

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of Order 11.04.2019

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+ W.P.(C) 12673/2018 & CM Nos.49250-51/2018
FUGRO SURVEY (INDIA) PRIVATE LIMITED Petitioner
Through : Mr. Rajeev K. Panday,
Mr.Rajeev M. Roy and Mr. P.
Srinivasan, Advs.

versus

ENGINEERS INDIA LIMITED AND ORS. Respondents
Through : Mr. Anil Kaushik and
Mr.Abhishek Mishra, Advocate
for respondent No.1.
Mr. Chitranshul A. Sinha and
Mr. Ahmad Ibrahim, Advocate
for respondent No. 2.
Mr. Aditya Verma and
Mr.Shrey Patnaik, Advocate for
respondent No. 4.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE PRATEEK JALAN

S. RAVINDRA BHAT, J.

1. The petitioner (hereafter “FUGRO”) challenges the award of contract to the fourth respondent Coastal Marine Construction and Engineering Ltd (hereafter called “CMCE”) for Marine Geophysical Survey, Marine Geotechnical Investigation and Marine Survey for CRZ MAP & Intake-Outfall facility for CBR project (hereafter “the contract”) of the second respondent (hereafter “CPCL”)

2. The facts in brief leading to filing the present petition are that on 20 April 2018 a global notice was issued by the first respondent (hereafter "EIL") for invitation for bids (IFB) for the contract, a

project of CPCL, a subsidiary of Indian Oil Corporation Ltd – a public sector undertaking of the Central Government (referred to as “IOCL”). The bidding document stated that CPCL intended to prepare Detailed Feasibility Report (DFR) for their proposed 9MMTPACauvery basin refinery (CBR) project at Nagapattinam, Tamil Nadu and for conducting DFR, the first respondent (EIL) was appointed to provide bidding consultancy service to CPCL. As part of the DFR studies EIL (the Engineer in-charge for the project) desired to engage an external agency for the contract, a state of the art work. In connection with the Invitation for Bids (IFB), EIL invited e-Bid(s) under single three tier bid system, for the entire scope covered under the Bidding Document.

3. Some relevant clauses of the Tender Document are reproduced below:-

“3.4 GENERAL

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3.4.3 The bidders who are on Holiday/Negative list of Owner/EIL during the process of evaluation of the bids, the offers of such bidders shall not be considered for bid opening/evaluation/Award.

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Clause 3.5.4

3.5.4 AUTHENTICATION OF DOCUMENTS

All documents submitted by bidders in support of meeting the BQC & MSE certificate shall be accepted based on certification by CEO or CFO or Company Secretary or any member of the Board of

Directors in case of limited companies (Private/Public Limited).

*CEO/CFO/Company Secretary or any member of the Board of Directors can either sign all the pages of the documents or submit a certificate signed by them, listing out all the BQC documents/MSE documents submitted in the bid along with basic details, duly referenced along with **Annexure-B**.*

However, in case of Proprietorship/Partnership firms, the authentication by notary public on all pages of the documents shall only be acceptable.

Bidder to note that the digitally signed electronic copies of BQC documents submitted in NIC portal on or before the cut-off date and time of submission shall only be considered as the basis for further evaluation. However, clarifications, confirmations of bidder's offer during bid evaluation can be sought. Bidder to note that no new reference BQC document after submission of bid shall be considered, until such experience are listed in the past experience list submitted along with the e-bid.

*If the above supportive documents are not in English language, then the English translation copy of the same shall also be furnished duly certified by (i) **Local Chamber of Commerce** or (ii) **Indian Embassy in their country** or (iii) **their Embassy in India** or (iv) **any translator in India recognized/authorized by their Embassy.***

Clause 3.5.10

“3.5.10 Bidder shall submit Self Certificate confirming that they are not on suspension/banning list of or black listed by any other Central Government Department/Central Public Sector on due date of submission of bid. In case this

information is not provided or provided falsely, their bid shall be rejected.”

Instructions to Bidders (ITB)

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3.2 A bidder who is on Holiday/Negative list of EIL/Owner on due date of submission of bid/during the process of evaluation of the bids, the offers of such bidders shall not be considered for bid opening/evaluation/award.

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4. In response to the global notice issued by EIL, for the project in question, FUGRO submitted its bid. Along with the bid documents FUGRO also submitted a Certificate in terms of Clause-3.5.10 confirming that it was not on suspension/ banning list of (or black listed by) any other Central Government Department/Central Public Sector on the date of submission of bid. FUGRO had also bid for another tender (Tender No. SERPL/BBS/TS/2018-19/010,) issued by IOCL (hereafter called “previous IOCL” tender) for which CMCE had too had submitted its bid. However, the bid submitted by CMCE was rejected as it was found to be on ‘Holiday List’ and hence not ‘techno-commercially qualified’. The tender was awarded to the FUGRO. The petitioner, FUGRO that even for the contract, CMCE was disqualified by virtue of the fact that IOCL kept it on the “Holiday List”. IOCL is a Public Sector undertaking and CPCL is its group company.

5. The petitioner, FUGRO complains that CMCE could not have been declared the successful bidder (L-1) as it was plainly ineligible. It argues that CMCE had clearly either not submitted a certificate in terms of clause 3.5.10 or had submitted a false certificate: both of which are sufficient grounds for rejection of its bid.

6. It is argued that in the circumstances, FUGRO caused a legal notice (dated 06.10.2018) to be issued to EIL, with a copy marked to CPCL pointing out the fact that the successful L-1 bidder, (CMCE) had been placed in the holiday list of IOCL and therefore, was disqualified and its bid ought to have been rejected. By the notice the Petitioner called upon EIL and CPCL to verify the self-certificate submitted by CMCE in terms of Clause 3.5.10 and not toward the contract to it as it was a disqualified bidder. It is argued that even after passage of considerable time the Petitioner did not receive any reply to the legal notice and no action was been taken by either EIL or CPCL in this regard.

7. Counsel for the petitioner Mr. Rajeev K. Panday relies upon the status update document uploaded in the portal of the IOCL, the principal agency in the previous IOCL tender in which CMCE's bid was rejected on the ground of its ineligibility. The petitioner argues that when the IOCL on its website published and uploaded in respect of another bid (technical services in respect of oil pipeline contract, i.e the previous contract), it became aware for the first time that the CMCE was placed in the holiday list. It immediately wrote to EIL to verify that in fact there was a violation of Clause 3.5.10 of the NIT

and if CMCE had submitted self-certification which was incorrect and false.

8. Learned counsel also relies upon its legal notice dated 06.10.2018 and states that in this notice, the EIL was informed categorically that CMCE's bid should not be considered for opening/evaluation/award. It is urged that despite these protests, the EIL went ahead and awarded the contract to CMCE in gross contravention and violation of Article 14 of the Constitution of India.

9. The EIL filed a response in the form of an affidavit dated 18.03.2018. In between hearings, it had disclosed on 27.11.2018 that CMCE had been awarded the contract on 20.09.2018. The court had therefore, expressly directed that the contract would be made subject to the final outcome of the proceedings. Learned counsel for the EIL submitted that while the petitioner in fact had e-mailed at the earliest with respect to the suspected ineligibility of CMCE, the latter was asked to clarify specifically on this aspect. CMCE's e-mails- dated 20.07.2018 and 23.07.2018: are relied on by EIL -to clarify that according to it, there was no black-listing order of Central Government or other department or PSU. Furthermore it was stated that CMCE's Terminal Management Division was black-listed by IOCL on 15.11.2017 for a work, scope of which was different from the tender (for the contract) issued by the EIL in the present case. The CMCE's communication listed out the detailed chronology for issuance of bids which led to the culmination of a "Holiday List" order of IOCL and also disclosed that the said order was challenged as

illegal before this court. A copy of that communication has been produced by the EIL along with its counter affidavit.

10. The copy of the black-listing order in question (issued by the IOCL on 15.11.2017) was enclosed. It, *inter alia*, reads as follows :

“It is submitted that considering the failures under the Contract No.25103990 dated 18.5.2017, vide letter no. PWVDR/17005 dated 6.10.2017, a show cause notice was issued by IOCL to COMACOE, providing it with an opportunity to show cause in writing, supported by all documents and documentary evidence within 15 days, as to why COMACOE should not be placed on holiday list on following grounds:

- 1. Failure to commence work at job site in accordance with the time prescribed in this behalf in the progress schedule;*
- 2. Failure to carry out the works or any of items to meet the Progress Schedule,*
- 3. Failure to deploy complete marine spread as per contractual specifications even within mutually agreed extended timeline;*
- 4. Failure to execute the works or any of items in accordance with the Contract.*
- 5. Disobedience of any order to instruction of the Engineer-in-Charge and/or Site Engineer.*

All failures had been duly brought out by IOCL in the termination letter and the same was enclosed with the show cause notice to enable COMACOE to respond to the show cause notice effectively.

COMACOE vide e-mail dated 19.10.2017, replied to the IOCL's notice, which was followed by its letter Ref. No.CM/IOCL-HO/2017/SR/024 dated 19.10.2017, which

was a covering letter enclosing the hard copy of same e-mail as referred to hereinabove. The said letter was received by IOCL on 04.11.2017. The reply so given has been duly reviewed and has been duly taken into consideration for arriving at appropriate decision in respect of holiday listing.

In its reply to the show cause notice, COMACOE has referred to certain letters and documents. The letters and documents referred have been examined so as to assess the merits of the response in the context of holiday listing of COMACOE. While referred letters No. CM/IOCL-HO/2017/SR/010 dated 27.06.2017, CM/IOCLHO/2017/SR/014 dated 10.07.2017, CM/IOCL-HO/2017/SR/016 dated 12.07.2017, CM/IOCL-HO/2017/SR/015 dated 11.07.2017, CM/IOCL-HO/2017/SR/018 dated 11.07.2017, CM/IOCL-HO/2017/SR/019 dated 14.07.2017, CM/IOCLHO/2017/WW/016 dated 14.07.2017 were issued before the date of the termination letter, the same have been duly considered while taking the decision of termination and have been not only taken into account under the termination letter but issues raised therein also have been specifically responded to by IOCL vide letters no. PWVDMR/17005 dated 4.7.2017, PWVDMR/17005 dated 12.7.2017 and PWVOMR/17005/01 dated 12.7.2017. Similarly, letter No. CM/IOCL-HO/2017/SR/021 dated 01.08.2017 has been duly responded to by IOCL vide its letter no PWVDMR/17005 dated 8.8.2017. A generic reliance has been placed on all other correspondences emails and DPRs sent to IOCL. It is submitted that the same have already been duly considered by IOCL and accounted for in the termination letter by IOCL. Hence, as regards the documentary evidence relied upon, it is observed that no additional justification other than what has transpired and documented till the termination of the contract has been raised by COMACOE and the communications so referred have already been considered and duly

accounted for in IOCL's termination letter read with IOCL's letter no. PWVDMR/17005 dated 8.8.2017.

Further, COMACOE in its reply to the show cause notice has taken a plea that it has complied with entire obligations under the contract and the termination is illegal. Similar plea was taken by COMACOE in its letter no. CM/IOCL-HO/2017/SR/021 dated 01.08.2017. IOCL had duly replied to the same vide its letter No. PWVDMR/17005 dated 8.8.2017. It is reiterated that the termination of contract is very much in terms of the contract and all details have been enumerated in termination letter dated 20.7.2017. Hence, the same is valid and IOCL is within its contractual rights in not only getting the work done at risk & cost of COMACOE but also claim other contractual claims from it. In light of the same, COMACOE's contention that the termination is wrongful and the consequences of such termination are on IOCL's account is incorrect and contrary to the contract. Hence, considering the same, it has been inferred that no evidence or plea has been submitted or taken by COMACOE, substantiating not to take action in the form of holiday listing of COMACOE.

In view of the aforesaid and after considering the allegations made in the show cause notice, the reply to the show cause notice and documentary evidence furnished by COMACOE, it has been decided that M/s Coastal Marine Construction & Engineering Limited be placed on Holiday list and debarred from entering into any contracts with Indian Oil Corporation Ltd. for a period of 3 years effective from the date hereof."

11. The EIL's counsel argued that according to its decision, the black-listing order of 15.11.2017 issued by the IOCL did not extend to any of its subsidiaries and that since it was challenged before this court; the matter was *sub-judice*. Accordingly, after evaluation of bids and taking into account time and economic constraints and the project

and the fact that the issue of black-listing is sub-judice before a court, it was found that out of the probable five bidders, only two bidders had participated and of the other three, none appeared to have the relevant equipment. The CMCE's strength was that its price bid was lower by 10.5% of the pre-filled cost estimate of `10,62,15,880/- for the works whereas the petitioner i.e. Fugro's bid was more than 41.48% of the pre-filled estimate cost.

12. The EIL also refers to an order of the learned Single Judge dated 22.05.2018 in W.P.(C)No.5525/2018 (*Costal Marine Construction and Engineering Ltd. v. IOCL &Ors.*) where the court had permitted CMCE to participate in a tender issued by the Hindustan Petroleum Corporation Ltd. (HPCL) on 04.05.2018. It is submitted that on 01.10.2018, CMCE was permitted to participate in bidding invited by all entities except IOCL. A copy of that order has been produced; it reads *inter alia* as follows :

"In view of the above, this court considers it apposite to stay the impugned order. However, till the present petition is decided, IOCL cannot be compelled to permit the petitioner to participate in any of its contracts. Mr. Vadiyanathan, states that the petitioner would not participate in any tender or contract floated by IOCL till further orders. The petitioner is bound down to the said settlement. Subject to the above, the impugned order and the order dated 15.11.2017 blacklisting the petitioner are stayed till the next date of hearing."

13. Furthermore, Mr. Kaushik, learned counsel for the EIL relied upon the final judgment of this court dated 15.01.2019, by which the

order of 15.11.2017 issued by the IOCL was set aside/quashed. The operative portion of that order reads as follows :

“76. In the present case, this Court is unable to sustain the impugned orders blacklisting the petitioner, as the said orders have been passed without reference to the underlying object, that is, to disbar people who were found to be undesirable for entering into contracts. In the present case, the action has been taken only on account of a dispute regarding performance of contractual obligations. In the given facts, it is apparent that there is a bona fide dispute raised by the petitioner and there is no material to indicate that IOCL had found the petitioner's conduct so reprehensible that it was undesirable for IOCL to deal further with the petitioner. Although, the Appellate Authority has made observations to the aforesaid effect, in the context of the importance of the contract in question, however, that was not the ground mentioned in the show cause notice or the ground on which the impugned order dated 15.11.2017 was passed.

77. This Court also finds that the action of blacklisting is wholly disproportionate and unreasonable in the given facts, as it is apparent that the petitioner had made efforts to perform its Contract and its contention that it was not in breach of the Contract, is bona fide and not insubstantial.

78. In view of the above, the impugned orders are set aside. The parties are left to bear their own costs.”

14. During the course of hearing, the EIL also produced the Minutes of Meeting by which the work was awarded, which *inter alia* reads as follows:

“Minutes of the 545th Meeting of the Committee of Functional Directors of Engineers India Limited held on Wednesday, the 19th September, 2018 at 5.30 p.m. at the Registered office of the Company at E.I. House, 1, Bhikaji Cama Place, New Delhi-110 066.

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Item No.2. Award of Marine Geophysical Survey, Marine Geotechnical Investigations and Marine Survey for CRZ Map & Intake-Outfall Facility.

Shri Vineet Agarwal, ED(SCM-2) informed that the meeting has been scheduled at shorter notice and the approval from all the members of the Committee was sought for convening the meeting at Shorter Notice and placing the agenda at shorter period as per the statutory requirements. The Committee took note of the same. Thereafter, he gave a brief background of the agenda and informed that EIL has been awarded the job for preparation of DFR for CPCL's CBR Project (Job No.145). EIL has to carryout Marine Geophysical Survey, Marine Geotechnical Investigations and Marine Survey for CRZ Map & Intake-Outfall Facility through an agency and survey report shall form part of DFR. The urgency of completing the services for DFR has been repeatedly expressed by CPCL. In order to engage an agency for survey work, enquiry was floated on Global Competitive Basis on 20.04.2018 and final extended bid due date was 07.06.2018. Bids from the following bidders were received and taken up for evaluation.

- (a) *M/s. Coastal Marine Construction and Engineering Ltd., Thane, Mumbai (COMCE)*

(b) *M/s. Fugro Survey (India) Pvt. Ltd., Mumbai.*

He further informed that Bids were Techno-Commercially evaluated and COMCE was found to be L1 bidder. Based on a communication received from M/s. Fugro Survey (India) Pvt. Ltd., EIL sought a re-confirmation from the COMCE regarding self certification that they are not on suspension/banning list or black listed by any other CPSE. In response, COMCE informed that they are blacklisted by IOCL but they have challenged this order of IOCL, in Hon'ble Delhi High Court. COMCE informed that the scope of work in which they have dispute with IOCL pertains to O&M contract, which was handled by a separate business vertical of COMCE. Further, the scope of the said O&M had no linkage with geographical, oceanographic, EIA or geotechnical investigation scope, which essentially are the services to be provided in the CPCL's CBR project for which they have quoted now. He further informed that even if the declaration would have been made by bidder upfront in the bid, the recommendation would have remained the same because as per procedure there is no rejection criteria based upon bidder's declarations. He further, informed that refloating of the tender at this stage may impact EIL's contract with CPCL as per details contained in the agenda note. Keeping in view the time available to complete the job, limited number of bidders in this field, price difference between L1 & L2 bidders, to complete EIL job in time, and no impact of declaration on the final recommendation, it was proposed to award the job to COMCE.

On a query from CFD, it was clarified that the aspect of no effect on the evaluation of Bidder's offer based upon bidder's declaration is not

specifically indicated in the Bidding Document though the same provision is reflected in the Procurement procedures. It was deliberated that in case such aspect as per procedure is spelt out clearly in the bidding document, Bidders may not hide any fact of being on negative list of other clients. The committee also advised Director (Commercial) to issue an advisory to ensure this provision in all future tenders while taking up in parallel with vigilance on the need of such a clause when no cognizance to the same is warranted.”

Analysis & Conclusions

15. It is well settled: nay axiomatic, that judicial review in matters concerning award of public contract through tenders, is circumspect and intervention, an exception. It is established that judicial review is available only if any of the quartet of conditions (illegality, *mala fides*, procedural irregularity-including plain contravention of tender conditions, and patent unreasonableness, i.e. the decision is so arbitrary that no reasonable individual placed in that situation, with similar facts, could ever arrived at it) is fulfilled. One of them, undoubtedly is if one of the *essential tender conditions- concerning eligibility* is not fulfilled. A caveat is added, that in case of ambiguity, the public agency’s interpretation would be deferred to by the courts. (Ref. *Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Ltd. and Ors.* (2016) 16 SCC 818).

16. The Supreme Court, in *Bakshi Security and Personnel Services Pvt. Ltd. vs. Devkishan Computed Pvt. Ltd. &Ors.* 2016 (8) SCC 446, stated as follows:

“15. The law is settled that an essential condition of a tender has to be strictly complied with. In Poddar Steel Corpn. v. Ganesh Engineering Works (1991) 3 SCC 273, this Court held as under:

The requirements in a tender notice can be classified into two categories--those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case the authority issuing the tender may be required to enforce them rigidly. In the other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases.... [para 6]

16. Similarly in B.S.N. Joshi and Sons Ltd. v. Nair Coal Services Ltd. (2006) 11 SCC 548, this Court held as under:

- ...(i) if there are essential conditions, the same must be adhered to;*
- (ii) if there is no power of general relaxation, ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully;*
- (iii) if, however, a deviation is made in relation to all the parties in regard to any of such conditions, ordinarily again a power of relaxation may be held to be existing;*
- (iv) the parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation*

to compliance with another part of tender contract, particularly when the was also not in a position to comply with all the conditions of tender fully, unless the court otherwise finds relaxation of a condition which being essential in nature could not be relaxed and thus the same was wholly illegal and without jurisdiction;

- (v) *when a decision is taken by the appropriate authority upon due consideration of the tender document submitted by all the tenderers on their own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with; ... [para 66]*”

17. Clause 3.4.3 clearly states that bidders “*who are on Holiday/Negative list of Owner/EIL during the process of evaluation of the bids, the offers of such bidders shall not be considered for bid opening/evaluation/Award.*” Clause 3.2 of the ITB, similarly instructs that a bidder “*who is on Holiday/Negative list of EIL/Owner on due date of submission of bid/during the process of evaluation of the bids, the offers of such bidders shall not be considered for bid opening/evaluation/award.*” These two stipulations clearly envision that the blacklisting or “holiday list” decision should be of either the EIL or the owner (i.e. CPCL). However, the requirement of self-certification is broader (Clause 3.5.10): it envisions that the bidder should confirm that it has not been on “*suspension/banning list of or black listed by any other Central Government Department/Central*

Public Sector on due date of submission of bid. In case this information is not provided or provided falsely, their bid shall be rejected.” The terms of this stipulation are plain and unambiguous: at the time of furnishing the bid, the party (in this case CMCE) should not be in the “holiday list” or suspension list (or have been) blacklisted by any other Central Government Department/Central Public Sector undertaking.

18. That CMCE was placed on the holiday list, and “*debarred from entering into any contracts with Indian Oil Corporation Ltd. for a period of 3 years effective from the date hereof...*” is apparent from IOCL’s order. In the facts of this case, the petitioner was justified in complaining that CMCE’s bid could not be considered. There is nothing on record to show that CMCE disclosed that it had been placed in the holiday list, when it submitted its bid. The petitioner complained and asked EIL to inquire into this aspect and take appropriate action. CMCE’s e-mails- dated 20.07.2018 and 23.07.2018 sought to clarify that according to it, there was no black-listing order of Central Government or other department or PSU. However, that there was a debarring/blacklisting order cannot be denied; clearly, the disclosure requirement in Clause 3.5.10 had not been complied with. No attempt was made by EIL to draw its own conclusions, based on the clear mandate of that provision. Furthermore, EIL went ahead and awarded the contract on 20 September 2018. The petitioner was in the dark, and issued a legal notice on 6 October 2018.

19. EIL's defence is that the matter (with regard to the legality of CMCE's blacklisting) was sub-judice. Even here, the court notices that the first categorical order which suggests that CMCE could submit bids was made by a learned single judge, on 1 October, 2018. The final order, however, quashing the blacklisting order, on the merits, was made on 15.1.2019. There was no indication however that these coming events could have been anticipated; EIL mercifully, does not say that it had some clairvoyance in that regard.

20. The result of the discussion is that in normal circumstances, given the categorical nature of the bid criteria, CMCE's tender could not have been accepted. However, that finding cannot, in the peculiar circumstances of this case, be dispositive of the present petition. EIL could not have been prescient about what would happen later, when it did award the contract, on 20 September, 2018. Nevertheless, as events transpired, the blacklisting order did not survive consideration. Furthermore, irrespective of the violation, there does not appear to have been any mala-fides. The overzealousness displayed by EIL's officials appears to be on account of two factors, i.e. that the contract had to be completed within four months, and the constraint that it was left evaluating only two bids, one of which (CMCE) had offered to complete the task well below the pre-estimate cost. These factors themselves could not have justified the award, given CMCE's status as a blacklisted firm, *on the date it submitted its bid*. However, since the blacklisting order was subsequently quashed- and also that the

contract has been since completed- it would not be appropriate to quash EIL's decision to award the contract.

21. For the foregoing reasons, the court is of the opinion that relief cannot be granted; however, in the peculiar circumstances of this case, EIL shall bear the costs of these proceedings, quantified at ₹1,50,000/- to be paid to the petitioner in two weeks. Subject to this direction, the writ petition is dismissed.

**S. RAVINDRA BHAT
(JUDGE)**

**PRATEEK JALAN
(JUDGE)**

APRIL 11, 2019

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