

ORDER SHEET

IN THE HIGH COURT OF SINDH, KARACHI

Suit No. 966 of 2016

DATE ORDER WITH SIGNATURE OF JUDGE(S)

For hearing of CMA No.6258/2016

Date of Hearing : 26.07.2016
Date of Order : 28.07.2016
Plaintiffs : Through Mr. Obaid-ur-Rehman Khan,
Advocate.
Defendants : Through Mr. Sajid Zahid, advocate for
Defendant No.1 alongwith Mr. Mansoor
A.Shaikh and Mr. Jawad Dero,
advocates.
Through Mr. Salman Aslam Butt,
Advocate for Defendant No.3 alongwith
Mr. Muhammad Hameed Baksh,
Advocate.

ORDER

Zulfiqar Ahmad Khan, J.:- Brief facts of the case are that the Plaintiff No.1 is a company incorporated in the People's Republic of China which along with Plaintiff No.2 submitted tender documents for the supply and commissioning of packaged gas turbine Centrifugal Compressor units for RLNG Project tendered through advertisement published by the defendant No.1 in the newspapers on 29.03.2015. The project aims enhancement of the national electrical power generation capacity of additional over 3,000 Megawatts and the project is anticipated to be completed by December, 2016 with a potential investment of around US\$ 1.2 Billion. Sealed bids were made by contenders in two parts. Part one being technical; and part two being financial, which were opened on 12.05.2015 initially

for technical evaluation conducted through independent consultants, which valuated all such bids and upon the plaintiffs' failure to provide certain pre-requisites as communicated by vide letter dated 28.09.2015 (annexed on Page No.255 of Part-2) the valuation committee refused the technical bids of the Plaintiff, whereupon bids of the Defendant No.3 were accepted. Per the information uploaded under the Public Procurement Regulations, 2009 (reproduced on Page No. 381 and 383 of Part-2), Plaintiffs' grievances were heard by such a grievance committee, which subsequently rejected the grievances and communicated its findings to the Plaintiffs in September, 2015. Resultantly a Letter of Intent (LoI) was issued to the Defendant No.3 on 20.01.2016 for the supply and allocation of centrifugal compressor units as per the specification laid down by the Defendant No.1. Per counsel, on this project of critical nature, work commenced immediately and by early July 2016 more than US\$7.2 Million have been disbursed, as well as, Letter of Credit for the remaining sums of over US\$30 Million have already been opened and the project is in full swing for its expected completion by December 2016.

Being aggrieved by the decision of not awarding the tender to the Plaintiff, the listed application has been filed on 21.04.2016 in the instant suit in terms of which a prayer has been made to restrain the Defendant No.1 from processing the award of contract in favour of the Defendant No.3 or from procuring the centrifugal compressor units. Learned counsel appearing on behalf of Plaintiffs submitted that the Plaintiffs' technical bids were refused on flimsy grounds and the Plaintiffs

were not given a fair chance to sail through the evaluation and procurement process. However, the learned counsel failed to satisfy the Court that once the Plaintiffs came to know of the rejection of their technical bids sometime in September, 2015 and of the issuance of LoI in favour of the Defendant No.3 on 20.01.2016, why they did not approach the courts to seek timely relief and why have they have approached the courts at this juncture when the project is already under way and full mobilization of manpower and resources has been made by the defendants, as well as, the public pressure on account of failure to provide them with electricity is mounting day by day?

These weaknesses in the case of the listed application were also highlighted by the learned counsel appearing for the Defendant No.1, who submitted that the listed injunction application being belated has become infructuous and relied on the cases reported as 2001 MLD 92, 1998 SCMR 376, 1970 SCMR 491, 1992 CLC 1868 and 1999 CLC 2010 wherein the courts refused to grant interim injunction where a contract has already been awarded to the successful bidder and alleged that the case of the Plaintiffs is hit by laches.

Learned counsel appearing on behalf of the Defendant No.3 challenged the very maintainability of the instant suit and placed reliance on Section 456 of the Companies Ordinance 1984, which bars foreign companies from bringing any suit in respect of any Contract unless requirements of sections 451 and 452 are met. The learned counsel submitted certain documents during the hearing, which were collected from the

office of the Companies Registration to substantiate that the plaintiff has not complied with the requirements of the Section 456. In support of these assertions, the learned counsel placed reliance on 2004 CLD 399, PLD 2013 SC 641, 2002 SCMR 450 where courts have held that unless a foreign company has fulfilled the requirements of section 451 and 452 of the Companies Ordinance, the company is not entitled to bring any suits or to institute any legal proceedings in respect of the any contract in Pakistan.

Heard the counsel at length and perused the records. Undoubtedly the instant matter is of national importance where a large fraction of population is waiting for the supply of the electricity to upgrade their living standards, therefore *time being of essence* and there is a strict deadline of December 2016 to complete the project. Since the relief of temporary injunction is a purely equitable relief and the same cannot be granted to a person who has approached the court after inordinate delay and laches in initiating action against the Defendants, as admittedly the Plaintiffs acquired the knowledge of the outcome of the procurement Grievance Committee (against which the appropriate legal remedy is provided under Rule 48(5) of the Public Procurement Rules, 2004) long before the contract was awarded to the successful bidder (Defendant No. 3) on April 1, 2016, nonetheless the present suit was instituted on April 21, 2016. Notwithstanding therewith, as the main grievance of the Plaintiffs arises from the refusal of their technical bid by the Defendant No.1 which being of very technical nature would involve expert witnesses' testimony and

no findings thereon can be given by this court at this preliminary stage, which I am sure the Plaintiffs would peruse during hearing of the main case. To the contrary the injunction sought is of interim nature, which if granted would primarily affect interests of the Defendant No.3, who is an alien to the disputes between the Plaintiffs and the Defendant No.1 & 2, therefore no prima facie case is made out by the Plaintiffs against the Defendant No.3 and grant of interim injunction by this court in favor of the Plaintiffs would amount to finally decreeing the present suit against the Defendant No.3 and therefore the said relief at this interim stage is impermissible in terms of the settled legal position. Also, as per the settled principles applicable to the grant of interim injunction, the nature of injunction sought by the Plaintiffs against the Defendant No.1, for the reasons given above (having become infructuous already), is of mandatory nature, to which the Plaintiffs are not entitled to by way of an interim relief at this juncture. Also the balance of convenience is not in favor of the Plaintiffs, as well as, there is no danger of any irreparable losses to be caused to the Plaintiffs who have not made any significant investments in the instant project, except by way of filing bid documents.

Therefore the Plaintiffs having failed to pass the three prerequisites for the grant of interim injunction as mandated by Order XXXIX, Rules 1 & 2, the listed application seeking interim injunction lacks the required merit and it is accordingly refused.

To come up in the third week of August 2016 after the summer vacations.

JUDGE