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ORDER SHEET
IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA

Constt. Petition No.D-551 of 2007

Constt. Petition No.D-289, 1103 of 2010.

Constt. Petition No.D-882, 1203, 1467, 2464, 2550, 2640, 2641, 2643
and 2699 of 2011.

Constt. Petition No.D-01, 123, 124, 605, 1105, 1117, 1236, 1280, 1325,
1384 and 1409 of 2012.

Constt. Petition No.D-518, 745, 771, 1213 and 1299 of 2013.

Constt. Petition No.D-290, 355, 356, 357, 358, 510, 582, 591, 696,
1102, 1328, 1329, 1330, 1331, 1377, 1378 and 1379 of 2014.

Constt. Petition No.D-316, 397, 511, 613, 685, 913, 947, 979, 1076,
1173, 1393, and 1435 of 2015.

Constt. Petition No.D-14, 15, 31, 130, 896, 931, 1243, 1296, 1297,
1298 and 1299 of 2016.

Constt. Petition No.D-12, 136, 137 and 523 of 2017

DATE OF HEARING	ORDER WITH SIGNATURE OF HON'BLE JUDGE
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Present:

Justice Muhammad Junaid Ghaffar

Justice Muhammad Saleem Jessar

For orders on maintainability.

Mr. Ghulam Dastagir A. Shahani, Advocate.

Mr. Habibullah G. Ghouri, Advocate.

Mr. Rashid Mustafa Solangi, Advocate.

Mr. Faiz Mohammad Larik, Advocate.

Mr. Rafique Ahmed K. Abro, Advocate.

Mr. Abdul Rehman A. Bhutto, Advocate.

Mr. Ashfaq Hussain Abro, Advocate.

Mr. Safdar Ali Ghouri, Advocate.

Mr. Fida Hussain Shah, Advocate.

Mr. Imtiaz Ali Bhatti, Advocate.

Mr. Saleem Raza Jakhar, Advocate

Mr. Mazher Ali Bhutto, Advocate.

Mr. Abdul Hamid Bhurgari, Addl. A. G assisted by Mr. Abid Hussain Qadri and Mr. Ameer Ahmed Narejo, State Counsels.

Mr. Mohammad Ashique Dhamraho, advocate for respondents.

Mr. Nisar Ahmed G. Abro, D.A.G.

Date of Hearing: 21.09.2017


Date of Order: 12.10.2017

Muhammad Junaid Ghaffar, J: Through this order all connected petitions are being disposed of as they involve a common question regarding their maintainability.

2. The case of the petitioners is that after performing their part of the contract entered into with respective Departments of the Government, payments are not being made despite completion and execution of work. In some cases part payments have been made, whereas, in some, part payment has been made pursuant to filing of petitions and directions given by this Court. Prior to hearing of these petitions, a learned Division Bench of this Court vide order dated 26.01.2017 passed in the case of Fida Hussain & Others v. Secretary Local Government, Sindh & Others (C.P.No.D-546 of 2014) has already decided the question of maintainability through a very detailed order, whereby, the petition was dismissed as not maintainable. The said order of the learned Division Bench was impugned by the petitioners before the Hon'ble Supreme Court by filing Civil Petitions No.95-K to 98-K of 2017, however, the Hon'ble Supreme Court through order dated 11.07.2017 has been pleased to dismiss these petitions and leave has been refused. When the matter was pending before the Hon'ble Supreme Court, all listed petitions were fixed before the same learned Bench, and these petitions through order dated 22.02.2017 were adjourned *sine-die* pending decision by the Hon'ble Supreme Court in the aforesaid Civil Petitions for leave to appeal. After the order has been passed by the Hon'ble Supreme Court, all these petitions were fixed before us and all learned Counsel appearing on behalf of the petitioners had contended that firstly the facts of that case are somewhat different from the facts of **Fida Hussain case** (Supra) [C.P.No.D546 of 2014]; and secondly, the learned Division Bench while coming to the conclusion through its order dated 26.01.2017 has erred in law by not appreciating various judgments of the Hon'ble Supreme Court, wherein in similar facts, the petitions have been maintained. Therefore, according to all learned Counsel, the order dated 26.01.2017, passed by the earlier Bench is *per in-curium* and, therefore, the matter be referred to the Hon'ble Chief Justice for constituting a larger Bench to decide the

maintainability of these petitions. It is on this point only that we have given an opportunity to all present before us to assist as to whether their contention can be entertained and whether matter can be referred to the Hon'ble Chief Justice for appropriate orders.

3. All learned Counsel present before us have very ably assisted the Court, however, for the sake of brevity their arguments are not recorded individually. It is their case that the Hon'ble Supreme Court while refusing leave to appeal through order dated 11.07.2017, was pleased to observe that the petitioners could not show any work order, execution of work, final bill certificates and completion certificates, therefore, the Civil Petitions were dismissed, whereas, the facts of their case are materially different as they all are in possession of work orders, final bill certificates, completion certificates, which have been annexed with the memo of their petitions; that in various petitions even the respondents have admitted the execution of work; that in cases where the comments have not been filed, it is yet to be ascertained that whether the work has been carried out or not; that these petitions are maintainable because the respondents have failed to discharge their duties in accordance with law; that the learned Division Bench through its order dated 26.01.2017 has not laid down any legal dicta; that there are various Supreme Court judgments which are contrary to the observations of the learned Division Bench; that it is only the non release of the funds by the Government which has been impugned in these petitions, whereas, the facts are not disputed, therefore, no factual controversy is involved; that the respondents being Government officials are bound to perform their duties in accordance with law; that in cases pertaining to the Local Government Departments there are flagrant violations of the Contract Rules framed under the Sindh Local Government Ordinance, hence Constitutional Petitions are maintainable. They have relied upon the following cases:

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1. Muhammad Ashraf Ali v. Muhammad Naseer 1986 SCMR 1096.
 2. Chief Settlt. Commr. V. Mohd. Fazil PLD 1975 Supreme Court 331.
 3. Airport Support Services v. Airport Manager 1998 SCMR 2268.
 4. M.H. Abidi v. State Life Insurance Corpn. 1990 MLD 563.
 5. Mahmood Ali Butt v. Inspector General of Police, Punjab Lahore and 10 others PLD 1997 Supreme Court 823.
 6. Javaid Iqbal v. Pak. Agricultural Storage & Services Corp. NLR 2004 Civil 394.
 7. Hazara (Hill Tract) Improvement Trust v. Qaisara Elahi 2005 SCMR 678.
 8. Habibullah Energy Limited v. WAPDA 2008 YLR 2612.
 9. Muslimabad Cooperative Housing Society Ltd. V. Siddiqa Faiz PLD 2008 Supreme Court 135.
 10. Haji Amin v. Pakistan Trading Corporation (Pvt.) Ltd. PLD 2009 Karachi 112.
 11. Shaman Mal v. Executive Engineer Irrigation and 5 others 2011 MLD 1644.

4. On the other hand, the learned Addl. A. G has opposed the maintainability of all these petitions and has contended that the earlier Division Bench through its order dated 26.01.2017 has given a very reasoned judgment and has already dealt with all the objections raised on behalf of the petitioners and such finding has been arrived at by the learned Division Bench after following the earlier judgment of this Court in the case of **Habib-ur-Rehman Unar and others v. Government of Sindh (PLD 2004 Karachi 728)** and, therefore, no exceptions could be drawn to such findings; that the Hon'ble Supreme Court while refusing leave to appeal through its order dated 11.07.2017 has already upheld the judgment of the earlier Division Bench and the reference to the observations of the Hon'ble Supreme Court as referred to on behalf of the petitioners is not proper appreciation of the same as the Hon'ble Supreme Court, only as an indulgence had given a chance to the petitioners to show their work orders, completion certificates etc. and by no means any inference can be drawn that if these documents are available a petition would be maintainable for contractual enforcement;

that Article 173 of the Constitution of Islamic Republic of Pakistan deals with contracts entered into by the Government, whereas, in all these petitions the contracts have been entered into by Local Government Department and they are not Government within the contemplation of Article 173 and, therefore, petitions are not maintainable; that no writ of *mandamus* can be issued for enforcement for a contract entered into by Government Department; that the proper remedy for the petitioners is to file Civil Suits for recovery and if the respective departments admit their claim then a judgment can always be passed by the Civil Court under Order 12 Rule 6, C.P.C; that a contract, if any, has to be proceeded with the terms of the contract and not otherwise.

5. Learned Counsel for Respondents / Town Municipal Administrators has contended that the claim of the petitioners regarding completion of their works is vehemently denied and is yet to be verified, whereas, in one of the cases the Contractor after completion of a Bus Stand is in fact residing in it, whereas, all the claims of the petitioners are disputed and, therefore, these petitions are not maintainable.

6. We have heard all the learned Counsel as well as learned Addl. A. G and have perused the record.

7. The petition bearing No.D-546 of 2014 was decided by the learned Division Bench through order dated 26.01.2017 and while passing the said order serious note was taken of by the learned Division Bench regarding certain payments made to the petitioners on the directions of the Court and the learned Division Bench was of the view that such orders were obtained by misrepresentation and fraud and, therefore, while exercising its jurisdiction the said orders were also recalled. It would be advantageous to refer to the relevant findings of the learned Division Bench in the said order dated 26.1.2017 which reads as under:

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"4. The question of maintainability of the petition remained unanswered and even without placing on record National Tax Number (NTN) in compliance of office objections, respondent No.3 in the cover of aforesaid consent order made the following payments to the petitioners:

1. Petitioner No.1 has received an amount of Rs.228,000/- & Rs.130,000/- aggregating to Rs.3,58,034/- on 12th July 2016 and 13th October 2016 respectively. Only one payment dated 12.07.2016 was through cheque and on 13.10.2016 receipt of total amount was issued by him.
2. Petitioners No.2, 3 & 4 were paid Rs.100,000/- each on 08.8.2016 towards part payment of their alleged contractual liabilities.

The remaining payment of petitioners No.2, 3 & 4 as claimed in para 4 reproduced above was not disbursed, therefore, on 21.11.2016, the petitioners filed Misc. Appln. No.7604/2016 for contempt of Court and on 30.11.2016 it was ordered to be fixed on 26.01.2017. Today this case is fixed for the following purposes:-

1. For orders on office objection as Flag 'A'.
2. For orders on M.A.No.7603/2016
3. For orders on M.A.No.7604/2016.
4. For Katcha Peshi.

The petitioners have not complied with office objection. The office objection was to file their respective NTN. Even till today he has not filed NTN of the petitioners and without showing NTN, the petitioners have realized money from respondent No.3 as mentioned above. The petitioners' Counsel was directed to satisfy the Court that why the order dated 05.5.2016 obtained in collusion and by misrepresentation should not be recalled since he was on notice by the Court to answer the question of maintainability of the petition. It is pertinent to mention here that on 13.5.2014 Mr. Syed Fida Hussain Shah, advocate was directed to satisfy the Court on the maintainability of petition. Therefore, he cannot claim ignorance of the said order. It is indeed regretted that the Advocate General office as well as the Counsel for respondent No.3 did not contest the petition on 05.5.2016 despite the fact that this Court in a judgment reported as Habib-ur-Rehman Unar and others v. Government of Sindh (PLD 2004 Karachi 728) has already dismissed several petitions of identical nature. It has been very elaborately discussed in the reported judgment that prayer clause (a) reproduced in para 1 above cannot be granted by this Court in exercise of its Constitutional jurisdiction. When confronted with this situation, the learned Counsel has nothing to press his contempt application and has also suggested he does not press the petition.

5. In fact this Court has no jurisdiction to entertain this petition. Therefore the order dated 05.5.2016 was without jurisdiction. The relevant observations from the judgment reported in PLD 2004 Karachi 728 are reproduced below:

"39. The third and last point for consideration is that no other adequate and specific remedy is available and without which there would be a failure of justice. Adequate and specific remedy is provided by filing a suit for recovery of amount, specific performance of contract or damages. In the present Constitutional petitions the petitioners have prayed for the recovery of amounts. By filing such petitions the petitioners have avoided to make the payment of Court Fees, which are usually to be paid for the suit of recovery of amount or damages.

Reliance is placed on a case of Musaffaruddin v. Chief Settlement Commissioner (1968 SCMR 1136).

40. In the above case the High Court had dismissed the petition with a short order on the ground that the writ petition could not be invoked for the enforcement of a contract. Hon'ble Supreme Court of Pakistan observed:

"On hearing the learned Advocate for the petitioner we found ourselves in complete accord with the view adopted by the learned Judges in the High Court that the only appropriate remedy open to the petitioner was to file a civil suit for the specific performance of the contract, if so advised."

41. In the case of Shamshad Ali v. Commissioner 1969 SCMR 122, it has been observed:

"We feel that the writ petition filed by the petitioner was misconceived. At the highest it was a case of breach of agreement for which the remedy did not lie in the writ jurisdiction of the High Court. This petition is dismissed."

42. Thus all the points which are required to be proved for the issuance of order of Mandamus have not been proved to exist, as such, no order of Mandamus can be issued.

43. The main question in these petitions is whether the breach of contract or contractual obligations are enforceable through writ petition, On this point the law is clear and settled as a Bench of 5 Hon'ble Judges of Supreme Court of Pakistan in a case of Momin Motor Co. v. R.T.A Dacca reported in PLD 1962 SC 108 at page 112 has observed as under:

"Learned Counsel then attempted to argue that his client had contractual rights, because he had been made to spend a lot of money on making the road bus-worthy and the understanding was that no other permit-holder would be introduced in this route. The short answer to this contention is that contractual rights, if any, are not enforceable by recourse to writ jurisdiction."

47. Analyzing the above legal position, we are of the considered view that it is a unanimous opinion of the Hon'ble Supreme Courts of Pakistan and India that a petition to enforce the contractual obligations does not lie, therefore, the petitions are not maintainable." (Emphasis provided).

The Hon'ble Division Bench while dismissing the petitions to enforce the contractual obligations as not maintainable has relied on the following Supreme Court pronouncements:

- 1) 1968 SCMR 1136, M. Muzaffar-ud-Din Industries Ltd v. The Chief Settlement and Rehabilitation Commissioner, Lahore and another.
- 2) 1969 SCMR 122, Shamshad Ali Khan v. Commissioner, Lahore etc.
- 3) PLD 1962 SC 108, Messrs Momin Motors Company v. The Regional Transport Authority Dacca and others.

And therefore it has full binding force on this Bench.

6. The inescapable conclusion of the above facts and discussion is that the order dated 05.05.2016 was obtained by fraud and misrepresentation. The order was admittedly without jurisdiction and patently in violation of the judgments of the Hon'ble Supreme Court mentioned above. In these circumstances, the order dated 05.05.2016 is recalled. In recalling the said order we are fortified by the judgments

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reported as Chief Settlement Commissioner, Lahore V. Mohammad. Fazil Khan and others (PLD 1975 SC 331) and Nek Bibi v. Muhammad Tufail and others (1989 MLD 3990). The relevant paragraphs from the judgment of Hon'ble Supreme Court in PLD 1975 SC 331 at page No.339 and Page No.345 are reproduced below:

(Page 339)

"The first question which arises in this connection is whether an order obtained by practicing fraud on the Court, tribunal or authority concerned is a void order or only voidable. We are in respectful agreement with the view expressed by Waheeduddin Ahmed, J., in the case of Ali Iqtidar Shah Dara, that an order obtained by fraud is not void, but only voidable. It remains operative as long as it is not set aside, rescinded, or recalled, by a competent authority in proper proceedings. An order is to be treated as void only when it is made by a Court, tribunal, or other authority, which had no jurisdiction either as regards the subject-matter, the pecuniary value or the territorial limits where the dispute arose. Such an order would amount to "a usurpation of power unwarranted by law", and accordingly it would be a nullity.

(Page 345)

It seems to us that while there are cases in which the power of a Court or tribunal of special or limited jurisdiction to suo motu recall or review an order obtained from it by fraud has been doubted, yet the preponderance of judicial authority is in favour of conceding such a power to every authority, tribunal or Court on the general principle that fraud vitiates the most solemn proceedings, and no party should be allowed to take advantage of his fraud. There can be no rational basis for discriminating between the powers available in this behalf to a Court of general jurisdiction and a Court or tribunal of special or limited jurisdiction, for in either case the effect of fraud is the same, and the duty to undo that effect must lie on the authority on which fraud is practiced. We are, therefore, of the view that even a tribunal of limited or special jurisdiction has the power to suo motu re-call or review an order obtained from it by fraud.

The relevant paragraph of the judgment in 1989 M L D 3990 at page 3994 is as follows:

"The moment it is found that an order has been procured by fraud or misrepresentation, it is within the inherent powers of this Court to set aside the same under section 151 C.P.C. Reference in this respect can be made to Asghar Ali Mollah v. Surabindu Sen and others P L D 1968 Dacca 498 and Kartik Mondal alias Kartick Chandra Mondal v. Sreemati Pagali Dasi and others P L D 1969 Dacca 456. In the former case, the sale of the property by auction was in contravention of the order of the executing Court. The contention was that Korsha Jote right belonging to the respondent, in the High Court, in the plot in question was never ordered to be sold but by means of interpolation in the records of the case, his right and interest in the land was also sold out. The High Court in, the circumstances, held that the Court was quite competent to exercise its inherent power and to set aside the sale if it was satisfied that it was bad by practice of fraud on the Court. In the present case, since injustice has been done to the applicant by preventing her from appearing in the Court at the time of the hearing of the case, therefore, this injustice can be rectified by invoking the provisions of section 151, C.P.C. A Court has got the power of reviewing its own order on proper cause being shown and there are cases in which the Privy Council had allowed execution proceedings to be re-opened in review on the ground that there was no proper representation of the

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party affected. This being the position in law, limitation would not stand in the way of the applicant, if it is proved that the order in question was procured by misrepresentation and by practicing fraud on Court."

7. In view of the above facts and legal position we are left with no option except to direct the beneficiary of the aforesaid order dated 05.05.2016 to return the benefits obtained by them by misrepresentation and patently on the force of an order which ought not have been passed by this Court for want of jurisdiction. Even a consent order passed by a Court of law which has no jurisdiction to entertain the lis is void and nullity. It is by now a settled law that when the Court has no jurisdiction, the parties by consent can not confer jurisdiction on Court. We cannot resist observing that respondent No.3 who was claiming to have complied with the order dated 05.05.2016 was the main person responsible for the order adverse to the interest of all the respondents, therefore, the petitioners who have realized the funds mentioned in para No.4 above pursuant to the order dated 05.05.2016 are directed to deposit the same in this Court within (15) fifteen days and the said amount shall be transferred back to the Treasury. If the order of depositing the amount in Court is not complied with by the petitioners within (15) fifteen days contempt proceedings shall be initiated against them as well as respondent No.3 for obtaining orders by playing fraud and then not complying with orders passed today. In case of non-compliance of this order, pending the possible contempt of Court proceedings the Additional Registrar shall obtain information about the bank accounts in the name of the petitioners by sending NIC number to the State Bank and then their accounts, if any, shall be attached to the extent of money recoverable from them.

8. In view of the above facts and law, this petition is dismissed as not maintainable. The contempt application has become infructuous. The Additional Registrar of this Court is directed to submit report on 10.02.2017 regarding compliance of the above order by the petitioners in Chamber for perusal by us and in case of non-compliance order shall be passed as suggested above."

8. Perusal of the aforesaid order reflects that the learned Division Bench while taking serious notice of the orders earlier passed was pleased to observe that the question of maintainability of these petitions, wherein, the petitioners are seeking release of funds/payments by enforcement of their contractual obligation has already been decided in the case of Habib-ur-Rehman Unar (supra) and while dismissing the petitions, the Court in the said case has elaborately discussed the legal issue regarding maintainability of these petitions. The relevant finding in the case of Habib-ur-Rehman (supra) is at paragraph 39, 40, 41, 42, 43 and 47 of the said judgment which

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have already been reproduced hereinabove and such finding of the learned Division Bench was arrived at after going through the judgments of the Hon'ble Supreme Court in the case reported as *M. Muzaffar-ud-Din Industries Ltd v. The Chief Settlement and Rehabilitation Commissioner, Lahore and another* (1968 SCMR 1136), *Shamshad Ali Khan v. Commissioner Lahore etc* (1969 SCMR 122) and *Messer Momin Motors Company v. The Regional Transport Authority Dacca and others* (PLD 1962 Supreme Court 108). The learned Division Bench by further elaborating the dicta led down in the case of *Habib-ur-Rehman* (supra) has also placed reliance on various other judgments of this Court as well as of the Hon'ble Supreme Court already reproduced hereinabove. In nutshell, in our view, the entire controversy regarding maintainability of these petitions has already been dealt with and decided by the learned Division Bench through its order dated 26.01.2017 and we do not see any other ground raised on behalf of the petitioners so as to compel us to refer the matter to the Hon'ble Chief Justice for constitution of a larger Bench. None of the Counsel for the petitioners have been able to make out a case that the said judgment of the learned Division Bench dated 26.01.2017 is *per-incurium*. As already observed the learned Division Bench has not only relied upon earlier judgment of a Division Bench of this Court in the case of *Habib-ur-Rehman* (supra) but so also on various judgments of other Division Benches as well as of the Hon'ble Supreme Court. In these circumstances, it cannot be held that the said judgment is *per-incurium*. Insofar as the case law relied upon by the Counsel for the petitioners is concerned, the same are distinguishable on facts, which is being dealt with hereunder.

9. Insofar as the case of *Chief Settlement Commissioner, Lahore* (supra) is concerned, we have not been able to understand as to how reliance has been placed on this case, as the material facts are

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entirely different, whereas on the contrary it has been held by the Hon'ble Supreme Court that no discretionary relief can be granted while exercising jurisdiction under Article 199 of the Constitution to help any petitioner not to repay the ill-gotten gains. Much stress has been laid on the case of *Airport Support Services* (supra) by all learned Counsel for the petitioners in support of their contention that the method and the motive of a decision of entering into a contract by a public functionary was open to judicial review on the touchstone of reasonableness, relevance, fair-play, natural justice, equality and non-discrimination. To this, perhaps there cannot be any cavil; however, in this case the issue was entirely different inasmuch as the Civil Aviation Authority, which itself is an authority created by the statute, had entered into an agreement of grant of license to a party on certain terms and conditions, who thereafter had challenged the cancellation of the license agreement. The facts in the present petitions are materially different; hence the ratio of this case is also not applicable. Again the case of *Muhammad Ashraf Ali* (supra) has distinct facts, as it involved a lease agreement which also contained arbitration and so also the funds of the Cooperative Development Fund, therefore, this case is also of no help. The case of *Hazara (Hill Tract) Improvement Trust* (supra) is again having entirely different facts, as in that case a sale deed was entered into by the parties for carrying out certain construction work within a stipulated time and upon failure the deed was cancelled, against which the proceedings were initiated and, therefore, this case is also has no relevance. The case of *Javid Iqbal* (supra) is a single Judge decision of the Lahore High Court and, therefore, in our considered view cannot be cited as a binding precedent on this Division Bench. Insofar as the case of *Mahmood Ali Butt* (supra) is concerned, again it had facts which are not at all relevant, as the prayer in the petition before the Lahore High Court was for directions to register a criminal case against respondents for committing certain offences and after service of notice it transpired

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that parties had some dispute regarding payments to each other and on the directions of the learned single Judge of the Lahore High Court they were directed to take oath on Holy Quran and thereafter the matter reached the Hon'ble Supreme Court. These facts are entirely irrelevant insofar as the present controversy is concerned. The case of *Muslimabad Cooperative Housing Society Ltd.* (supra) is only confined to the issue of alternate remedy and its availability and has got nothing to do with the present facts pertaining to the enforcement of contractual obligations. Insofar as the case of *Haji Amin* (supra) is concerned, in that case the petitioner had participated in a tender and had deposited tender money and upon his unsuccessful bid he was seeking refund of the tender money, which was being refused and accordingly the petition was entertained. We are fully in agreement with the findings of the learned Division Bench of this Court, however, it may be appreciated that it never involved enforcement of a contractual obligation. Again in the case of *M.H. Abidi* (supra) the issue was regarding violation and non-compliance of Rule 39-A of the Insurance Rules, 1958, framed under Section 114 of the Insurance Act, 1938 and, therefore, this decision also cannot be cited as a precedent for enforcement of a contractual obligation.

10. On the contrary, there is a series of judgments of this Court as well as of the Hon'ble Supreme Court wherein it has been consistently held that contractual obligations cannot be enforced through writ jurisdiction. Reliance in this regard may be placed on the case of *SF Engineering Services v. Federation of Pakistan* (PLD 2014 Sindh 378), wherein the relevant finding is as under:-

"8. The petitioners wants implementation of contractual obligation for which the civil court is the most appropriate, adequate and efficacious remedy. In case of contractual obligation for resolution of disputed questions of facts the proper way to decide the controversy is to record evidence so that the rights and claims of the parties may be determined. The petitioner has approached this court for the recovery of dues and also asserted in the memo of petition that constitution petition is an adequate remedy under the law which is totally a misconceived notion. It is often seen which has become a common fashion and

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practice that to cure and remedy all the problems/sufferings, litigants use to file constitutional petitions, no matter, the petition is maintainable or not or equally efficacious and alternate remedy is already provided under the law. It is clear from the letter of the law that claim arising from contractual obligations require inquiry and evidence and it can only be decided by civil court which is most adequate and efficacious remedy. The writ jurisdiction cannot be exploited as sole solution for ventilating all miseries, distresses and plights. This extraordinary jurisdiction should not be misused to waste precious time of the court in fruitless exercise particularly when a huge backlog of pending cases are in docket almost in all courts. It is time and again seen that due to wrong approach to the wrong forum on misconception of law or wrong selection of forum, the actual remedy provided under the law becomes time barred and in that situation, the petition has to first cross the barrier of limitation for seeking relief and leaving himself at the mercy of the court to consider the sufficient cause for condonation of delay and then embark upon the merits of the case.

9. Learned Counsel for the petitioner referred to various dictums in support of his case which are mentioned above but all are found distinguishable. In the case of *Anjumian-e-Ahmadiya, Sargodha*, the subject matter was construction of mosque along with boundary wall, in which it was claimed that the construction was being raised on the basis of plan submitted to the municipality. In the case of *Hyderi Ship Breaking Industries Ltd.*, the common question was involved in 130 petitions, which were in fact related to the grant of import license and the payment of Octroi. In the case of *Muslimabad Cooperative Housing Society Ltd.*, the order of Deputy Registrar Cooperative Societies was challenged and it was set aside on the ground that it was beyond the scope of Section 54-A or Section 56 of the Cooperative Societies Act. In the case of *Haji Amin* the petitioner participated in the tender proceedings for the supply of rice. A tender was issued in favour of another party so the petitioner only claimed the refund of bid amount which was deposited along with bid documents. In the case of *Messrs Ahmed Clinic*, the dispute was related to the grant of an amenity plot, which was subsequently cancelled under Martial Law Order 34. The next quoted case is *Province of Sindh v. Messrs Azad Wine Shop and others*, which was related to the levy and recovery of vend fee, assessment fee and surcharge on assessment fee as without lawful authority. The last case of *Pakistan Defence Officers Housing Authority, Karachi* is also related to the allotment of residential plot and its cancellation due to non-deposit of development charges. In none of the cited cases the controversy of like nature was involved so the same are not attracted to the facts and circumstances of the present case, which is merely in the form of civil suit for recovery for which a futile attempt has been made to convert the same into a constitutional petition, which is not conceivable."

11. In the case of *Manzoor Ahmed Bhayo v. Government of Sindh (2014 M L D 1130)*, a learned Division Bench of this Court has been pleased to hold as under:-

....."Further, it is evident that petitioners claim relates to the contractual obligation, thus, whether the petitioner completed the work in accordance with terms and conditions of the contract or not, such controversy cannot be resolved in this writ petition as recording of evidence is necessary to resolve the same. The unpaid amount for the work carried out by the petitioner, can be proved, through evidence in ordinary Court, having jurisdiction, because if the amount was

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ascertained and was admitted by the respondent, in that eventuality this Court could exercise its discretion in favour of the petitioner. Not only the claim of the petitioner but also the work, claimed to be done by petition is disputed, therefore, such controversy is factual and can't be resolved in the writ jurisdiction. Moreover, the grievance of petitioner pertains to the contractual obligation, and it is settled proposition of law that contractual obligations cannot be enforced through the writ petition."

12. In the instant matter, the facts as averred by the petitioner have been seriously disputed by the respondents, whereas, the relief being sought by the petitioner in the instant matter is primarily with regard to enforcement of Contractual Obligation between the parties, which cannot be enforced or granted while exercising discretionary jurisdiction of this Court under Article 199 of the Constitution of Pakistan, for which the appropriate remedy lies through a Suit before a Civil Court of competent jurisdiction. The Hon'ble Supreme Court in the case of *Pakcom Limited & Others Vs. Federation of Pakistan & Others (PLD 2011 SC 44)*, while examining the issue of enforcement of contractual obligations has been pleased to hold that;

47. It seems proper here at this juncture to mention that the contractual rights, commitments, undertakings and obligations have to be enforced through courts of ordinary jurisdiction which should not be interfered with by the High Court while exercising its Constitutional jurisdiction especially in those matters arising out of contractual obligations. (Millat Tractors E.T. v. Govt. of Pak (PLD 1992 Lah.68) Ahmad Hassan v. Pakistan Machine Tools Factory (1990 CLC 2007), Sufi Muhammad Ramzan v. Secretary, Local Government and Rural Development Department, Punjab, Lahore (PLD 1987 Lah. 262), Pakistan Mineral Development Corporation Ltd v. Pak. WAPDA (PLD 1986 Quetta 181). In such like eventualities the normal remedy to law being a suit for enforcement of contractual rights and obligations would be availed instead of invocation of Article 199 of the Constitution merely for the purpose of enforcing contractual obligations. The said view finds support from the dictum laid down in the following authorities:-

Ahmad Hassan v. Pakistan Machine Tools Factory (1990 CLC 2007), Lutfonnessa Ibrahim v. Province of East Pak. (PLD 1969 Dacca 779), Mohd.Din and Sons v. Province of West Pak. (PLD 1969 Lahore 823), Muzaffar-ud-Din v. Chief Settlement Commissioner (1968 SCMR 1136), Miajan Ali v. Province of E.Pak (22 DLR 235), Momin Motor Co v. R.T.A.Dacca (PLD 1962 SC 108), Chandpur Mills Ltd. V. District Magistrate Tippera (PLD 1958 SC 267), The State of Pakistan v. Mehrajuddin (PLD 1959 SC 147), Raghavendra Singh v. State of Vindhya Pradesh (AIR 1952 Vindh Pra.13).


48. It hardly needs any elaboration that violation of a contract or

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Failure to abide by the terms and conditions mentioned therein or to honor obligations arising out of an agreement cannot be decided in exercise of Constitutional jurisdiction and such controversies should be resolved by approaching the appropriate forums provided by law. *Abdul Rahim v. Town Committee* (1985 CLC 2805), *Haji Noor Din v. C.C.I and E* (NLR 1978 Civ. Lah. 1114), *Ashraf Ali v Abdul Awal* (PLD 1968 Dacca 962), *A.F.M. Abdul Fateh v. Province of East Pak* (PLD 1966 Dacca 178). "The Superior Courts should not involve themselves into investigations of disputed question of fact which necessitate taking of evidence. This can more appropriately be done in the ordinary civil procedure for litigation by a suit. This extraordinary jurisdiction is intended primarily, for providing an expeditious remedy in a case where the illegality of the impugned action of an executive or other authority can be established without any elaborate enquiry into complicated or disputed facts. Controverted questions of fact, adjudication on which is possible only after obtaining all types of evidence in power and possession of parties can be determined only by courts having plenary jurisdiction in matter and on such ground constitutional petition was incompetent."

13. Similarly in the case of *Nizamuddin and another Vs. Civil Aviation Authority and 2 others* (1999 SCMR 467), the Hon'ble Supreme Court has deprecated the enforcement of contractual obligations by filing Constitutional petitions and has been pleased to observe as follows;


The argument advanced by the learned Counsel for the appellants that as the latest trend of superior Courts in our country and also elsewhere is to enlarge the scope of judicial review, therefore, availability of alternate remedy or matter involving contractual obligation should not pose hurdle in exercise of power of judicial review under Article 199, is too wide and sweeping to be adopted in every case. It is axiomatic principle of law that every case is to be adjudged on its own facts, circumstances and merits. If in a particular case both the parties admit the factual aspect which give rise to the dispute and the Court feels that the matter is of such an urgent nature that the very remedy would get frustrated, if the aggrieved party is directed to seek redress through alternative remedy available under the law, then in that case it would be proper for the Court to entertain the writ petition. Similarly if through alternative remedy an action /order of a lower authority is to be impugned before a higher authority at whose behest the action is taken or order is passed then that cannot be termed as an adequate and efficacious remedy so as to justify refusal of exercise of judicial review. If in every contractual matter giving rise to enforcement of contractual obligation or a dispute which can be redressed through other remedy available under the law, Writ petitions are entertained, then this would defeat that very purpose of law and which competent Courts are established and vested with jurisdiction under the law.

 14. In view of hereinabove facts and discussion, we are of the considered view that as per the dicta laid down by the Hon'ble Supreme Court in the case of *Multiline Associates v. Ardeshir Cowasjee* (1995 SCMR 362), a decision of the earlier Division Bench of this Court on the

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same point is binding on this Division Bench and it is only if we could have come to a contrary, view then perhaps the matter could have been referred to the Hon'ble Chief Justice for constitution of a larger Bench. In our view, no such case is made out on behalf of the petitioners. Accordingly in the given facts in our view no writ is maintainable for seeking directions of payment through enforcement of a contractual obligation, wherein, even otherwise, there is serous objection regarding execution and completion of work, and therefore, by following the earlier judgment of this Court dated 26.01.2017 in the case of Fida Hussain & Others v. Secretary Local Government, Sindh & Others all these petitions stands dismissed as not being maintainable.

Dated: 12.10.2017


JUDGE
Sindh


JUDGE
12.10.17