APHC010565982024

IN THE HIGH COURT OF ANDHRA PRADESH
AT AMARAVATI

Bench Sr.Nos:- L.M-1, 89 & 90 [3446]

WRIT APPEAL NO: 1034 of 2024
ALONG WITH
WRIT APPEAL Nos.1028, 1029 of 2024

<u>WRIT APPEAL NO: 1034 of 2024</u>

East Coast Railway and others ...Appellants

Vs.

KPC Projects Ltd ...Respondent

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Advocate for Appellants:	Mr. B. Adinarayana Rao, Ld. Senior Counsel appearing vice Mr. Venkat Chalasani, Pasala Ponna Rao (Deputy Solicitor General of India)
Advocate for Respondent:	Mr. Dammalapati Srinivas, Ld. Senior Counsel, Mr. Vimal Varma Vasi Reddy

CORAM : THE CHIEF JUSTICE DHIRAJ SINGH THAKUR
SRI JUSTICE R. RAGHUNANDAN RAO

DATE : 12^{th} December, 2024.

<u>PER DHIRAJ SINGH THAKUR, CJ :</u>

The present set of writ appeals bearing numbers W.A.Nos.1029 and 1034 of 2024 have been preferred against the judgment and order dated 03.12.2024 passed in W.P.No.17150 of 2024. By virtue of the said Order, the learned Single Judge allowed the Writ Petition filed by M/s. KPC Projects Ltd, and set aside the order of rejection dated 31.07.2024 issued by East Coast Railway, disqualifying the Technical Bid of the Writ Petitioner in relation to Tender Notice dated 29.12.2023.

2. Briefly stated, the material facts are as under.

The Appellant in W.A.No.1034 of 2024, the East Coast Railway, issued a Request for Proposal (RFP) vide Tender Notice dated 29.12.2023, inviting bids for the "Major Upgradation of Visakhapatnam Railway Station, Visakhapatnam, Andhra Pradesh on EPC Mode". The estimated project cost was Rs. 433,56,19,990/- with a project completion period of 30 months.

3. In response to the said Tender Notice, the Writ Petitioner and other entities submitted their bids. The tender process adopted was a two-bid system, comprising a Technical Bid and a Financial Bid. Qualification in the Technical Bid was a prerequisite for consideration of the Financial Bid.

4. The Appellant in W.A.No.1029 of 2024, M/s. TTIPL-DECIPL (JV), was declared qualified in both the Technical and Financial Bids and was subsequently identified as the Lowest Tenderer (L1).

5. However, the Technical Bid of the Writ Petitioner, M/s. KPC Projects Ltd, was rejected by the Railway vide online rejection order dated 31.07.2024. The reason cited for rejection was "Submitted incomplete document in regard to Annexure-VII of Appendix-IA". Consequently, the Writ Petitioner was not considered for the Financial Bid stage.

6. Aggrieved by the disqualification, the Writ Petitioner filed W.P.No.17150 of 2024 seeking a Writ of *Mandamus* to declare the disqualification as arbitrary and illegal, to set aside the disqualification order, and to direct the Railway to conduct the tender process strictly in accordance with the tender terms.

7. The learned Single Judge, vide order dated 03.12.2024, allowed the Writ Petition, set aside the disqualification order and granted liberty to the Railway to proceed with the tender process after considering the Financial Bid of the Writ Petitioner along with other technically qualified bidders.

8. Before we proceed further, at this stage, it would be necessary to refer to some of the clauses of the tender document as also point out and highlight those clauses in the tender document which the appellants state were essential in nature for purposes of compliance and for purposes of making the Technical Bid responsive.

9. A reference to the tender document would show that the same envisaged a two-bid system involving a technical bid and a financial bid. Clause 2.1.4 under the 'general terms of bidding' envisaged as under:

> "The bid shall be furnished in the format exactly as per Appendix IA and IB, i.e., Technical bid as per Appendix IA and Financial bid as per Appendix IB and it shall be signed by the Bidder's authorized signatory. The bid price shall be quoted online at the e-procurement portal. In the event of any difference between figures and words, the amount indicated in words shall be taken into account."

10. Clause 2.2.2.5 of the tender document under the general terms of bidding further emphasized that the Technical Bid ought to be submitted as per the format at Appendix IA complete with its annexures.

Clause 2.11.1 read as follows.

> "The Bidder shall first upload all the project details including Technical Capacity, Financial Capacity, Net Worth details, turnover details, and all other details required in this RFP for technical qualification. The Bidder shall ensure that all the details are updated as on the due date of submission of this Bid. The Bidder shall then apply for the RFP by submitting the documents mentioned below along with the supporting documents which shall comprise of the Technical Bid oh thee-Procurement Portal:
>
> Technical Bid:
>
> (a) Appendix-IA (Letter comprising the Technical Bid) including Annexure I-V and supporting certificates / documents.
> (b) Power of Attorney for signing the Bid as per the format at Appendix-II;
> (c) if applicable, Power of Attorney for Lead Member of Consortium/Joint Venture as per the format at Appendix-III;
> (d) if applicable. Joint Bidding Agreement for Consortium/Joint Venture as per the format at Appendix-IV;

(e) (Bid Security though [e- payment Gateway of e-Procurement Portal/Authority] OR in the form of Bank Guarantee in the format at Appendix-V from a Bank (to be submitted physically as well);
(f) Deleted;
(g) An undertaking from the person having Power of Attorney referred to in Sub. Clause-(b) above that they agree and abide by the bid documents uploaded by Authority and amendments uploaded, if any in the format at Appendix-VI; and
(h) copy of Memorandum and Articles of Association, if the Bidder is a body corporate, and if a partnership then a copy of its partnership deed. Copies of duly audited complete annual accounts of the Bidder or of each member (in case of Joint Venture/Consortium) for preceding 5 years."

Reference is not being made to the other clauses pertaining to the financial bid inasmuch as those clauses do not materially affect the outcome of the present controversy.

11. Clause 3.1 pertains to evaluation of Technical Bids. Clause 3.1.6 dealing with evaluation envisaged the test for responsiveness of the Technical Bid. Clause 3.1.6.1 further envisaged as under.

"3.1.6.1. As a first step towards evaluation of Technical Bids, the Authority shall determine whether each Technical Bid is responsive to the requirements of this RFP. A Technical Bid shall be considered responsive only if:

(a) Technical Bid is received online as per the format at Appendix-IA including Annexure I, II, III, IV, V and Appendix-VI;

(b) All Documents listed at Clause 2.11.2 are received physically within time as mentioned in the KIT;

(c) (Technical Bid is accompanied by the Bid Security as specified in Clause 12 4 and 2.20;

(d) The Power of Attorney is uploaded on e-Procurement Portal as specified in Clauses 2.1.5;

> (e) Technical Bid is accompanied by Power of Attorney for Lead Member of Consortium/Joint Venture and the Joint Bidding Agreement as specified in Clause 2.1.6, if so required;
>
> (f) Technical Bid is accompanied by Affidavit as specified in 2.11.1;
>
> (g) Technical Bid contains all the information (complete in all respects);
>
> (h) Technical Bid does not contain any condition or qualification;"

12. Since Clause 2.1.4 made a reference to the format in which the Technical Bid was to be submitted, i.e., as per appendix IA, it would be pertinent to examine the clauses in Appendix IA.

As per Appendix IA, the bidder was to acknowledge and certify that all the information provided in the bid and its Annexures I to VII along with the supporting documents were true and correct and nothing had been omitted therein which would render such information misleading, and further that the documents accompanying the bid were true copies of the respective originals.

13. It is not out of place to mention that the Appendix IA besides its covering letter contained as many as VII Annexures which was supposed to be complied with and information submitted accordingly.

14. Annexure I of Appendix IA dealt, among others, with the details of the bidders, namely the name, the country of incorporation of the entity, date of incorporation, the particulars with regard to the authorised signatories etc.

Annexure II, on the other hand, referred to the details with regard to technical capacity of the bidder. Annexure III of appendix IA pertained to the financial capacity of the bidder for the last 5 years and its net worth. Annexure IV, on the other hand, required the bidder to give details of the eligible projects which had been executed by the bidder in the past 5 years.

Annexure V pertained to statement of legal capacity whereas Annexure VI pertained to the guidelines for qualification of bidders seeking to acquire stakes in public sector enterprises which may not be relevant in the present context.

15. Finally, Annexure VII around which the present controversy revolves needs to be discussed slightly elaborately. The first document which finds a mention in Annexure VII of Appendix IA is an office memorandum dated 23rd of July 2020 which reflects the amendment incorporated to Rule 144 of the General Financial Rules, 2017 which for facility of reference is reproduced here under:

> "Notwithstanding anything contained in these Rules, Department of Expenditure may, by order in-writing, impose restrictions, including prior registration and/or screening, on procurement from bidders from a country or

> countries, or a class of countries, on grounds of defence of India, or matters directly or indirectly related thereto including national security; no procurement shall be made in violation of such restrictions."

16. Based upon the amended Rule 144 of the GFR, 2017, the Ministry of Finance, Department of Expenditure, Public Procurement Division issued an order dated 23rd of July 2020 which, *inter alia*, required a bidder from a country which shares a land border with India to be registered with the competent authority specified in Annexure I to the said order dated 23rd of July 2020.

The said order also defined a '*bidder'* as also a '*bidder from a country which shares a land border with India'*. For purposes of reference definitions of 'bidder' and 'bidder from a country which shares a land border with India' are reproduced hereunder:

> "6. "Bidder for the purpose of this Order (including, the term 'tenderer', 'consultant' 'vendor' or 'service provider' in certain contexts) means any person or firm or company, including any member of a consortium or joint venture (that is association of several persons, or firms or companies), every artificial juridical person not falling in any of the descriptions of bidders stated hereinbefore, including any agency, branch or office controlled by such person, participating in a procurement process.
>
> 8. "Bidder from a country which shares a land border with India" for the purpose of this Order means
>
> a) An entity incorporated, established or registered in such a country; or
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> b) A subsidiary of an entity incorporated, established or registered in such a country; or

c) An entity substantially controlled through entities incorporated, established or registered in such a country: or

(d) An entity whose beneficial owner is situated in such a country; or

e) An Indian (or other) agent of such an entity: or

f) . A natural person who is a citizen of such a country; or

g) A consortium or joint venture where any member of the consortium or joint venture falls under any of the above"

17. Clauses 12 and 15 of the said order are also required to be reproduced and read as under:

"Certificate regarding compliance

12. A certificate shall be taken from bidders in the tender documents regarding their compliance with this Order. If such certificate given by a bidder whose bid is accepted is found to be false, this would be a ground for immediate termination and further legal action in accordance with law.

Model Clauses/ Certificates

15. Model Clauses and Model Certificates which may be inserted In tenders obtained from Bidders are enclosed as Annex iii. While adhering to the substance of the Order, procuring entities are free to appropriately modify the wording of these clauses based on their past experience, local needs etc. without making any reference to this Department."

18. It also needs to be mentioned that with the order dated 23rd of July 2020, there are three Annexures i.e., Annexure I, II and III of which Annexure III is relevant. Annexure III envisaged the model clauses for tenders highlighting the necessity of a bidder from a country which shares a land border with India to be registered with the prescribed competent authority before it became eligible to bid in India. The model Certificate for tenders in Annexure III to the order dated 23.07.2020 reads as under.

> **“Model Certificate for Tenders**
>
> I have read the clause regarding restrictions on procurement from a bidder of a country which shares a land border with India; I certify that this bidder is not from such a country or, if from such a country, has been registered with the Competent Authority. I hereby certify that this bidder fulfills all requirements in this regard and is eligible to be considered. [Where applicable, evidence of valid registration by the Competent Authority shall be attached.]”

19. Reference is also necessary to Clause 7 under the head ‘Commercial Compliance’ of the NIT which required a bidder to submit the certificate as per Annexure VII. The said Clause 7 under the head ‘Commercial Compliance’ is reproduced hereunder:

> *“The Tenderer must submit Mandatory certificate as per Annexure-VII (Instructions for bidders from a country which shares a land border with India as per clause APPENDIX-IA)”*

20. The basis for the East Coast Railways to reject the Technical Bid submitted by the petitioner was the fact that the petitioner had not furnished the 'model certificate for tenders' which was described in Annexure III of the Order dated 23rd of July 2020 issued by the Ministry of Finance which formed part of Annexure VII to Appendix IA of the tender document.

21. Learned DSGI, Mr. Pasala Ponnarao, appearing for the East Coast Railway, the appellant in W.A.No.1034 of 2024, submitted that the Railway had acted in a transparent and reasonable manner in rejecting the Technical Bid of the Writ Petitioner, for non-submission of complete Annexure VII of Appendix-IA. Reference was made to Clause 2.1.4, Clause 2.2.2.5, and point No. 7 of the "Commercial Compliance" checklist, read with Appendix-IA, and it was urged that these clauses mandated the submission of Annexure VII.

It was further submitted that the Railway, being an instrumentality of the State, could not afford to compromise on mandatory tender conditions, especially for a project of national importance like the upgradation of Visakhapatnam Railway Station.

The learned DSGI further submitted that the evaluation process was conducted by a Tender Evaluation Committee comprising experienced senior officers, and the decision was taken after due deliberation, and that there was no arbitrariness, mala fides, or illegality in the rejection order.

22. Learned Senior Counsel, Mr. B. Adinarayana Rao appearing for M/s. TTIPL-DECIPL, the appellant in W.A.No.1029 of 2024, submitted that the tender conditions clearly mandated the submission of complete documents, and failure to do so justified disqualification and further that the order of disqualification was purely an administrative decision based on tender conditions and did not suffer from any arbitrariness or illegality. It was further submitted that judicial review in tender matters is circumscribed and should only be exercised in cases of mala fides, arbitrariness, or irrationality.

23. The argument advanced by Mr. Dammalapati Srinivas, learned Senior Counsel appearing for the petitioner, is that there was no requirement for the petitioner to submit any certificate in terms of Annexure VII of Appendix IA inasmuch as responsiveness of the Technical Bid had to be tested only in terms of Clause 3.1.6.1 which made a mention in clause (a) only to Annexures I to V of Appendix IA, along with Appendix VI and therefore, since there was no requirement to annex such a certificate, the Technical Bid could not have been rejected.

Additionally, it was urged that there was no specific template provided in Annexure VII in which the certificate could be issued and therefore, absent such a template, the bidder could not be expected to furnish such a certificate, much less could the bid be rejected on that ground. Thirdly, it was urged that the requirement of Annexure VII of Appendix IA with regard to the model certificate was in any case furnished by the petitioner along with the requirement of Clause 10 of

Appendix VI. It was also urged by learned Senior Counsel for the petitioner that the said requirement had even been satisfied by providing the requisite information/declaration as was otherwise required as per Clause 29 of Appendix IA.

24. The entire purpose of complying with the said certificate which was required to be filed was to see as to whether a bidder belonged to a country which shared its land border with India, inasmuch as if he did belong to such a country, he would be ineligible to bid unless he had been registered with the competent authority.

25. In fact, what the petitioner did was that for purposes of compliance of Annexure VII of Appendix IA, it filed only the office memorandum containing Rule 144 of the GFR Rules 2017 in its amended form without the certificate which was otherwise envisaged in terms of Annexure III of the Order, dated 23rd of July 2020. In the absence of such a certificate, the bid evaluation committee/authority would not know whether the bidder belongs to a country which shares its borders with India or not, and if it did belong to such a country, and whether it was registered with the competent authority and in that case the registration certificate ought to have been placed on record.

26. The argument that Clause 3.6.1(a) did not require the bidder to comply with the requirement of Annexure 7 of Appendix IA at all, in our opinion, is without any basis. On a reading of sub-clause (a) of Clause 3.1.6.1, it can be clearly seen that the said clause did not restrict the compliance only to Annexures I to V of Appendix IA and Appendix VI, rather the said sub-clause (a) required the bidder to submit the Technical Bid as per the format at Appendix IA including Annexure I to V and Appendix VI, which clearly reflects that the intention of the authorities was to seek compliance of the entire Appendix IA, including Annexures I to V, and by no means intended to exclude the compliance as per Annexure VII of Appendix IA.

27. Moreover, Clause 12 of Order, dated 23.07.2020, issued by the Ministry of Finance which formed part of Annexure VII, clearly required a certificate to be taken from the bidders in the tender documents regarding their compliance with the said Order. The said Clause 12 has already been reproduced in the preceding paragraphs. The requirement to furnish a certificate was therefore clearly spelt out by the authorities in Annexure VII.

28. In addition to this, as per Appendix IA, the bidder was to acknowledge and certify that all the information provided in the bid and its Annexures I to VII along with the supporting documents were true and correct and nothing had been omitted therein which would render such information misleading, and further that the documents accompanying the bid were true copies of the respective originals. For purposes of reference, Clause 2 of Appendix IA is reproduced hereunder:

> "2. I/We acknowledge that the Authority will be relying on the information provided in the Bid and the documents accompanying the Bid for selection of the Contractor for the aforesaid Project, and <u>we certify that all information provided in the Bid and it's the Annexure I to VII along with the supporting documents are true and correct;</u> <u>**nothing has been omitted**</u> which renders such information misleading; and all documents accompanying the Bid are true copies of their respective originals.

29. Further, Clause (g) of 3.1.6.1 did require the bidder to submit in the Technical Bid information complete in all respects which would include even the certificate envisaged under Clause 12 of the order dated 23.07.2020 forming a part of Annexure VII of Appendix IA.

30. The argument that there was no specific template prescribed for furnishing such a certificate is unacceptable to us inasmuch as the model certificate, which was required to be furnished in terms of Clause 12, was specifically prescribed in Annexure III to the said order of 23.07.2020.

31. The learned Senior Counsel for the petitioner had urged that the Technical Bid ought not to have been rejected in as much as even when the certificate was not furnished, yet the information that was required in terms of the certificate was furnished in terms of the requirement of Appendix VI Clause 10, and Appendix IA, Clause 29. The counsel for the petitioner would urge that the terms and conditions of the tender notice had thus been substantially complied with. On a reading of the information which is in the shape of an affidavit furnished by the petitioner, purportedly as per Clause 10 of Appendix VI, as also Clause 29 of Appendix IA, it can be seen that the petitioner had bodily lifted the language of the said appendices from the tender document and pasted it, which read as under:

> **APPENDIX VI:**
>
> "10. I/We have read the clause regarding restriction on procurement from a bidder of a country which shares a land border with India and certify that I am/We are not from such a country or, if from such a country, have been registered with the competent Authority. I/We hereby certify that I/we fulfil all the requirements in this regard and am/are eligible to be considered (evidence of valid registration by the competent authority is enclosed)."
>
> **APPENDIX IA:**
>
> "29. I/We have read the clause regarding restriction on procurement from a bidder of a country which shares a land border with India and certify that I/We am/are not from such a country or, if from such a country, has been registered with the competent Authority. I/We hereby certify that I/we fulfills all the requirements in this regard and am/are eligible to be considered (evidence of valid registration by the competent authority is enclosed)"

32. On a bare perusal of the information so provided above, it can be seen that the said information does not at all give even the least indication as to whether the petitioner belongs to a country which shares its borders with India or if it belongs to such a country which was registered with the competent authority and therefore was eligible. In our opinion, the bid of the petitioner could have been rejected even on this ground, much less does it support the case of the petitioner that the information provided and reproduced hereinabove substantially complied with the requirement of the certificate which was otherwise envisaged to be provided in terms of Annexure VII of Appendix IA.

The information so provided and reproduced hereinabove is suggestive more of contradiction than of ambiguity, which could be resolved by seeking clarification in terms of Clause 3.1.4 which clarification could be sought only if such a certificate was indeed filed.

33. The learned single Judge in the judgment and order impugned proceeded to hold that the conditions prescribed under Annexure VII of Appendix IA was a non-essential tender condition inasmuch as Clause 2.11.1(a) required the documents for Technical Bid to include Annexures I to V of Appendix IA and not Annexure VII of Appendix IA, and therefore proceeded to hold that Annexure VII was only an ancillary condition and not an essential condition.

34. The issue as to whether the Courts can go into the terms and conditions of the NIT to determine whether the same are essential or ancillary in nature, is no longer *res intergra*. In **Central Coalfields Ltd. vs. SLL-SML (Joint Venture Consortium),** (2016) 8 SCC 622, it was held that the Courts ought not to take over the decision making function of the employer and make a distinction between essential and non-essential terms contrary to the intention of the employer and thereby rewrite the arrangement and that if an employer holds a particular term to be ancillary or subsidiary, that decision should be respected, lawfulness whereof can be challenged on limited grounds.

This view was subsequently followed by the Apex Court in **Afcons Infrastructure Ltd. Vs. Nagpur Metro Rail Corpn. Ltd., (2016) 16 SCC 818,** wherein it was held:

> "13. In other words, a mere disagreement with the decision-making process or the decision of the administrative authority is no reason for a constitutional court to interfere. The threshold of mala fides, intention to favour someone or arbitrariness, irrationality or perversity must be met before the constitutional court interferes with the decision-making process or the decision.
>
> 15. We may add that the owner or the **employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional courts must defer to this understanding and appreciation of the tender documents,** unless there is mala fide or perversity in

the understanding or appreciation or in the application of the terms of the tender conditions. **It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given.**

16. In the present appeals, although there does not appear to be any ambiguity or doubt about the interpretation given by Nmrcl to the tender conditions, we are of the view **that even if there was such an ambiguity or doubt, the High Court ought to have refrained from giving its own interpretation unless it had come to a clear conclusion that the interpretation given by Nmrcl was perverse or mala fide or intended to favour one of the bidders.** This was certainly not the case either before the High Court or before this Court."

35. Even when the Constitutional Courts are not required to go into the issue of a particular condition in a tender document as being either essential or ancillary, yet while testing the decision of the tendering authority in rejecting the Technical Bid of the petitioner on the Wednesbury principle, we find that the said decision is not perverse. Firstly, for the reason that the petitioner or for that matter any bidder was required to furnish all the information as was required in terms of Appendix IA in all respects. Moreover, Clause 12 of the order, dated 23.07.2020, forming Annexure VII of Appendix IA specifically envisaged that, in case the certificate prescribed was found to be false then it would be a ground for immediate termination of the contract and further legal action in accordance with law. So, a condition which envisages immediate termination, if the information provided in the certificate was found to be false cannot be said to be a non-essential condition.

Further, it is also pertinent to mention that even Clause 7 of the 'Commercial Compliance' checklist in the NIT did prescribe the certificate provided in Annexure VII to be mandatory in character, and further prescribed that the said certificate had to be mandatorily uploaded.

36. In ***Jagdish Mandal v. State of Orissa***, **(2007) 14 SCC 517**, the Apex Court held that power of judicial review of administrative action in matters relating to tenders or award of contracts is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. It was held that if a decision relating to award of contract was bona fide and in public interest, the Court in exercise of power of judicial review would not interfere even if there was a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The tests which were prescribed were the following:

> "22. …(i) Whether the process adopted or decision made by the authority was mala fide or intended to favour someone;
>
> OR

> whether the decision made was so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached";
>
> (ii) whether public interest was affected."

37. The said principles of law were reiterated subsequently in ***Michigan Rubber (India) Ltd. v. State of Karnataka***, (2012) 8 SCC 216, as also by a three-judge bench of the Apex Court in ***Tata Motors Ltd. v. Brihan Mumbai Electric Supply & Transport Undertaking (BEST)***, 2023 SCC OnLine SC 671.

38. Testing the facts of the present case on the touchstone of the judgments supra, it can clearly be seen that there was no element of arbitrariness or mala fides established against the appellant – East Coast Railway in rejecting the bid of the petitioner nor can the said decision be said to be bad when tested on the Wednesbury principle.

39. Be that as it may, we find that the judgment and order impugned is unsustainable in law and is accordingly set aside. W.A Nos. 1029 and 1034 of 2024 stand allowed.

W.A.No.1028 of 2024 has been preferred against the Order dated 18.09.2024, passed in I.A. No.3 of W.P. No. 17150 of 2024, whereby the application, for impleadment, filed by M/s. TTIPL-DECIPL, was disallowed. In view of the fact that leave was granted to prefer an appeal and that the main appeals are allowed, W.A.No.1028 of 2024 stands closed as having been rendered infructuous.

No order as to costs. Pending miscellaneous applications, if any, in these appeals, shall stand closed.

DHIRAJ SINGH THAKUR, CJ.

R. RAGHUNANDAN RAO, J.

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