

**HON'BLE THE ACTING CHIEF JUSTICE RAMESH RANGANATHAN
AND
THE HON'BLE SRI JUSTICE A.SHANKAR NARAYANA**

**Writ Appeal No.1080 of 2016
And
Writ Petition No.27840 of 2016**

COMMON JUDGMENT: (per Hon'ble the Acting Chief Justice Sri Ramesh Ranganathan)

The Appeal, under Clause 15 of the Letters Patent, is preferred against the order passed by the Learned Single Judge in W.P.M.P.No.34491 of 2016 in W.P.No.27840 of 2016 dated 22.08.2016, and the order dated 26.09.2016 passed in W.P.No.27840 of 2016, as a result of which all further proceedings, pursuant to the tender notification issued by the 2nd respondent dated 23.04.2016, was stayed. The parties shall, hereinafter, be referred to as they are arrayed in the Writ Petition.

In the order under appeal, the Learned Single Judge recorded that, *prima-facie*, the selection of the 3rd respondent as a consultant for the 2nd respondent was in violation of Note 2 of Clause 7.4 of the request for proposal issued on 22.04.2016, which prohibited a professional, proposed by a consultant, from being a part of another smart city team, and directed disqualification of the consultancy formed on that ground. The Learned Single Judge was of the, *prima facie*, view that, since the 4th respondent was admitted to be a professional engaged by the 3rd respondent not only for the smart city project of Kakinada but by another consultant in respect of the Indore Smart City project, as could be seen from Ex.P-5 furnished by the 4th respondent, all further proceedings, pursuant to the tender notification, should be stayed.

Sri Vedula Venkata Ramana, Learned Senior Counsel appearing on behalf of the 2nd respondent, would submit that, in

terms of Note 2 to Clause 7.4, a consultant, who has submitted his bid for two or more smart city projects and has engaged the very same professional as part of the team for both the projects, is liable for disqualification; Note 2 is an enabling clause, and confers power on the 2nd respondent to disqualify the consultant on this ground; the Learned Single Judge erred in holding that Note 2 to clause 7.4 prohibited a professional from being part of the team for more than one smart city project; and the interim direction granted by the Learned Single Judge would result in a time bound project being inordinately delayed.

On the other hand Sri C.Raghu, Learned Counsel appearing on behalf of the petitioner, would submit that the 2nd respondent cannot file an appeal under Clause 15 of the Letters Patent against an *ex parte* ad-interim order; their remedy is only to file a petition to vacate the interim order; in fact, the 2nd respondent has filed a petition to vacate the interim order; it is only because the 4th respondent was engaged as a professional by the 3rd respondent did they secure more marks than the petitioner; the marks allotted for a team leader, (which the 3rd respondent declared the 4th respondent to be), is 13; as against the total 85.64 marks awarded to the 3rd respondent as the technical score, the petitioner was awarded 76.29 marks; but for the 3rd respondent having engaged the services of the 4th respondent, the petitioner would have secured a higher technical score than them; as against the financial bid submitted by the 3rd respondent for Rs.28.56 crores, the petitioner had submitted their financial bid for only Rs.19.52 crores i.e. Rs.9.04 crores less than the financial bid submitted by the 3rd respondent; accepting the bid of the petitioner would result

in the 2nd respondent saving a sum in excess of Rs.9.00 crores; as the C.V. of the 4th respondent has been used by the 3rd respondent only for the contract to be awarded to them, the 3rd respondent ought to have been disqualified; and it is only because the 2nd respondent failed to disqualify the 3rd respondent, were the petitioner constrained to invoke the jurisdiction of this Court.

On the question of maintainability of an appeal, under Clause 15 of the Letters Patent, it is relevant to note that, in **Bharat Cooking Coal Limited v. Dev PL(JV), Dhanbad**¹, the challenge before the Division Bench of the Jharkhand High Court was to an interim order passed by the Learned Single Judge granting status quo. On an objection being raised to the maintainability of the appeal, the Division Bench of the Jharkhand High Court, relying on the judgment of the Supreme Court in **Midnapore Peoples Co-op. Bank Limited v. Chunilal Nanda**², held that it is only against routine orders or orders which may cause some inconvenience or some prejudice to a party, but which do not finally determine the rights and obligations of the parties, that a Letters Patent Appeal is not maintainable; and the interlocutory order under appeal, which caused gross injustice to a party, which deprived him of a valuable right, should be treated as a judgment within the meaning of the Letters Patent.

In **Union of India v. Government of Tamilnadu**³, the question which arose for consideration before the Division bench of the Madras High Court was whether an appeal, under Clause 15 of the Letters Patent, would lie against an interim order of injunction

¹ 2014 Indlaw JHKD 294

² (2006) 5 SCC 399

³ 2013 Indlaw MAD 832

passed by the learned Single Judge. Relying on the judgment of the Supreme Court in **Shah Babulal Khimji v. Jayaben D.Kania**⁴, the Division bench of Madras High Court observed:

“.....In reply, the learned Advocate General submitted that the policy decision taken by the Central Government can be challenged if it is in violation of the provisions of the Constitution, statutory enactment and against public interest or does not subserve the public interest. He further submitted that under the dual pricing policy, there is no restriction imposed on any of the bulk consumers to get high speed diesel from the retail outlets operated by the petro dealers, and the effect of the impugned order passed by the learned single Judge is only to provide a single place for the supply of high speed diesel required for operating the buses. According to the learned Advocate General, if the impugned order had not been passed, the buses of the State Transport Undertakings would have to go to the retail outlets for getting their tanks filled up, for which the State would have paid only concessional rate payable to high speed diesel, as there is no such prohibition in the policy. Thus, neither the Union of India nor the oil marketing companies are suffering any losses on account of the interim injunction granted by the learned single Judge. **He further submitted that the interim injunction was granted only till 12th April, 2013, and before the learned single Judge, learned standing counsel appearing for the Union of India did not raise any such plea, as has been raised in the present appeal. It is always open to the Union of India to move an application for vacating the exparte order of interim injunction passed by the learned single Judge, and all the pleas raised herein by the appellant shall be considered by the learned single Judge at the time of passing final orders on the application filed for grant of interim relief or finally deciding the main writ petition.** He further submitted that it is the usual practice of this Court not to assign any reasons while granting interim relief by passing an order of interim injunction at the initial stage, which practice has been followed by the learned single Judge in this case also. According to him, after exchange of affidavits, this Court considers all the pleas raised by the respective parties while passing order on the miscellaneous application, and therefore, the impugned order passed by the learned single Judge does not call for any interference.

Mr.M.Ravindran, learned senior counsel appearing for the Oil Marketing Companies, submitted that the learned single Judge ought not to have granted an order of temporary injunction where a policy decision is under challenge. The effect of grant of temporary injunction has a cascading effect and the oil marketing companies are put to loss of approximately Rs.424 crores daily, as other bulk consumers have also approached the other High Courts for grant of interim injunction. He has relied upon a decision of the Hon’ble Supreme Court in *Bhavesh D.Parish vs. Union of India* reported in 2000 (5) SCC 471.

In the present case, the interim order passed by the learned single Judge, though does not finally decide a issue, but materially and directly affects the appellant, as the Oil Marketing Companies, which supply diesel to the first respondent herein, would be required to supply diesel at the rate at which they are supplying to the retail consumers thereby causing daily loss to the Oil Marketing Companies

⁴ AIR 1981 SC 1786

running into several crores of rupees, and thus burdening the appellant in grant of subsidy. The view, which we are taking, is in lines with the principles laid down by the Hon'ble Supreme Court in Shah Babulal Khimji vs. Jayaben D.Kania and another (supra) (which has been followed by the Hon'ble Supreme Court in the case of Midnapore Peoples' Coop. Bank Ltd., (supra), wherein the Hon'ble Supreme Court, while considering the scope of Clause 15 of the Letters Patent had held that every interlocutory order cannot be regarded as a judgment, but only those orders would be judgments, which decide matters of moment or affect vital and valuable rights of the parties and which work serious injustice to the party concerned.

Thus, the appeal preferred under Clause 15 of the Letters Patent by the appellant is maintainable....." (emphasis supplied)

The law laid down in the aforesaid judgments, of the Jharkhand and Madras High Courts, is that, even where the interim order passed by the learned Single Judge does not finally decide an issue, but materially and directly affects the appellant, it can be regarded as a judgment under Clause 15 of the Letters Patent as it affects the vital and valuable rights of the parties and causes serious injustice to them. The order under appeal, whereby all further proceedings pursuant to the tender notification has been stayed, would undoubtedly cause substantial prejudice to the appellant as it has resulted in the tender process coming to a grinding halt, and may thereby inordinately delay implementation of the time bound Kakinada smart city project.

In **Raunaq International Ltd. v. I.V.R. Construction Ltd.**⁵, the Supreme Court held:-

"....It is common experience that considerable time is spent by the authorities concerned before a final decision is taken regarding the execution of a public project. This is the appropriate time when all aspects and all objections should be considered. It is only when valid objections are not taken into account or ignored that the court may intervene. Even so, the Court should be moved at the earliest possible opportunity. Belated petitions should not be entertained.

The same considerations must weigh with the court when interim orders are passed in such petitions. **The party at whose instance interim orders are obtained has to be made accountable for the consequences of the interim**

⁵ AIR 1999 SC 393

order. The interim order could delay the project, jettison finely worked financial arrangements and escalate costs. Hence the petitioner asking for interim orders, in appropriate cases should be asked to provide security for any increase in cost as a result of such delay, or any damages suffered by the opposite party in consequence of an interim order. Otherwise public detriment may outweigh public benefit in granting such interim orders. Stay order or injunction order, if issued, must be moulded to provide for restitution.....” (emphasis supplied).

As held, by the Supreme Court, in **Raunaq International Ltd.**⁵, any delay in adjudicating disputes, relating to the tender process, would adversely affect larger public interest. We see no reason, therefore, to refuse to examine the appeal on its merits, or to non-suit the appellant on this ground.

In **Raunaq International Ltd.**⁵ the Supreme Court also observed that when a Writ Petition is filed in the High Court challenging the award of a contract by a public authority or the State, the Court must be satisfied that there is some element of public interest involved in entertaining such a petition; a mere difference in the price offered by two tenderers may or may not be decisive in deciding whether any public interest is involved in intervening in a commercial transaction; by Court intervention, the proposed project may be considerably delayed thus escalating the cost for more than any saving which the Court would ultimately effect in public money by deciding the dispute in favour of one tenderer or the other; therefore, unless the Court is satisfied that there is a substantial amount of public interest, or the transaction is entered into *mala fide*, the Court should not intervene under Article 226 in disputes between two rival tenderers; and, where the decision has been taken *bona fide*, and a choice has been exercised on legitimate considerations and not arbitrarily, there is no reason why the Court should entertain a petition under Article 226 of the Constitution of India.

We shall examine the rival contentions on merits bearing the aforesaid factors in mind.

Clause 7.4 relates to team composition and qualification requirements. Note 2 of Clause 7.4 reads thus:

“The Consultant may bid for more than one Smart City, but if the Consultant is bidding for more than one Smart City simultaneously, shall propose separate team for each Smart City. If at any time it is found by the Client that professional proposed is also part of another Smart City Team then the Client may disqualify the Consultancy firm.”

The obligation cast, by Note 2 to Clause 7.4, on the consultant is to propose separate teams for each smart city, if he simultaneously bids for more than one smart city project. It is not even the petitioner's case that the 3rd respondent had simultaneously submitted a bid for more than one smart city project, or that the 3rd respondent, who had submitted his bid for the Kakinada smart city project with the 4th respondent as the team leader, had also submitted a bid for the Indore smart city project with the 4th respondent either as a team leader or as a member of the team. The only allegation made against them is that the 4th respondent, who is their team leader as referred to in the bid submitted by them to the 2nd respondent, was also a member of the team for the bid submitted by M/s.Eptisa Servicios De Ingenieria S.L. for the Indore smart city project. While the 4th respondent has asserted that he was never completely associated with M/s.Eptisa Servicios De Ingenieria S.L. in the Indore smart city project, and he is now working full time for the 3rd respondent, we shall proceed on the premise that the 4th respondent was a member of the team of M/s.Eptisa Servicios De Ingenieria S.L, for the bid submitted by them for the Indore smart city project, bearing in mind that the obligation cast, by Note 2 of Clause 7.4, is on the Consultant.

Sri C.Raghu, Learned Counsel appearing for the petitioner, would contend that the first limb of Note 2 of Clause 7.4 must be read separately from the second limb as they are different sentences separated by a 'full stop'. While it is difficult to read Note-2 in such a manner, even if we were to read the second limb of Note 2 to Clause 7.4 separately from the first limb, it merely stipulates that, if it is found by the client (2nd respondent) at any time that the professional proposed (4th respondent) is also part of another smart city project, the Client (2nd respondent) may then disqualify the Consultancy firm (i.e the 3rd respondent). Even if the 4th respondent is presumed to be a part of the smart city team of M/s.Eptisa Servicios De Ingenieria S.L which was awarded the Indore smart city project, the second limb of Note 2 to Clause 7.4 only enables the 2nd respondent to disqualify the 3rd respondent. The use of the word 'may', in Note 2 to Clause 7.4, indicates that it is only an enabling clause, and does not mandate that the 2nd respondent should disqualify the 3rd respondent if it is found that the 4th respondent is part of the smart city team of the successful bidder for the Indore smart city project. The second limb of Note 2 to Clause 7.4, in effect, confers a discretion on the 2nd respondent to disqualify the Consultant (3rd respondent) if it is found, at any time, that the proposed professional (4th respondent) is a part of another smart city project. This Court, in proceedings under Article 226 of the Constitution of India, would not, ordinarily, substitute its views for that of the 2nd respondent or itself exercise the discretion, which the tender conditions confer on the 2nd respondent, instead of asking them to do so.

We are satisfied that, since the fact that the 4th respondent was allegedly a member of the team of M/s.Eptisa Servicios De Ingenieria S.L which was awarded the Indore smart city project, admittedly came to light after the bids were opened, the 2nd respondent should consider these facts, and take a decision whether it should exercise the power, conferred by Note 2 to Clause 7.4, to disqualify the 3rd respondent, more so as the difference in the financial bids, submitted by the petitioner and the 3rd respondent, is more than Rs.9.00 crores.

The tender evaluation committee, constituted by the 2nd respondent, shall be apprised of these facts, and shall thereafter take a decision on whether or not the 3rd respondent should be disqualified. While we do not propose to convert the re-evaluation process into a judicial or quasi-judicial proceedings and direct the tender evaluation committee to give a personal hearing to the tenderers, it is but appropriate that any information, which any of the parties to these Writ proceedings seek to place before the tender evaluation committee, shall be taken into consideration by the committee before taking a decision. Any of parties to these Writ proceedings may, if they so choose, place information in this regard before the tender evaluation committee within one week from today and any such information made available by them, within the time stipulated hereinabove, shall be taken into consideration by the tender evaluation committee in arriving at a decision on whether or not the 3rd respondent should be disqualified. The decision taken by the tender evaluation committee shall be communicated by the 2nd respondent to the petitioner, the 3rd and the 4th respondents. It is open to the 2nd

respondent, thereafter, to proceed and finalise the bids in accordance with law. The order under appeal is modified accordingly.

Sri C.Raghu, Learned Counsel for the petitioner, would submit that, as nothing further survives for adjudication before the Learned Single Judge, the Writ Petition itself may be disposed of in terms of this order.

Both the Writ Appeal and the Writ Petition are, accordingly, disposed of. The miscellaneous petitions pending, if any, shall also stand disposed of. No costs.



RAMESH RANGANATHAN, ACJ

A.SHANKAR NARAYANA, J

Date:27.10.2016
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