

ORDER SHEET
HIGH COURT OF SINDH, KARACHI

Suit No. 1235 of 2017

Date	Order with signature of Judge
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Present:
Mr. Justice Muhammad Ali Mazhar

Muhammad Sohail Tabba & anotherPlaintiffs

Versus

Pakistan & others.....Defendants

For hearing of CMA No.7855/2017.

Date of hearing: 26.01, 09.02 & 13.02.2018.

Mr. Amel Khan Kasi, Advocate for the Plaintiffs.

Mr. Faisal Siddiqui, Advocate for the Defendant No.2.

Mr. Abdul Qadir Leghari, Assistant Attorney General.

Muhammad Ali Mazhar, J. By means of this suit for declaration and permanent injunction, the plaintiffs have entreated for the declaration that the show cause notice dated 31.01.2017 and the termination notice of letter of Interest dated 04.5.2017 are illegal and liable to be quashed. According to the condensed facts put forward, the subject matter of this lis is a letter of interest issued by defendant No.2 for the construction of the 209MW, Asrit-Kedam Hydro Power Project on Swat River, district Swat, KPK.

2. The learned counsel for the plaintiff argued that the letter of interest and the impugned notices have been received at the registered office of the plaintiff No.1 at Karachi hence the cause of action has accrued within the territorial jurisdiction

of this court in view of the provision contained under Section 20 (c) CPC.

3. It was further contended that in terms of the Policy, 2002, the project has been awarded on build own, operate and transfer basis (BOOT) thus creating vested right and interest in favour of the plaintiff. He argued that the facts of the case of **Munda Hydropower Pvt. Ltd. (2009 MLD 526)** are attracted in which the Islamabad High Court in the identical case stayed the re-bidding of the project. On bare reading of Section of 6, 7, 8 and 9 of the Private Power and Infrastructure Board Act, 2012 it would be suffice to hold that the Managing Director, in absence of a decision of the Board in this regard is not competent to take such drastic action of cancellation. The defendant failed to file minutes of any such Board meeting where the decision of termination of the rights of the plaintiff in project was taken. In response to the proposal dated 29.07.2006, the plaintiff No.1 was served with a Letter of Interest ("LOI") on 14.04.2007 to undertake and prepare feasibility study. The LOI was to expire after lapse of 24 months but the feasibility report was submitted within 12 months by the plaintiff No.1 and the panel of experts was appointed for feasibility study.

4. It was further contended that the defendant No.2 was aware of volatile situation in SWAT (terrorism, flooding and Army operations). Vide letter dated 13.06.2016, the plaintiff was given last chance to negotiate the Tariff with NEPRA and to place the feasibility study within 3 months. No personal hearing was provided to the plaintiffs before terminating its rights and interest in the project. The learned counsel further contended that the required expertise for the project is unavailable in Pakistan therefore a considerable number of foreign qualified engineers and consultants are required for

accomplishing the project. The unforeseen flooding in the Swat River dramatically changed the dynamics of the region leaving the project site inaccessible.

5. It was averred that inviting fresh bids will delay the project further by years. Judicial reviews have always upheld the sanctity of a contract between two parties. He referred to the case of **Hafeezullah Khan vs. Barkat Ali (PLD 1998 Karachi 274)**. The counsel made much emphasis that the stigma of termination of LOI shall gravely affect the reputation of the plaintiffs which cannot be compensated in terms of money. He reiterated that the plaintiffs desire to complete the project as considerable period, expertise, money and manpower have already been consumed. The learned counsel in support of his contention, further cited the judicial precedents such as **AIR 1978 J&K 102** and **AIR 1969 Mysore 310**.

6. On the contrary, the learned counsel for the defendant No.2 argued that letter of interest dated 14.04.2007 (LOI), was issued to the plaintiff No.1 to submit the feasibility study within 24 months. He added that LOI was not a contractual instrument but a pre-contractual arrangement. The plaintiffs completed the feasibility study which was approved by the defendant No.2. The defendant No.2 through letter dated 29.12.2008, required the plaintiff No.1 to approach NEPRA to file the Tariff Petition till March 29th, 2009 but Tariff Petition was submitted by the plaintiffs on September 7th 2016 after delay of 07 years. Repeated requests and deadlines by the defendant No.2 and repeated assurances by the plaintiff No.1 are contained in the lengthy correspondence between 07.10.2010 to 13.06.2016. The plaintiffs failed to explain why Tariff Petition was delayed for over 7 years. Neither the floods nor the militancy which ended in 2012 or at best, 2013 in Swat stopped the plaintiffs from filing the Tariff Petition to

NEPRA at Islamabad. Though Tariff Petition was filed on 07.09.2016 but NEPRA rejected the Tariff Petition on the ground that the plaintiffs needed to update their feasibility study.

7. The learned counsel further contended that the initial show cause notice was issued on 31.01.2017 which was replied however a final show cause notice was issued on 31.03.2017. The plaintiffs representatives Abdul Sattar Jumani and Sohail Tabba met Munawar Iqbal of the defendant No.2 and Shah Jahan, MD of the defendant No.2 for personal hearing. He further argued that the real reason for the plaintiffs delay in submitting the Tariff Petition is that they wanted to delay the issuance of the letter of support which would have required them to do substantive work in this project, namely (a) Implementation Agreement (b) Power Purchase Agreement (c) Lease Agreement (d) Financial Closure (e) Commercial Operations date and (f) Submit substantive Bank Guarantee. Only execution of the aforementioned Agreement would have given rise to contractual relations between the Government of Pakistan and the plaintiffs. He further argued that injunction may not be granted to the plaintiffs because of the following reasons (a) No prima facie case because the plaintiffs are at fault (b) weighing the interest shows that the interest of the government should prevail as it represents the public interest in completing this project (c) No irreparable loss as any loss of the plaintiff can be compensated by money (d) The public interest requires the building of this project as the plaintiff has shown itself to be incompetent (e) The aforementioned reasons show that injunction being a equitable and discretionary relief should not be granted. In support of his arguments, he referred to my judgments reported as **2017 MLD 1616, 2017 MLD 785, 2013 PLC (C.S) 768, 2017 CLC**

1140, 2016 CLC 83 and PLD 2018 Sindh 222.

8. Heard the arguments. The record reflects that on 29th July, 2006 Younus Brothers Group submitted a statement of qualification (SOQ) for 209 Asrit-Kedam Hydro Power Projects. On submission of this SOQ, the Managing Director of Private Power and Infrastructure Board, Ministry of Water and Power, Government of Pakistan on 14th April 2017 communicated a Letter of Interest (LOI) for 209 Mega Watt Asrit-Kedam Hydro- Power Project. The plaintiffs were required to complete the feasibility study on their own risk and cost without any obligation on the part of Government of Pakistan and its agencies within 24 months from the date of letter of interest. On submission of feasibility, the Managing Director vide letter dated 29.12.2008 communicated the approval of feasibility study thereafter; the sponsors were required to approach NEPRA for tariff negotiation.

9. Due to persistent default, a show cause notice was issued. The pith and substance of the show cause notice headed to the conclusion that sponsors miserably delayed, defaulted and failed to make any significant progress to the development of the project on one or the other pretext and after approval of the feasibility study they rendered it outdated. The plaintiffs were called upon to explain as to why the PPIB/GoP should not terminate the interest. In the reply it was alleged that before 2008 the geo-political situation in the Swat region has been worsening due to infiltration by militants so any further development remained at a standstill. It was further avowed that the Law Enforcement Agencies conducted massive operations to remove the militants hence the travel advisory was negative for Swat region. It was further averred the area problems were also compounded by the floods of 2010 and 2011 which rendered

the site inaccessible. The record reflects that on 31.03.2017, the Private Power & Infrastructure Board again put emphasis that sponsors failed to show cause with plausible reasons of the delay, failure and default to develop the project timely. The sponsors also failed to show how law and order situation in project site area in Swat which came back to normal life in the year 2011 prevented the sponsors for more than six years to file the Tariff Petition to NEPRA at Islamabad and apply for issuance of letter of support to negotiate and execute project agreements. This letter was also replied by the plaintiffs on 17.04.2017 and in the concluding paragraph a request was made to withdraw the notice and an opportunity be provided to the plaintiff to continue to develop the project. Finally, on 04.05.2017 while jotting down the relevant facts, it was communicated that the sponsor was afforded personal hearing on 10.04.2017 but no plausible justification was provided against the averments made in the show cause notice and later the sponsor reiterated whimsical and false justification vide letter dated 17.04.2017. The concluding paragraph for the ease of reference is copied as under:-

“NOW THEREFORE, the Sponsor having failed to show cause with plausible explanations and justifications for its delay, default and failure towards timely development of the Project including but not limited to filing of a Tariff Petition as per the requirements of NEPRA Act, applicable rules and regulations thereunder, thus having defeated the Policy objectives of the GOP as set out in the Show Cause Notice, all rights and interest of the Sponsor (or any party claiming through or on behalf of the Sponsor) in and related to the Project are hereby terminated with immediate effect.”

10. According to Policy for Power Generation Projects, 2002, the previous power policy, 1998 failed to effect the private power investors, therefore, the government felt it necessary to create an environment and craft a new set of incentives which on the one hand offer attraction of investors and on the other hand keep the consumer prices within affordable limits. The Policy was launched in 2002 after thorough deliberation and brain-storming amongst all stakeholders and the policy offers

maximum incentives and assurances that an investor can expect. The Private Power & Infrastructure Board has been established under Private Power & Infrastructure Board Act, 2012. The objective and ambition of the board is to implement and machination the power policies, development and implementation of power projects and related infrastructure in the private sector and public/private partnership basis and also promote, encourage, and facilitate private sector investment in the power sector and to safeguard the investment to provide one window facility to investors. According to Section 7 of the Act, the Managing Director is responsible for the day to day administration of the affairs of PPIB, whereas, under Section 8 of the Act, it is provided that the meetings of the board shall be presided over by the Chairman and at least 50% of the total membership of the board shall constitute a quorum for the meeting of the board.

11. In depth analysis of the Policy for Power Generation Projects, 2002 divulges Clause 4.1 which in fact communicates the submission of proposals. Clause 4.2 apropos to letter of interest whereas 4.3 germane to the negotiation on tariff. 4.4 is participation in bidding and 4.5 is schedule. At page 12 of the aforesaid Policy, a table is also incorporated and assimilated with activity wise timeline.

12. Though the learned counsel for the plaintiffs argued with vehemence that in terms of Policy 2002, the project was awarded on built own, operate and transfer basis (boot) which created a vested right in favour of the plaintiff but in reality and practicality there is no concluded contract between the parties. In point of fact only a letter of interest was issued by the PPIB. It is an admitted position that the statement of qualification was submitted in the year 2006

and letter of interest was issued on 14.04.2007 and on approval in the year 2008, the plaintiff was required to file Tariff Petition to the NEPRA at Islamabad. Let's assume that law and order situation was not satisfactory even than the feasibility study was to be submitted to NEPRA for determination at Islamabad and not at Swat. The defendant No.2 has attached various documents including the minutes of meeting to put on show their bona fide that much evenhanded opportunities were afforded to the plaintiffs but they submitted the petition to NEPRA after a long delay which was returned back with the directions to submit updated feasibility. Despite providing various gateways and probabilities, no seriousness was shown by the plaintiffs to accomplish and attain the project. In this awkward and tenacious state of affairs, the defendant No.2 was left with no other option but to terminate the letter of interest which was at initial phase neither it was concluded or culminated into any binding contract nor created any vested right in favour of plaintiffs. Lengthy course of action is lay down step by step to complete the negotiations for a concluded contract with certain timelines live up to the actions one after the other. It is not the letter of interest alone which could create legitimate or vested right in favour of the plaintiffs but some more auxiliary steps and stages were to be complied with for a concluded contract but then again due to consistent default, the matter could not travel beyond the letter of interest.

13. The learned counsel for the plaintiffs referred to the case of **Munda Hydropower Pvt. Ltd** (supra) which is distinguishable to the facts of the case in hand. The facts leading to an understanding that a decision in the above case was taken in the public interest to change the project into a Public Private Partnership Venture with WAPDA to assume public role and the Appellants in that case were called upon

to contract WAPDA as a "Potential Private Partner". No question of such a persistent delay and default was involved. He further referred to the case of Union of India reported in **AIR 1978 J&K 102** in which the contract was cancelled on 22.05.1958 on the ground that respondent failed to make supply with due diligence. It was held that the authorities could and ought to have exercised this option, the moment the respondent had committed the breach of the second work order. They could not be permitted to exercise both these options of accepting the supplies in contravention of the second and third work order and cancelling the contract because of the said contravention. The controversy and facts and circumstances of this case are also distinguishable and not helpful to the plaintiff's case. He also referred to the case of C.S. Narayana Rao reported in **AIR 1969 Mysore 310** in which the court held that under the agreement the allottee had to complete the directions on or before 18.12.1955 but he did not commence the construction. The Trust Board never entertained any thought for resumption. The power of resumption was to be exercised within a reasonable time but the board did not exercise any such power for a period of nearly for 12 years. So it is reasonable to presume the abandonment of that power. Again it is inescapable to comment that this judgment is also widely divergent and poles apart.

14. The raison d'être of making policy for power generation project is to watch over and shield the larger public interest and to fight out dark and frightening shadows of load-shedding and to make necessary provisions to generate ample electricity which is an engine for the growth of economy. If such projects are delayed inordinately showing indolent attitude of the sponsors, the acumen of making such policies would be redundant and superfluous. In 2008 letter of

interest was issued by the PPIB/GOP and in 2018 the plaintiffs are still fighting for injunction against the letter of termination without taking any material steps to complete the project successfully. In my considerate view to the present facts and circumstances, the relief of injunction if any would be against the larger public interest. In the judgment **(authored by me)** in case of **Abu Dhabi Medical Devices Co. L.L.C vs. Federation of Pakistan** reported in **2010 CLC 1253**, I held that the expression "**public importance**" is not capable of any précised definition. It can only be defined by process of judicial inclusion or exclusion. Each case has to be judged in the circumstances of the case as to whether the question of public importance is involved but it is settled that public importance must include a purpose or aim in which the general interest of the community as opposed to the particular interest of the individual directly or widely concern. Public Interest is very wide expression and embraces public security, public order and public morality. Expression Public Interest in common parlance means an act beneficial to general public and action taken in public interest necessarily means an action taken for public purpose. It further leads general social welfare or regard for social good and predicating interest of the general public in matters where regard was social good is of the first moment.

15. What is effect and impact of **letter of intent, letter of interest and or expression of interest**? Where parties are discussing and exchanging dialogues on prospective contract, one may issue **letter of intent**. The outcome of such letter is generally to connote the aim of the issuer to move in a contract whom letter was issued and to allow parties to sketch out fundamental terms and due diligence quickly before expending substantial resources on negotiating definitive agreements. Normally such letter is interpreted as

not creating a legally binding obligation. The effect of such letter will therefore depend on its wording and the context in which it is used in such a case there may be no contract at the time the letter is issued. The letter of intent may have three conceivable constituents. It could be an offer of an ordinary consensual agreement; it could be an offer of one-sided contract by which the issuer wished the recipient to do particular job and undertook to reimburse him for it if he did so and it might have no contractual effect at all. Its effect in any particular case would depend on the working of the letter and surrounding. Normally, it does not constitute a definitive contract but signifies a genuine interest in reaching the final agreement subject to due diligence, additional information, or fulfillment of certain conditions. The language used in writing a letter of intent is of vital importance and determines whether it is only an expression of intent or an enforceable undertaking. Whereas the **letter of interest** is acknowledged and recognized as quarrying and delving letter which describes the interest and serve as formal request contemplating for any potential members. This also cannot be categorized and tantamount a conclusive contract but connotes only interest may be for attainment and accomplishment of final agreement subject to due diligence, additional information and conditionalities. Concomitantly, an **expression of interest** is a formal offer made by strategic and premeditated financial procurer for the buying out the business. The uppermost perception is to put forward strategic diversity that the buyer is willing to pay for company. EOI's are usually submitted in the form of a letter or a summary document and in addition to the range of valuation may include details on the proposed timing of the transaction, the synergies the buyer sees, the deal structure, and any other items that would help the seller to decide.

16. A scanned view to the written statement refers to the decision of minutes of meeting dated 09.08.2010 in which a timetable was accentuated to fulfill the requirements within the cutoff date. The minutes of progress review meeting dated 10.12.2010 exhibits that again reasonable time was given to the plaintiffs. Three more letters dated 15.03.2011, 07.04.2011 and 26.05.2011 are attached in sequence to display that defendant No.2 recapped the previous decisions for making compliance. On 24.09.2011, the Managing Director again advised the plaintiffs to approach NEPRA for generation license and tariff determination within two months. The minutes of progress review meeting dated 31.10.2011 and 03.05.2012 demonstrate that again the decisions were taken in line of making effective implementation for expediting the development of project. Five more letters dated 16.05.2013, 09.09.2014, 13.06.2016, 09.09.2016 and 19.10.2016 are also attached. In all letters somehow or the other the PPIB reminded the plaintiffs for fulfilling their obligations so that the project may be activated. In the letter 17.07.2014 a final/last chance was given to move the project ahead by submitting tariff petition to NEPRA within two months. The chronology and sequence of events decipher unequivocally that regardless of providing unlimited opportunities to the plaintiffs they have failed to fulfill their obligations so the defendant No.2 had left with no other option but to terminate letter of interest which was an action in the larger public interest. Due to reckless and unserious attitude of the plaintiffs towards implementation on different pretexts, the project has already been delayed for much considerable time. So in these state of affairs, the plaintiffs do not deserve to pursue and claim equitable relief of injunction but it would be in the larger public interest to invite fresh bids for the same project by the defendant No.2 in terms of relevant policy.

17. In the judgments **(authored by me)** in the case of **Hajj Organizers Association of Pakistan Versus Federation of Pakistan (2017 MLD 1616)**, **Al-Tamash Medical Society versus Dr. Anwar Ye Bin Ju (2017 MLD 785)**, **MTW Pak Assembling v/s Shahzad Riaz Industries Pvt. Ltd. (2017 CLC 1140)**, **Sayyid Yousaf Husain Shirazi v. Pakistan Defence Officers' Housing Authority (2010 MLD 1267)**, **Shahzad Trade Links versus MTW Pak Assembling Industries (Pvt) Ltd. (2016 CLC 83) & Roche Pakistan Limited Vs. Pakistan (PLD 2018 Sindh 222)**, I have discussed in detail that the injunction is an equitable relief based on well-known equitable principles. Since the relief is wholly equitable in nature, the party invoking the jurisdiction has to show that he himself was not at fault. The phrase prima facie case in its plain language signifies a triable case where some substantial question is to be investigated or some serious questions are to be tried and this phrase 'prima facie' need not to be confused with 'prima facie title'. Before granting injunction the court is bound to consider probability of the plaintiff succeeding in the suit. All presumptions and ambiguities are taken against the party seeking to obtain temporary injunction. The balance of convenience and inconvenience being in favour of the defendant i.e. greater damage would arise to the defendant by granting the injunction in the event of its turning out afterwards to have been wrongly granted, than to the plaintiff from withholding it, in the event of the legal right proving to be in his favour, the injunction may not be granted. A party seeks the aid of the court by way of injunction must as a rule satisfy the court that the interference is necessary to protect from the species of injury which the court calls irreparable before the legal right can be established on trial. In the technical sense with the question of granting or withholding preventive equitable aid, an injury is set to be irreparable either because

no legal remedy furnishes full compensation or adequate redress or owing to the inherent ineffectiveness of such legal remedy. The existence of prima facie case is to be judged or made out on the basis of material/evidence on record at the time of hearing of injunction application and such evidence of material should be of the nature that by considering the same, court should or ought to be of the view that plaintiff applying for injunction was in all probability likely to succeed in the suit by having a decision in his favour. Balance of convenience means that if an injunction is not granted and the suit is ultimately decided in favour of the plaintiff, the inconvenience caused to the plaintiff would be greater than that would be caused to the defendant, if the injunction is granted. It is for the plaintiff to show that the inconvenience caused to him would be greater than that which may be caused to the defendant. An injunction is a writ framed according to the circumstances of the case commanding an act which the court regards as essential to justice or restraining an act, which it esteems contrary to equity and good conscience.

18. In the wake of above discussion, the injunction application **(C.M.A No. 7855/2017)** is dismissed.

Karachi:-
Dated.31.5.2018

Judge