-interim injunction granted on 02 May 2023 maintained by Lakhani Enterprises bearing **CMA No. 7410 of 2023** and on the injunction Application bearing **CMA No. 7405 of 2023** maintained by Lakhani Enterprises in Suit No. 728 of 2023.

19. Mr. Abbas Rasheed Razvi led arguments that Master Management had a prima facie case as on the basis of the clear mala fide as referred to him in the arguments on **CMA No. 7411 of 2023** and on which basis the injunction should clearly be granted. He submitted that if the bidding process is allowed to proceed with the ambiguities and irregularities as clarified by him, Master Management would suffer irreparable loss on account of abject bias of the CAA to Lakhani Enterprises and which will also impact Master Management's goodwill and reputation. He relied on three decision of a learned Single Judges of this Court reported as **Musheer Ahmed Pesh Imam vs. Razia Omer**⁹ and **Durafoam (Pvt.) Ltd. Vs. Vohra Enterprises (Pvt.) Ltd.**¹⁰ and **Port Grand Limited Versus K-Electric Limited**¹¹ and of a division bench judgment of this Court reported as **Al-Tamash Medical Society Versus Dr. Anwar Ye**

⁹ 1991 CLC 678

¹⁰ 2002 CLD 1639

¹¹ 2019 CLC 133

Bin Ju¹² each of which outlines the principles for granting an injunction. He maintained that it has been repeatedly held that statutory power is to be exercised “reasonably, fairly, justly and for the advancement of the purposes of the enactment” and relied on three decisions of the Supreme Court of Pakistan reported as **Muhammad Amin Muhammad Bashir Limited vs. Government of Pakistan Through Secretary Ministry Of Finance, Central Secretariat, Islamabad**,¹³ **Suo Motu Case No.13 Of 2009**¹⁴ and **Asaf Fasihuddin Khan vs. Government Of Pakistan**¹⁵ to support his contention. He concluded his arguments on this issue by stating that in cases of non-transparency and blatant irregularities in procurement process it has been held by this Court in the decision reported as **Shaheen Construction vs. PDOHS and others**¹⁶ and by the Supreme Court of Pakistan in the decision **Federation of Pakistan v.s E.Movers (Pvt) Ltd.**,¹⁷ that where a mis-procurement had occurred the entire procurement process should be carried out *de novo*.

20. Mr. Haider Waheed, addressed his arguments on **CMA No. 6573 of 2023**, **CMA No. 9342 of 2023** and **CMA No. 7410 of 2023** maintained in Suit No. 600 of 2023 and on **CMA No. 7405 of 2023** maintained by Lakhani Enterprises in Suit No. 728 of 2023 has contended that the failure on the part of Master Management to address his grievance to the Grievance Redressal Committee under Rule 48 of the Public Procurement Rules, 2004 was fatal to any claim of Master Management to having a prima facie case in this matter. He contended that under Sub-Rule (1) of Rule 31 of the Public Procurement Rules, 2004, the CAA had ample authority to seek a clarification of the bid and which was exercised within the perimeters of the law. He contended that the grant of injunctive relief would in effect suspend the entire procurement process and hence the

¹² 2019 CLC 1

¹³ 2015 SCMR 630

¹⁴ PLD 2011 SC 619

¹⁵ 2014 SCMR 676

¹⁶ PLD 2012 Sindh 434

¹⁷ 2022 SCMR 1021

balance of convenience cannot lie in favour of Master Management and similarly irreparable loss would be suffered if the injunction was granted as the procurement would be left suspended indefinitely. Mr. Khalid Mehmood Siddiqui who appeared on behalf of the CAA argued that the entire procurement process had been done in consonance with law and that there was no question of any illegality or mala fide on the part of the CAA as has been alleged by Master Management. He relied on a decision of a learned single judge of this court reported as **Jiangsu Dajin Heavy Industry Co. Ltd. vs. Port Qasim Authority (PQA)**¹⁸ wherein it was held that a participant to bid cannot challenge the prerequisites stipulated for qualification and could only maintain a challenge if there was an illegality committed by the procuring agency and a decision of the Supreme Court of Pakistan reported as **Muhammad Shfique Khan Swati vs. Federation of Pakistan through Secretary Ministry of Water and Power, Islamabad and others**¹⁹ wherein when a challenge was made under the cover of “Public Interest Litigation” in a procurement process was rejected in those facts and circumstances.

21. Regarding the restoration of Master Management’s possession of the CIP Lounge, Mr. Abbas Rasheed Razvi had maintained **CMA No. 9342 of 2023** and in respect of which he contended that while the CAA had on 13 June 2023 sealed the CIP Lounge on alleging that Masters Managements possession thereof, after the expiry of the License Agreement dated 04 April 2018 was illegal, it is clear that the Plaintiff had continued his occupation of the CIP Lounge after the expiry of the License Agreement against payments that were being made by them to and received by the CAA including payments for the month of June 2023 and which amount cannot be quantified. Neither Mr. Haider Waheed nor Mr. Khalid Mehmood Siddiqui made any arguments on this application.

¹⁸ 2021 CLC 1931

¹⁹ 2015 SCMR 851

21. I have heard the counsels for Master Management, Lakhani Enterprises and the CAA and have perused the record.

A. CMA No. 7411 of 2023 – APPLICATION UNDER ORDER 7 RULE 11 OF THE CODE OF CIVIL PROCEDURE, 1908

22. This Application has been maintained by Lakhani Enterprises seeking the rejection of the Complaint in Suit No. 600 of 2023 on the ground that there being an alternative remedy available to Master Management under Rule 48 of the Public Procurement Rules, 2004 before a “Grievance Redressal Committee” of the CAA consequentially the jurisdiction of this court is “impliedly” barred under Section 9 of the Code of Civil Procedure, 1908.

23. There are two decisions of the Supreme Court of Pakistan which have clarified the scope of what is an express bar and what is an implied as contained in Section 90 of the Code of Civil Procedure, 1908. Firstly in **Abbassia Cooperative Bank v. Hakeem Hafiz Muhammad Ghaus and 5 others**²⁰ wherein a clarification was made as to how the jurisdiction of a civil court under Section 9 of the Code of Civil Procedure, 1908 would be excluded. It being held that:

“ ... *“It is also well-settled law that where the jurisdiction of the Civil court to examine the validity of an action or an order of executive authority or a special tribunal is challenged on the ground of ouster of jurisdiction of the Civil court, it must be shown (a) that the authority or the tribunal was validly constituted under the Act; (b) that the order passed or action taken by the authority or the tribunal was not mala fide; (c) that the order passed or action taken was such which could be passed or taken under the law which conferred exclusive jurisdiction on the authority or the tribunal; and (d) that in passing the order or taking the action, the principles of natural justice were not violated.”*

As is apparent, if the authority has not been legally constituted or the authority being exercised by it and which are under challenge are “*coram non iudice*” a civil court's jurisdiction to maintain a *lis* against such a cause of action would be maintainable. Similarly if there is an averment made in the complaint of mala fide, the Court would also retain its jurisdiction. Finally

²⁰ PLD 1997 SC 3

if the authority exercised violates the Rules of Natural Justice the *lis* would also be maintainable under Section 9 of the Code of Civil Procedure, 1908. The second decision of the Supreme Court of Pakistan regarding the interpretation of Section 9 of the Code of Civil Procedure, 1908 is **Searle IV Solution (Pvt.) Ltd. and vs. Federation Of Pakistan and Others**²¹ wherein while considering as to what would constitute “ mala fide” it was held that”

“ ... *Although the appellants have also relied on the exception where an action/order is tainted with mala fide, no proof or tangible argument in this regard has been raised besides blowing smoke of the allegedly prevalent corruption in the Customs Department. Therefore we conclusively hold that the appellants do not fall within the ambit of the exceptions carved out by the judgments of this court with respect to a bar to the jurisdiction of civil courts.*”

It is therefore clear that where the Plaintiffs pleadings of mala fide are vague then the Courts jurisdiction under section 9 of the Code of Civil Procedure, 1908 cannot be sustained so as to bring the cause before the Court. To do so, the Plaintiff would be responsible not to make just a bare allegation against the authority of mala fide but rather to expressly make a tangible argument supported by proof.

24. The exceptions mentioned above and their applications applying to both “express” and “implied” bars contained in the law. It is left to consider what would be an express bar and what would be an implied bar. It is clear that an “express” bar would be one of the nature of an “ouster” clause where a statute specifically prohibits a Court from having jurisdiction over the authority. By Contrast, an example of what constitutes an “implied” bar has been dilated on by my learned brother Adnan Iqbal Chaudary, J. in the decision reported as **Syed Zain ul Abideen Versus Federal Board Of Revenue, Islamabad**²² wherein he held that:

²¹ 2018 SCMR 1444

²² PLD 2021 Sindh 130

“ ... 9. Thus, the ratio decidendi of *Searle IV Solution* is that even though an ouster clause in a special statute barring the jurisdiction of a ‘civil court’ did not apply to the High Court of Sindh at Karachi dealing with civil suits, there was nonetheless an ‘implied’ bar to jurisdiction as contemplated under section 9 CPC, arising as a consequence of special law which envisaged exclusive jurisdiction by a special forum, which implied bar could only be circumvented if the plaintiff demonstrated that the case attracted one of the established exceptions to the ouster of jurisdiction highlighted in para 7 above.”

I am in agreement with my learned brothers finding with regard to the finding that unless the cause of action as pleaded in the plaint comes within the exceptions as clarified by the Supreme Court of Pakistan in **Abbassia Cooperative Bank v. Hakeem Hafiz Muhammad Ghaus and 5 others**²³ and **Searle IV Solution (Pvt.) Ltd. and vs. Federation Of Pakistan and Others**²⁴ the provision of a special forum that has been created by the enabling statute to redress the cause would impliedly oust the jurisdiction of a civil court from hearing the matter. That being said I am also of the opinion that while the existence of a special forum would impliedly oust the jurisdiction of a civil court, I would think that such an interpretation would not be exhaustive of what would constitute an implied bar to the institution of a *lis* before a civil court and other circumstances may arise which may also well find themselves to come with the definition of an “implied” bar.

25. I have perused the provisions of the Public Procurement Regulatory Authority Ordinance, 2002 and of the Public Procurement Rules, 2004 and am clear that there are no provisions in either that Ordinance or those Rules where the jurisdiction of this Court has been **expressly** been barred. That being said clearly Master Management on 19 April 2023, when it gained the knowledge of the Technical Assistance Report and had considered there to be improprieties in the procurement process, had available to it, under Rule 48 of the of the Public Procurement Rules, 2004, a remedy before a “Grievance Redressal Committee” of the CAA and which it did not avail within the statutory period of seven days as

²³ PLD 1997 SC 3

²⁴ 2018 SCMR 1444

notified in Sub-Rule (3) of Rule 48 of the Public Procurement Rules, 2004. This would, to my mind, clearly be an “implied” bar preventing this Court from exercising its jurisdiction under Section 9 of the Code of Civil Procedure, 1908. It would therefore remain to be seen as to whether through its pleadings Master Management would have demonstrated “proof or tangible argument” of mala fide on the part of the CAA to allow this court to retain its jurisdiction to entertain this *lis*. The contention of mala fide that has been raised by Master Management is that while conducting the Technical Evaluation, the CAA had granted 100% marks to Lakhani Enterprises while simultaneously seeking confirmation of the veracity of the documentation submitted by Lakhani Enterprises. Rule 31 of the Public Procurement Rules, 2004 states as under:

“ ... 31. Clarification of bids

(1) No bidder shall be allowed to alter or modify his bid after the bids have been opened. However the procuring agency may seek and accept clarifications to the bid that do not change the substance of the bid.

(2) Any request for clarification in the bid, made by the procuring agency shall invariably be in writing. The response to such request shall also be in writing.”

A distinction is made in this rule as between the expression alter or modify. The expression “alter” has been defined to mean:²⁵

“ ... transitive. To make (a person or thing) otherwise or different in some respect; to modify, to change the appearance of.”

The expression “modify” has been defined to mean:²⁶

“ ... transitive. To make partial or minor changes to; to alter (an object) in respect of some of its qualities, now typically so as to improve it.”

With regard to the expression “clarification” the word “clarify” which is the verb of the noun “clarification” has been defined to mean:²⁷

“ ... figurative. To make clear (an obscure subject).”

It would therefore have to be seen as to whether request that was made by the CAA attempted to “make clear” some portion of the bid submitted

²⁵ Oxford English Dictionary Online Edition – www.oed.com

²⁶ *Ibid*

²⁷ *Ibid*

by Lakhani Enterprises or as to whether the attempt was in fact a modification of the bid which permitted Lakhani Enterprises to “improve” their bid. I have perused the letter of 7 April 2023 that was written by the CAA to Lakhani Enterprises and the response dated 10 April 2023 sent by Lakhani Enterprises pertaining to their professional experience. Prima facie while each of their professional experience had been clearly identified and against which marks had been assigned, the CAA sought proof of such professional experience to satisfy itself of the veracity of the professional experience of Lakhani Enterprises and which to my mind does not in any way improve the bid made by Lakhani Enterprises it simply reconfirms the information already provided by under the bid. The need for such clarification on the part of the CAA could well be that it wanted to confirm that the information provided Lakhani Enterprises to it was correct **so as to ensure** that the license being awarded was done to a person of some technical ability and for the benefit of the CAA. The action of the CAA seeking the clarification having been done in conformity with the provisions of Rule 31 of the Public Procurement Rules, 2004 one can barely allege that the request for seeking the clarification was either mala fide to that extent or outside of the jurisdiction of the CAA. I am therefore clear that CAA did not act with mala fide intent or by seeking such a clarification it showed bias in favour of Lakhani Enterprises or that such a query permitted Lakhani Enterprises to improve their bid.

26. While, I am clear that there was no mala fide on the part of the CAA in seeking a clarification of the bid made by Lakhani Enterprises, I am less convinced with other aspects of the Technical Evaluation that had been carried out by the CAA and which to my mind are clearly in excess of its jurisdiction. Clause 2 of the Bid Document clarifies as under:

“ ... Tender Opening Committee will open Technical Offer and technically evaluate each bid put up the recommendation to the COO/Airport Manager, JIAP, Karachi. The bidders have to obtain 80% marks to technically qualify. Technical evaluation shall be conducted in the light of proforma/evaluation form developed on the requirements of Clause

16 (sub-para a to n). The bidder (s) who are not qualified will be informed accordingly and their financial offers will be returned unopened. Financial offers of technically qualified bidders will be opened in the presence of their representatives who may choose to be present within fifteen (15) working days of tender process."

Where a bid is made as "**single stage, two envelope bid**" then clause

(v) of Sub-Rule (b) of Rule 36 of the Public Procurement Rules, 2004

specifies that:

" ... *(v) the procuring agency shall evaluate the technical proposal in a manner prescribed in advance, without reference to the price and reject any proposal which does not conform to the specified requirements;*"

The process as identified in the Bid Document specifies that there will be "Tender Opening Committee" who will open the bid and send its recommendations to the COO/Airport Manager, JIAP, Karachi. The clause is thereafter silent as to who is authorised make the decision as to the Technical Evaluation as clearly no such power has been conferred on either the "Tender Opening Committee" or on the COO/Airport Manager, JIAP, Karachi under that clause or under any other clause of the Bid Document. It must therefore be assumed that the document is ambiguous as to such an authority and in absence of which no person can be considered to have the authority to carry out the Technical Evaluation of the Bid. In addition, it is clarified in the Bid Document that the Financial Bid is to be opened within 15 working days of "tender process". While logically the financial bid should be opened within 15 days of the Technical Evaluation Report being finalised, this clause however specifies that the Financial bid would be opened within 15 working days of "tender process." This to my mind on account of the ambiguity created by the insertion of the expression "tender process" in the clause cannot be considered to specify a precise date and time for the opening of the Financial Bid and which falls foul of clause (vii) of Sub-Rule (b) of Rule 36 of the Public Procurement Rules, 2004 which requires the terms of the Bid to be unambiguous.

27. If the ambiguity in the Bid Document itself does not create enough issues, the Technical Evaluation Report in awarding 100% marks to both

Master Management and to Lakhani Enterprises while simultaneously marking reservations on each of the bids is to my mind absurd and irrational. By way of example in the case of the Lakhani Enterprises clause M of the Technical Evaluation requires documentary proof of the previous experience of the bidder inter alia with preference being given to experience as single entity. Firstly, I cannot understand how in the Technical Evaluation 15 out of 15 marks have been given to Lakhani Enterprises if clarifications were still warranted on their bid. The same irrationality has been pointed out by the CAA in its internal correspondence dated 10 May 2023 and rightly so. Having given such marks assume for a moment that the clarification as sought did not substantiate the submission that had been made by Lakhani Enterprises; could the marks once awarded be subject to a downward revision? Secondly, one of the criteria for marking in terms of the experience of a business was that priority would be given to entities working independently. While, some of the work experience of Lakhani Enterprises was independent it had listed certain projects in its work experience that it was doing in concert with other persons. The Evaluation Criteria makes no mention for the amounts of marks that may or for that matter may not be deducted for the inclusion of such a form of work experience and clearly in its application no downward revision has been made by the Tender Opening Committee for this. Similarly in respect of Master Management if a determination had to be made, that amounts outside of the amounts due in the current month were payable by Master Management to the CAA then clearly no discretion vested with the person making the Technical Evaluation not to disqualify Master Management under sub-clause (b) of Clause 3 of the Bid Document from participating in the Bid and no marks whatsoever should have been awarded to it all. All in all, the application of the Technical Evaluation in respect of the evaluation of Lakhani Enterprises prima facie leads to a conclusion of there either being ambiguities in the Evaluation Criteria and to which to

my mind prima facie indicate that the manner in which the tender had been conducted amounted to a mis-procurement under Rule 29 of the Public Procurement Rules, 2004 and in the case of Master Management prima facie leads to the conclusion of a misapplication of the Evaluation Criteria rendering the Evaluation Process as being in excess of the jurisdiction of the person who had exercised such authority.

28. Having come to the conclusion that both the bidding process and the Technical Evaluation Report have clearly been undertaken in violation of the provisions of the Public Procurement Rules, 2004, I am of the considered opinion that Suit No. 600 of 2023 and for that matter Suit No. 728 of 2023 both having made valid jurisdictional challenges to the Technical Evaluation Report are maintainable before this Court as it clearly falls into the exception laid down by the Supreme Court of Pakistan in the decision reported as in *Abbassia Cooperative Bank v. Hakeem Hafiz Muhammad Ghaus and 5 others*²⁸ and *Searle IV Solution (Pvt.) Ltd. and vs. Federation Of Pakistan and Others*²⁹ and consequentially *CMA No. 7411 of 2023* is dismissed with no order as to costs.

B. CMA NO. 6573 OF 2023, CMA NO. 9342 OF 2023 AND CMA NO. 7410 OF 2023 MAINTAINED IN SUIT NO. 600 OF 2023 AND ON CMA NO. 7405 OF 2023 MAINTAINED BY LAKHANI ENTERPRISES IN SUIT NO. 728 OF 2023

29. For the reasons recorded in the order on CMA No. 7411 of 2023 I am of the opinion that there being an ambiguity in the Evaluation Criteria in the Bid Document in respect of the tender of the Establishment, Operation and Management of the CIP Lounge in respect of the Technical Evaluation Report of Lakhani Enterprises prima facie would lead to a conclusion of there being a mis-procurement under Rule 29 of the Public Procurement Rules, 2004 and in the case of Master Management prima facie leads to the conclusion of there being a misapplication of the

²⁸ PLD 1997 SC 3

²⁹ 2018 SCMR 1444

Evaluation Criteria rendering the Evaluation Process. In the circumstances and as held by this Court in the decision reported as **Shaheen Construction vs. PDOHS and others**³⁰ and by the Supreme Court of Pakistan in the decision reported as **Federation of Pakistan v.s E.Movers (Pvt) Ltd.**,³¹ that where prima facie a mis-procurement had occurred the entire procurement process should be ideally carried out *de novo* and the previous procurement should abate as while the public procurement prima facie being illegal must be enjoined, the public procurement authority should not be prohibited from retendering the procurement afresh. In the circumstances **CMA No. 6573 of 2023** maintained by the Master Management is granted and the tender impugned in Suit No. 600 of 2023 is stayed while **CMA No. 7410 of 2023** maintained by Lakhani Enterprises seeking modification of the interim order dated 2 May 2023 in Suit No 600 of 2023 is dismissed with no order as to costs. However, it is clarified that the injunction granted in CMA No. 6573 of 2023 in Suit No. 600 of 2023 will not preclude the CAA from carrying out a fresh procurement in respect of the tender of the CIP Lounge and it is hoped that while doing so it will take into account the observations made herein above.

30. Master Management has also maintained **CMA No. 9342 of 2023** seeking to be put back into possession of the CIP Lounge from which they state they have been removed illegally. It is clear that the right that was conferred on Master Management was that of a License and not that of a Lease and in fact no where in the pleadings of Suit No. 600 of 2023 or in the affidavit in support of CMA No. 9342 of 2023 has it been contended that such a right is coupled within an interest in the property. That being the case any injunctive relief would be barred in terms of clause (f) of Section 56 of the Specific Relief Act, 1877. Reliance in this regard may be placed on the decision of the Supreme Court of Pakistan reported as **M.A.**

³⁰ PLD 2012 Sindh 434

³¹ 2022 SCMR 1021

Naser vs. Chairman Pakistan Eastern Railways and others.³² There being no right of Master Management to remain in possession of the CIP Lounge after the expiry of the License Agreement dated 4 April 2018, **CMA No. 9342 of 2023** is dismissed, subject to the condition that such an order will not preclude Master Management from retaking possession of the CIP Lounge if it is successful in a subsequent tender issued by the CAA,

31. **CMA No. 7405 OF 2023** had been maintained by Lakhani Enterprises in Suit No. 728 of 2023 seeking two separate injunctions the first to restrain Master Management from occupying the CIP Lounge and also seeking injunctive relief to restrain Master Management from continuing to participate in the tender of the Establishment, Operation and Management of the CIP Lounge. Technically this Application as drafted falls foul of clause (a) of Sub Rule 1 of Rule 74 of the Sindh Chief Court Rules and ordinarily I would have been inclined to dismiss this application or at least insist that one of the prayers may be withdrawn. However, as I have already dismissed **CMA No. 9342 of 2023**, the prayer maintained by Lakhani Enterprises to restrain Master Management from being put back into possession of the CIP Lounge is granted subject to the condition that such an order will not preclude Master Management from retaking possession of the CIP Lounge if it is successful in a subsequent tender issued by the CAA. The second prayer as maintained by the Lakhani Enterprises in **CMA No. 7405 OF 2023** to prevent Master Management from participating the Tender of the Establishment, Operation and Management of the CIP Lounge is dismissed as having become infructuous as that tender has been stayed pursuant to the order passed on CMA No. 6573 of 2023 in Suit No. 600 of 2023.

32. To summarise the impact of the applications as decided:

³² PLD 1965 SC 83

- (i) Suit No. 600 of 2023 is maintainable and is not impliedly barred on account of the availability of an alternative remedy being available in Rule 48 of the Public Procurement Rules, 2004 on account of there being prima facie clear jurisdictional defects in the procurement process and the Evaluation of the Technical Bid rendering the Suit as maintainable;
- (ii) As there were prime clear jurisdictional defects in the procurement process involving the Tender of the Establishment, Operation and Management of the CIP Lounge, that procurement is stayed, with the observation that the grant of the injunction will not preclude the CAA from carrying out a fresh procurement in respect of the tender of the CIP Lounge. Both Master Management and Lakhani Enterprises can participate in any new tender and will be evaluated as against the criteria stipulated in the Bid Document as to their eligibility; and
- (iii) The Possession of Master Management of the CIP Lounge, being in the nature of a License cannot be restored and the possession of which area will be retained by the CAA until the award of a fresh license.

J U D G E

Karachi dated 4 December 2023

ANNOUNCED ON 4 December 2023

BY

SANA AKRAM MINHAS, J.