

IN THE HIGH COURT OF SINDH AT KARACHI
SUIT No. 1163/ 2019

Plaintiff: M/s Ahsan Engineering Works through Mr. Muhammad Sarfaraz Ali Metlo Advocate.

Respondents: Pakistan Petroleum Limited & Others through Mr. Basil Nabi Malik Advocate.

For hearing of CMA No. 9567/2019

Date of hearing: 27.08.2019, 18.09.2019, 25.09.2019

Date of order: 25.09.2019

ORDER

Muhammad Junaid Ghaffar, J. This is a Suit for Declaration and Injunction impugning the process of tender bearing No. FRQ No. PD/GEN/PT/8420/2019 (“**Tender**”) initiated by Defendant No.1, whereas, through listed application (**CMA No. 9567/2019**), the Plaintiff seeks an injunctive order for restraining the Defendant No.1 from issuing Letter of Award of the tender to Defendant No. 7.

2. Precise facts as stated are that Plaintiff owns a fleet of vehicles and is a prequalified contractor of Defendant No.1 for hiring of such vehicles and has been working with Defendant No.1 for the past many years. It is further stated that in 2018 a fresh tender was invited for three years period, wherein, the Plaintiff had participated; but made a miscalculation in the financial bid amount, though furnished a correct bid bond; however, Defendant No.1 scrapped the said tender and a new tender was published, by which the Plaintiff was aggrieved and filed Suit No. 2171/2018 and obtained ad-interim orders. Thereafter, vide order dated 23.05.2019 the injunction application was dismissed and Defendant No.1 was directed to start fresh tender proceedings and complete the same in accordance with law. Subsequently, the tender in question was published, wherein, the Plaintiff also participated and Defendant No.7 has been found to be the lowest bidder, by which the Plaintiff is once again aggrieved and has filed instant Suit.

3. Learned Counsel for the Plaintiff has contended that the entire tender, and its conditions in question, are in violation of the PPRA Rules 2004, as it is not a tender but, a request for quotation; that after

publishing the tender in the newspaper, at least on three occasions, the closing date was extended which was in fact an attempt to accommodate the favorites of Defendant No.1; that the tender itself is unclear as well as ambiguous and is not in conformity with the procedure adopted in previous tenders regarding quotations with fuel and without fuel, and this has been done to accommodate other bidders; that the Plaintiff approached Defendant No.1 on various occasions verbally to seek clarification; but no proper response was received and Plaintiff was compelled to file his bids; that the conditions of the tender have been changed unilaterally so that the Plaintiff is ousted from the competition; that even in this tender there were three separate requirements / portions, out of which the Plaintiff is the lowest in at least two categories, but has been ousted on an overall basis and instead of awarding the tender of the two categories to the Plaintiff, the entire tender is being awarded to Defendant No. 7; that Defendant No.1 has acted in violation of various of PPRA Rules, 2004, including but not limited to sealed bids, confusion in the bids and various other irregularities, which according to the learned Counsel makes the entire process partial and tainted with malafides and favoritism; that the tender in question was also called in violation of Rule 36 of the PPRA Rules 2004, as no secrecy has been maintained by calling the quotation on line through the Web Portal of Defendant No.1, for which necessary permission has not been obtained from the Public Procurement Authority; hence, the entire process is illegal; that after filing of this Suit and obtaining ad-interim orders the Plaintiff has been victimized as well as penalized in respect of other business transactions which reflects clear malafide on the part of Defendant No.1; that the counter affidavit of Defendant No.1 cannot be considered by the Court as it has not been filed by a properly authorized person; hence, the Court must not consider the same; that Defendant No.1, unilaterally and in violation of the PPRA Rules 2004 has reduced the amount of bid bond to Rs. 500,000/- on its own which is impermissible; that admission to the effect that other bidders also contacted Defendant No.1 seeking clarifications is within itself a supporting ground for the Plaintiff's case; that notwithstanding the fact that the bid submitted by the Plaintiff was last in order, the administrator of the web-portal can still manipulate the secrecy of the bids; that asking for quotation(s) in respect of similar type of Vehicles in similar situations, with and without fuel, is not a

clear and express term, and is rather ambiguous so that the Plaintiff could not submit a proper bid; therefore, the listed application be allowed as prayed. In support of his contention he has relied upon ***Messrs GETZ Pharma (Pvt.) Limited V. Province of Sindh and 7 others (PLD 2016 Sindh 479), In re: Suo Motu Case No. 5 of 2010 (PLD 2010 SC 731), Al Noor through Partner v The Province of Sindh and others (PLD 2017 Sindh 400), Dr. Akhtar Hasan Khan v Federation of Pakistan (2012 SCMR 455), Wattan Party v Federation of Pakistan (PLD 2006 SC 697), Getz Pharma (Pvt) Limited v Province of Sindh (PLD 2016 Sindh 479).***

4. On the other hand, Learned Counsel for the Defendants No. 1 to 6 has contended that the Plaintiff has not come before this Court with clean hands, whereas, time and again, the Plaintiff, by approaching this Court and obtaining ad-interim order(s), has held Defendant No.1 hostage, compelling it to continue with the Plaintiff on the basis of old arrangement of plying of Vehicles; that renting of Vehicle services in the Kandhkot field is a must and a priority issue, and by obtaining restraining orders, the Plaintiff continues to ply his vehicles on his own terms and conditions; that the Plaintiff does not want to compete in the tender process, and after failing to have any success in the bidding, has resorted to Court battling; that in the new tender initiated pursuant to orders of this Court, three parties participated, whereas, it is not a request for quotation but a duly published tender in which all participants can come and file their bids; that insofar as the extensions granted are concerned, they were at the request of the participating bidders including the Plaintiff and other Defendants as in the meantime there were Eid holidays and no prejudice has been caused as the Plaintiff also requested for extension; that even otherwise, the Plaintiff was the last one to file and submit his bids therefore, there is no question of any information of the bidders being leaked or accessed by any of the employees of Defendant No.1; that Rule 27 of the PPRA Rules 2004 was complied with and all concerned were taken on board; that reduction of the bid bond amount benefitted all, including the Plaintiff; hence, after opening of the bids this objection has no basis; that bid conditions can be changed and altered by the Procuring Agency in terms of Rule 23(3) of the PPRA Rules 2004; that insofar as the estimation and the submission of bids with fuel and without fuel is

concerned, it is the case of Defendant No.1 that all bidders after going through the bid conditions participated, including the Plaintiff, whereas, the Plaintiff is not the lowest bidder; hence, no case is made out; that it is an afterthought on the part of the Plaintiff to raise such an objection once he has filed his bids which have not been found to be the lowest; that all queries of the bidders including the Plaintiff were replied and knowingly the Plaintiff participated in the bid process; that it is the prerogative of the Procuring Agency to give and mention its requirements in the bid document and there cannot be any exception to it; that the tender in question is a composite tender and is not separable, whereas, the fuel is part of the tender; therefore, the stance of the Plaintiff that he is lowest in two categories is not justified; that if the tender conditions were so difficult as claimed, then the Plaintiff ought not to have participated, and approach the Court; but once he has done so, then there cannot be any exception to it; that even otherwise, this Suit is not maintainable inasmuch as the Plaintiff has opted to avail the alternate remedy as provided in the PPRA Rules 2004 by filing complaint before the Grievance Redressal Committee constituted in terms of Rule 48 *ibid*, which fact was not disclosed properly at the time of obtaining ad-interim injunction; that it is settled law that if two remedies are available and a party has made a choice of availing any one, then at the same time the other remedy cannot be availed simultaneously; that the counter affidavit has been filed by a competent person on the basis of a proper Board Resolution; hence, the objection is misconceived. In support of his contention he has relied upon ***Sinotec Co. Limited v. Province of Sindh and 5 Others (PLD 2018 Sindh 303)***, ***Sinotec Co. Limited v. Province of Khyber Pakhtunkhwa and 5 Others (2015 CLC 1589)***, ***Saifco Group another v. Privatization Commission of Pakistan and others (2017 CLC 1493)***, ***Trading Corporation of Pakistan V. Devan Sugar Mills Limited and others (PLD 2018 SC 828)***, ***Mst. Fehmida Begum V. Muhammad Khalid and another (1992 SCMR 1908)*** and ***Messrs Pakistan Gas Port Ltd. V. Messrs Sui Southern Gas Co. Ltd. and 2 others (PLD 2016 Sindh 207)***.

5. I have heard both the learned Counsel and perused the record. Facts have been briefly discussed hereinabove, which reflect that in the first tender in the year 2018, the Plaintiff had participated and claimed

to be the lowest bidder, but the said tender was cancelled by Defendant No.1 as Plaintiff after filing his bid, had revised the same upwards which was not acceptable to Defendant No.1. The Plaintiff after its cancellation had approached this Court by claiming that since he was the sole bidder left; therefore, he was entitled for the award of the tender. The injunction application in the earlier Suit was dismissed by this Court vide order dated 23.05.2019. Thereafter, the Defendant No.1 has initiated the process of a fresh tender and the Plaintiff has once again participated but was not the lowest. Being once again aggrieved he has approached this Court through instant Suit and on 15.07.2019 has obtained an ad-interim order. The said order of 15.07.2019 reads as under:-

“Notice issued to the defendants has received back unserved.

It is the case of the plaintiff that it owns a fleet of vehicles and in terms of Rules 15 and 16 of Public Procurement Rules, 2004, it is a prequalified contractor of Defendant No.1. It is further case of the plaintiff that; on 25.8.2019, the Defendant No.1 published Request for Quotation for hiring of various vehicles at Kandhkot Gas Field for three years and the bid of the plaintiff for the subject work was lowest but the defendant No. 7 has been declared as the lowest bidder by the Defendant No.1 illegally and arbitrarily. Learned Counsel for the plaintiff states that though remedy of approaching committee for Redressal of Grievances and Settlement of Disputes under Rule 48 of PPRA is available to the plaintiff but the Defendant No.1 has yet not formed such Committee.

Let notice be issued to the defendants for 19.07.2019. Meanwhile, Defendant No.1 is restrained from awarding subject contract to defendant No. 7, till the next date of hearing.”

6. Perusal of the aforesaid order reflects that though notice was unserved upon the Defendants; but Counsel had pleaded urgency, and the precise argument of the Plaintiff’s Counsel was to the effect that Grievance Redressal Committee has not yet been formed; hence, the Plaintiff was left with no other immediate remedy except this Suit and on such submissions, the Court was pleased to pass the ad-interim injunction. However, the record placed before the Court speaks otherwise. It is not in dispute that the Plaintiff had himself approached the Grievance Redressal Committee on 11.7.2019 @ 5.42 P.M; and Defendant No.1 upon his complaint, had immediately took up the matter and fixed it for hearing on 16.07.2019, whereas, after filing of the complaint on 11.7.2019; at the same time Plaintiff filed instant Suit

on the very next date on 12.7.2019 @ 9.51 A.M. by appearing before the identification branch of this Court as reflected from his affidavit filed in support of the Plaint. On 12.07.2019 i.e. on the first date of hearing, no orders were passed and a notice was ordered, whereas, on 15.07.2019 though the notice was unserved; but the Plaintiff's Counsel pleaded urgency and obtained the ad-interim orders. Record further reflects that notice could not be served on such date as apparently the Suit was filed on 12.07.2019 which was a Friday and notice was ordered for Monday, whereas, the bailiff report reflects that he went for service of notice on Saturday but the office was closed. Now the question would be that once the Plaintiff has filed a complaint before the Grievance Redressal Committee in terms of Rule 48 of the PPRA Rules, 2004, can he approach the Court with this Civil Suit at the same time, without waiting for the decision of the said Committee. In my view the answer would be a big No. The law provides that once a complaint has been made before the Grievance Committee, the same has to be decided within 15 days in the terms of Rule 48(3) of the PPRA Rules 2004; but the Plaintiff instead of waiting for any decision, on the same date has filed instant Suit and has misled the Court by pleading that the Committee is non-functional. On the other hand, the record placed before the Court on behalf of Defendant No.1 clearly reflects that in fact the Grievance Redressal Committee is a permanent Committee as Defendant No.1 is involved in various procurements and the Redressal Committee is not constituted only for one tender in question. The reconstitution of Redressal Committee does not in any manner amounts to non-functioning of the same and enough material has been placed on record on behalf of Defendant No.1 to justify that the Grievance Redressal Committee was functional and the complaint of the Plaintiff was entertained and hearing was fixed for 16.07.2019. In fact the Plaintiff even replied to the hearing notice by stating that he is abroad and will not be able to attend the hearing and at the same time obtained an ad-interim order on 15.07.2019. Such conduct on the part of the Plaintiff is not appreciable so as to consider his grievance presently pleaded though the listed application. Insofar as the argument of the Plaintiff's Counsel that the Grievance Redressal Committee is not a judicial forum and therefore, the Plaintiff is within his rights to approach a Civil Court at the same time is concerned, with utmost respect such contention is devoid of any merits. The law is that if the

party exercise its option to avail any of the two remedies which may be available in law, then the party cannot leave aside the first remedy in between, and try to avail the other remedy. In this case, the Plaintiff has admittedly filed his complaint before the Redressal Committee, and until the complaint was decided; or in the alternative a period of 15 days had lapsed and no decision was made, the Plaintiff could not in any manner was permitted to avail remedy of approaching this Court through a Civil Suit or a Constitutional Petition as the case may be. The argument that remedy before the Grievance Committee is not an adequate remedy and is not to be equated with a remedy before a Court of law is also misplaced. The PPRA Rules 2004, have been issued / framed in terms of section 26 of the Public Procurement Regulatory Authority Ordinance, 2002, and is a remedy provided for under a valid law. It is the legislative intent to provide such remedy. It may be a valid argument, only in a situation when the aggrieved person has come before the Court without resorting to and or availing such remedy and may have a case on its own merits in that situation. But where, such an option for vailing the said remedy, (howsoever inefficacious it may as contended), has been exercised, then the party cannot abort the same in between. In this context it would be advantageous to refer to the judgment of the Hon'ble Supreme Court in the case of **Commissioner of Income Tax Vs. Hamdard Dawakhana (Waqf) KHI, (PLD 1992 SC 847)** in which it has been observed that in case where any party resorts to statutory remedy against an order, then the same could not be abandoned or by passed without any valid and reasonable cause and cannot file constitution petition challenging the same action. The Hon'ble Supreme Court has further held that such practice, in case when statute provides alternate and efficacious remedy up to the High Court could not be approved or encouraged. In the case of **Arhsad Hussain (Supra)**, a Division Bench of this Court has expressed the same view and has observed that the petitioner at his own sweet will and whims cannot be allowed to impugn the same cause of action in a writ petition filed before the Court and at the same time pursue the remedies available under the relevant law. The same view has been followed in the cases of **M/s Pak Saudi Fertilizers Ltd., Vs Federation of Pakistan (2002 PTD 679)**, **Bulk Shipping & Trading (Pvt) Limited Vs Collector of Customs (2004 PTD 509)** and so also in

the case of ***BP Pakistan Exploration & Production Inc. Karachi Vs Additional Commissioner Inland Revenue (2011 PTD 647)***.

7. It further reflects that the Plaintiff has been coming before this Court and obtaining ad-interim orders in respect of the tender process, whereas, he is the main beneficiary of such ad-interim orders inasmuch as prior to issuance of tenders he has been supplying vehicles on rental basis to Defendant No.1 for its Kandhkot Gas Field. This passing of ad-interim order(s) and non-finalization of the tender process, has compelled Defendant No.1 to continue with the existing arrangement as it cannot afford to discontinue plying of Vehicles on such an important Gas Field. The Plaintiff on the one hand continues to carry on with his business on the terms and conditions of his choice, and on the other, after participating in the tender and having lost in competition, approaches this Court and obtains ad-interim orders. Such conduct of the Plaintiff does not warrant exercise of any discretion in his favour. This in fact needs to be deprecated with imposition of costs. He is in fact keeping Defendant No.1 as a hostage, under the garb of ad-interim orders obtained from this Court and that too by not even disclosing complete and proper facts.

8. Insofar as the other objection(s) which have been raised by the Plaintiff's Counsel, it may be noted that all these objections, if at all, are to be raised and attended to, prior to filing of the bids. Once the Plaintiff has participated in the tender and filed his individual bid in respect of each and every category, and has only been found to be the second lowest, and not the lowest overall, he has no right to then object to the very conditions of the tender. If the Plaintiff was aggrieved with any such conditions, or for that matter, these conditions and the process was against PPRA Rules, 2004, then the Plaintiff was required to approach this Court before filing of his bids and participation in the tender. Once he has done so and is not the lowest, then, he cannot, at the same time come before the Court and challenge the said process in which he has participated and has in fact acquiesced. Such an act and conduct amounts to assent and waiver of any such right. An argument was also raised by the learned Counsel for the Plaintiff that he is a whistle blower and therefore, this Court must take notice of the irregularities as pleaded; however, it may be noted that the Plaintiff at

the very outset does not fall into the category of a whistle blower. He has claimed to be lowest, and the only qualified bidder as against the others. In that case he is not a whistle blower and his personal interest is ahead of any other public interest. If someone comes before the Court without any claim to be the lowest, or being a successful bidder, and the Court is satisfied as to the case so made out, then perhaps, in such exceptional circumstances, a case on behalf of a whistle blower is made out. See Para 11 of the case reported as ***Al Noor v Province of Sindh (PLD 2019 Sindh 400)***. It may be appreciated that the Plaintiff has fully participated in the tender. Secondly, by challenging the tender he is also enjoying another benefit as his contract continues till such time the tender is finally awarded. Therefore, he is even a step higher than any other ordinary bidder who being aggrieved comes to the Court. His intention appears to be to continue with the present arrangement and restrain / prohibit any other bidder, who is competitive and benefits Defendant No.1. Therefore, this argument of being a whistle blower is of no consequence. At least, for the purpose of an injunctive order, he does not qualify. There may be a case of the Plaintiff at the trial, in respect of his challenge to the entire exercise and the process of procurement; including but not limited to what has been discussed hereinabove; however, not at least, for seeking an injunctive order through which he continues to benefit himself. The Plaintiff's case lacks all ingredients of an injunctive order of the nature he is seeking from this Court.

9. In view of hereinabove facts and circumstances of this case, since the Plaintiff has failed to make out any prima facie case, nor balance of convenience lies in his favour, whereas, irreparable loss, if any, is being caused to Defendant No.1 instead of the Plaintiff, therefore, by means of a short order, and due to the conduct of the Plaintiff as noted hereinabove, listed application was dismissed on 25.09.2019 by imposing cost of Rs. 25,000/- to be deposited in the account of Sindh High Court Clinic and these are the reasons thereof.

J U D G E

ARSHAD/