

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
Suit No.2236 of 2018

DATE ORDER WITH SIGNATURE OF JUDGE

Plaintiff: **The Shaheen Foundation Through**
Syed Mustafa Ali, Advocate. **Mr.**

Defendant No.1 to 3: **Civil Aviation Authority Through**
Mr. Babar Sattar, Advocate.

Defendant No.4: **Reliance Aviation Tech Services (Pvt)**
Limited Through Mr. Salman Akram
Raja, Advocate.

Federation of Pak. **Through Mr. Osman A. Hadi, Assistant**
Attorney General.

For hearing of CMA No.17041/2018.

Dates of Hearing: **24.01.2019 & 25.01.2019**

Date of Order: **25.01.2019**

ORDER

Muhammad Junaid Ghaffar J. This is a Suit for Declaration and Permanent Injunction; whereas, through listed application, the Plaintiff seeks a restraining order against Defendants No.1 to 3 from awarding the Tender in relation to the Deployment, Operation and Maintenance of Common Use Passenger Processing System (“**CUPPS**”) and Baggage Reconciliation System (“**BRS**”) (hereinafter referred to as “**The Tender**”), with a further restraining order in respect of implementing or giving effect to any other instrument, letter or order till final disposal of this Suit.

2. The precise stated facts are that Plaintiff which is a Trust formed pursuant to Notification dated 08.08.1977 through its Project known as Shaheen Airport Services (“**SAPS**”) is engaged in providing ground handling services at various Airports in Pakistan, including providing common use Terminal Equipment passenger facilities etc. In addition to this SAPS is also providing Baggage Reconciliation System and Maestro Departure Control System at Karachi Airport for the last six years. It is

further stated that Defendant No.1 to 3, i.e. Civil Aviation Authority (**“CAA”**) vide publication dated 12.08.2018 invited bids/proposals for the Tender at seven Airports in Pakistan. The Plaintiff after completing codal formalities obtained initial request for proposal and after fulfilment of requisite process, was qualified technically at Stage-I, along with Defendant No.4 and participated further in the Tender, whereafter the financial bids were opened, wherein, Defendant No.4 has submitted a bid of US \$ 0.66 per passenger as against the bid of the Plaintiff of US \$ 0.68 per passenger, and is the lowest bidder. It is the case of the Plaintiff that though the bid of Defendant No.4 is less than the Plaintiff; however, Defendant No.4 was otherwise technically disqualified due to the criteria laid down in the Tender documents; therefore, Tender could not be awarded to Defendant No.4; hence instant Suit. On 29.11.2018, an exparte ad-interim order was passed, whereby, CAA was restrained from issuing Letter of Award to Defendant No.4.

3. Learned Counsel for the Plaintiff has contended that pursuant to calling of Tender by CAA, the Plaintiff was issued 1st Request For Proposal (**“RFP”**), and participated, whereafter it was qualified technically; that CAA in a clandestine manner permitted Defendant No.4 to also participate; despite being technically disqualified, as it was incorporated after publication of the Tender; that Public Procurement Rules 2004 (**“PPRA Rules 2004”**) have been violated and the eligibility criteria has been relaxed in favour of Defendant No.4, which is not permissible in terms of Rule 36(c) *ibid*, and it is only the technical aspect of the bidding documents which can be altered, but not the eligibility criteria; that as per RFP-1 the eligibility of bidders was provided in Clause A-4.1.1, which required a minimum five years' experience; whereas, admittedly Defendant No.4 was not qualified; that even in terms of Clause-A.4.2 there are other eligibility conditions for the bidders and since Defendant No.4 was incorporated on 24.10.2018, it could not have fully complied with it; that it has come on record through Minutes of the pre-bidding meeting held on 30.08.2018; in response to query raised on behalf of Principal of Defendant No.4, through its then Agents, that as per CAA the Principal Software Manufacturer cannot nominate two Companies as it is Principal Agents; whereas, a Principal Agent duly nominated by a Principal Software Manufacturer cannot further nominate a third Company as a Principal Agent, and lastly a Principal Software Manufacturer cannot nominate two Companies as its Principal Agent, whereas, it was further recorded that further response will be

provided subsequently in respect of nomination of a holding Company in a group of Companies as a Principal Agent; that despite this observations in the minutes, Defendant No.4 was qualified as a technical bidder, though all these conditions were not fulfilled; that the same stance of CAA was reiterated through their Email dated 06.09.2018; that in terms of Rule 36(c), it is only permissive for the Procurement Agency to revive, modify or add any aspect of the technical requirements or evaluation criteria; however, the eligibility notified through a Tender document cannot be altered or changed to favour a particular bidder; that once a bidder is disqualified on the basis of any eligibility criteria, the Procurement Agency cannot enter into any negotiation as has been done in this case; that during the process of Tender, Securities Exchange Commission of Pakistan (“**SECP**”) was also approached by Defendant No.4 and in this context he has relied upon an Email dated 12.10.2018 as well as another Email dated 10.10.2018 by CAA to the Bidder, which is against the norms of a Tender; that subsequently revised RFP documents were shared in a meeting on 16.10.2018 and even in the revised documents, as to the eligibility criteria laid down in clause A-4.1.1, there was no change whereas, on the basis of revised RFP, Defendant No.4 could not have participated any further; that in view of such position, the Tender ought to have been awarded to the Plaintiff; that to circumvent the eligibility criteria, CAA permitted local agents to form a Joint Venture (“**JV**”) with another Company and then participate through a Special Purpose Vehicle (“**SPV**”), which is against the very tender documents; that Plaintiff filed a complaint on 06.11.2018 to this effect by informing CAA that the two companies, who have formed JV, were incorporated on 11.02.2013 and 18.05.2018 and had no related experience of Aviation Industries and IT services, as per RFP; whereas, their financial statements were not available with SECP; hence they do not qualify for Stage-II participation in respect of the financial bids; that subsequently another complaint was lodged with CAA on 23.11.2018, but no response was received; that since Defendant No.4 was ineligible for Stage-I i.e. the technical bidding; hence could not be considered for Stage-II i.e. financial bids, and therefore the Tender cannot be awarded to Defendant No.4; that the purpose of competitive bidding by a government functionary should be in transparent manner; however, the same is lacking by permitting to by-pass the requisite qualifications; that the SPV formed as Defendant No.4 has no relevant experience in the field nor it could claim any such experience as it was incorporated

recently on 24.10.2018; that the condition of five years' experience would apply independently on all JV parties and the same cannot be circumvented in any manner. In support of his contention, he has relied upon ***Sana International Trading Corporation (Pvt.) Ltd. v. Federation of Pakistan through Chairman / Secretary Federal Board of Revenue and 2 others (2015 Y L R 2699), Hazir (Pvt.) Limited v. Pakistan National Airlines Corporation and another (1993 M L D 1308), Pakistan Defence Officers Housing Authority and another v. Shaheen Construction Company and others (2013 C L C 476), Messrs Shaheen Construction Company v. Pakistan Defence Officers Housing Authority (P L D 2012 Sindh 434), Alleged Corruption in Rental Power Plants etc. (2012 S C M R 773), Jamil Ahmad v. Provincial Government of West Pakistan and 4 others (P L D 1982 Lahore 49), Asaf Fasihuddin Khan Vardag v. Government of Pakistan and others (2014 S C M R 676), Habibullah Energy Limited and another v. WAPDA and others (P L D 2014 SC 47), Messrs Airport Support Services v. The Airport Manager, Quaid-e-Azam International Airport, Karachi and others (1998 S C M R 2268), Messrs Toyota Garden Motors (Pvt.) Ltd. v. Government of Punjab and 2 others (P L D 2012 Lahore 503), Messrs Haji Abdul Baqi and brothers v. Managing Director, Karachi Water and Sewerage Board and 6 others (2008 C L D 909), Ramana Dayaram Shetty v. International Airport Authority of India and others (1979) 3 Supreme Court Cases 489, Messrs Air Cairo v. Civil Aviation Authority and 5 others (2017 C L C 126) and M/s Monarch Infrastructure (P) Ltd. v. Commissioner, Ulhasnagar Municipal Corporation and others (AIR 2000 Supreme Court 2272).***

4. On the other hand, learned Counsel for CAA has, at the very outset, raised an objection regarding maintainability of this suit as well as nondisclosure of complete facts by the Plaintiff and submits that no injunction is to be allowed in favour of a party, who comes before the Court with unclean hands; that the Plaintiff all along was privy to the negotiations and discussion held by CAA with the Plaintiff as well as Defendant No.4 and never objected to any such issue and fully participated in both the stages and after losing the financial bid, has come before this Court; that PPRA Rules, 2004, require that all public procurement bidding should be fair, transparent and competitive as well, which should be worth the value of money and he has referred to Rules-

4, 10 and 20 *ibid*; that the services required by CAA are not provided by too many companies in the industry and it is a crucial aspect of the matter, which has to be considered by this Court; that Rule 36 *ibid* is permissive in nature and allows a Procurement Agency to amend, alter or modify the technical aspect, which also includes the eligibility criteria laid down by the Procurement Agency; that the Plaintiff ought to have availed the alternate remedy as provided under Rule 48 (*ibid*); therefore, even otherwise the Suit is not maintainable; that Plaintiff itself is a non-entity and was never a bidder before CAA rather it was SAPS, which is claimed to be a Project of the Plaintiff which participated in the Tender; that despite this shortcoming, CAA to promote competition, permitted SAPS to participate and was entertained; and therefore, the treatment given to SAPS was equally given to all others; hence no case for any discrimination or for that matter an objection in respect of eligibility is made out; that since 2001 in a monopolistic manner, SAPS is rendering services to CAA and despite best efforts on various occasions, the Tenders floated for competitive bidding could not materialize for one reason or the other, which are not relevant here; however, now once the process has been completed for award of Tender to another Company, the Plaintiff has filed instant Suit and has obtained a restraining order; whereas, without any formal contract is still performing and rendering services on its own terms and conditions; that even otherwise SAPS, as per clause-6 of the RFP was at the very outset disqualified, being big defaulter of CAA but again taking a lenient view and to promote competition, CAA allowed them to participate by a liberal construction of the bidding conditions; that after the first stage proceedings and the negotiations with all bidders, and before opening of the financial bids, the Plaintiff filed an affidavit before CAA on 20.11.2018 and withdrew from its earlier complaints and so also undertook that no further grievance would be raised, but unfortunately, immediately after opening of the financial bids, they have retracted from such affidavit, which otherwise disqualifies them from seeking an injunction; that if the Plaintiff had any grievance, they ought to have approached the Court immediately after the briefing and discussion in this regard; but not after opening of the financial bids wherein their bid is not the lowest; that CAA never coerced SAPS to give any affidavit or undertaking, therefore, any allegation to this effect or acting in a clandestine manner to give favour to anyone else is incorrect and liable to be discarded; that on the Board of Directors of CAA as well as the Plaintiff, the Vice Chief of Air Staff is a

Board Member, and therefore, the allegation to this effect otherwise does not merit any consideration; that Plaintiff was never a bidder and entire Suit is incompetent on this ground alone; that SAPS is otherwise not incorporated under any law and works under the shelter of Plaintiff by using their income tax and sales tax numbers, which is not proper and legal; that in the technical bids, the Plaintiff secured higher numbers as against Defendant No.4, and if intention of CAA had been otherwise as alleged, they would not have been awarded higher marks as compared to Defendant No.4; that nothing wrong has been done by CAA in permitting Defendant No.4 to participate, which is an SPV of two Agents of the Principal Software Manufacturer, as the condition in the RFP was only to the effect that no two Agents can bid separately on behalf of a Principal; that the term JV is broad enough; whereas, SPV has been formed only for legal purposes and enforcement of law; that there is no condition in the RFP that SPV itself should also be qualified on its own, but it is the participating companies, who must be qualified and in this case Defendant No.4 fulfills this criteria; that an SPV is always formed for certain purpose and requirement for an assignment, and therefore, will never be able to meet the eligibility criteria of five years, nor the same was required by CAA; whereas, independently and severally both members of the JV as well as SPV are otherwise qualified; that the intention for any restrictions in the RFP was only for the reason that CAA was not inclined to have multiple bids on behalf of one Principal Manufacturer of Software; that all along meetings were held, conducted and participated by all bidders, including SAPS, and none had raised any such objection including the Plaintiff or SAPS, and therefore, the principle of acquiescence would be applicable; that without prejudice, a case if any, could have been made out by SAPS, it was before opening of the financial bids; but once they participated throughout, subsequently, after losing the financial bids, no case could be made out on their behalf; that even otherwise the intention of CAA was to have the latest and the best software in passenger handling; whereas, the system being run and provided presently by SAPS is outdated and is no more compliant with the latest requirements of the Airline Industry; that in the Affidavit in Rejoinder, some reference has been made as to their eligibility and permission of CAA to participate in the proceedings; however, that was in respect of some earlier Project and has no nexus with the present Tender; that this shows that the Plaintiff has come with unclean hands; that filing of this Suit amounts to coerce and black mail CAA to continue

with the existing arrangement with them; whereas, they are the direct beneficiaries of any favorable orders, as till such time a new Tender is floated and awarded, they will continue with their assignment; that this amounts to holding CAA as hostage through the litigation process; hence, no case for an injunctive relief is made out and the listed application is liable to be dismissed. In support, learned Counsel has formulated certain situations under which interim relief cannot be granted and which according to him apply to the case of Plaintiff and in support he has relied upon the following cases-

A. ORDER 39, RULE 1 & 2 IS TO BE READ WITH SPECIFIC RELIEF ACT AND INTERIM RELIEF MAY ONLY BE GRANTED WHERE ALL THREE PRECONDITIONS ARE SIMULTANEOUSLY SATISFIED

1. (P L D 1970 SC 139) Shahzada Muhammad Umar Beg v. Sultan Mahmood Khan and another.
2. (1974 S C M R 519) Marghub Siddiqui v. Hamid Ahmed Khan and 2 others.
3. (1976 S C M R 393) Qamar Ali Shah v. Waryam Ali & 3 others.
4. (PLD 2000 Peshawar 4) Col. (Rtd.) Dr. Sharifullah Khan v. Superintending Engineer (PESCO), Peshawar Electric Supply Corporation, Peshawar & 3 others.
5. (PLD 2004 SC 860) Bolan Beverages (Pvt.) Limited v. Pepsi Co. Inc. & 4 others.
6. (2009 Y L R 171) Taimur Usman Khawaja & others v. Ali Muhammad Shaikh & others.
7. (2016 Y L R 113) Akos Grosz & 7 others v. Saidullah Shah & Co. through Chief Executive.
8. (PLD 2016 Sindh 445) Mst. Roshan Bano & 5 others v. Pakistan Defence Officers Housing Authority through Administrator & 7 others.
9. (PLD 1972 (AJ&K) 70) Azad Jammu & Kashmir Government v. Brig. Muhammad Aslam Khan.
10. (2009 C L D 42) Muhammad Hussain Khan v. N.I.B. Bank Limited and another.
11. (2009 CLC 406) Daewoo Pakistan Motorway Services Limited through Chief Executive v. Sun Shine Service (Regd) through Chief Executive Office & another.
12. (PLD 1978 Quetta 164) Malik Gul Hassan & 2 others v. Malik Haji Ismatullah & 6 others.
13. (AIR 1964 Pat. 387) State of Bihar & others v. Thakur Manmohan Deo.

B. PLAINTIFF SEEKING DISCRETIONARY RELIEF OF INJUNCTION AND DECLARATORY RELIEF OUGHT TO APPROACH COURT WITH CLEAN HANDS.

PURSUANT TO SECTION 56(j) OF THE SPECIFIC RELIEF ACT, 1877 AN INJUNCTION CANNOT BE GRANTED WHEN THE CONDUCT OF THE PLAINTIFF HAS BEEN SUCH AS TO DISENTITLE HIM TO THE ASSISTANCE OF THE COURT

1. (P L D 1965 (W.P.) Baghdad-ul-Jadid 1) Haji Noor Muhammad v. Ghulam Masih Gill.
2. (2003 C L D 794) Bayer A.G. and another v. Macter International (Pvt.) Ltd. (Karachi).

3. (2003 Y L R 1673 (Karachi) Aurangzeb v. Messrs Sui Southern Gas Company Ltd.
4. (2011 Y L R 1282 (Karachi) Bashir Ahmed v. Messrs Al-Qadeer Housing Project through Attorney and 6 others.
5. (2016 C L C 1396 Sindh) M/s Hascol Petroleum Ltd. through Authorized Attorney v. M/s Shell Pakistan Limited through Chief Executive Officer and 5 others.
6. (2018 M L D 959) (Lahore (Multan Bench) Muhammad Ahmad Farooq and another v. Province of Punjab through Member Judicial-VII, Board of Revenue Punjab, Lahore through DCO / Collector District Sahiwal and 12 others.

C. PURSUANT TO SECTION 56(D) OF THE SPECIFIC RELIEF ACT, 1877 INJUNCTION CANNOT BE GRANTED TO INTERFERE WITH THE PUBLIC DUTIES OF ANY GOVERNMENT DEPARTMENT / PUBLIC BODY.

1. (2011 M L D 925) (Peshawar) Waheed Khan v. Additional Chief Secretary Fata and 4 others.
2. (P L D 2012 Balochistan 154) Haji Abdul Mateen Akhundzada and another v. District Coordination Officer / Deputy Commissioner, Quetta and 5 others.
3. (2012 C L C 1113) (Peshawar) Rasheed Khan v. Muhammad Khan and others.

D. PRINCIPLES / CONSIDERATION FOR GRANT OF INJUNCTION IN PUBLIC PROCUREMENT MATTERS.

1. (2011 C L D 1774) (Peshawar) Messrs Gaggan Catering Service v. Messrs Balana Restaurant through Authorized Partner and others.
2. (PLD 2018 Sindh 303) Sinotec Co. Limited through Authorized Person v. Province of Sindh through Secretary Sindh and 5 others.

E. WHERE REMEDY IS AVAILABLE UNDER A SPECIAL LAW, THE JURISDICTION OF CIVIL COURT CANNOT BE INVOKED WITHOUT EXHAUSTING THE REMEDIES PROVIDED IN THE STATUTE.

1. (2016 P T D 163) (Sindh High Court) Muhammad Asim Arman v. Collectorate of Customs (Preventive) and 3 others.
2. (2016 C L C 1372) (Sindh) District Officer (Revenue) Thatta and another v. Karim Bux.
3. (2018 C L C Note 39) Tariq Rafi v. Topgen Health Care/T.G. Pharma and 2 others. (Sindh)
4. (1989 C L C 1938) (Karachi) Messrs Shahid Agency v. The Collector of Customs (Appraisalment) and another.

F. REMEDY SPECIFIED UNDER RULE 48 OF PPR 2004 OUGHT TO BE AVAILED BEFORE INVOKING THE JURISDICTION OF THE HIGH COURT.

1. (2016 M L D 2006) (Islamabad) Maqbool Associates (Pvt.) Ltd. and others v. Federation of Pakistan and others.

G. INTERPRETATION OF BIDDING DOCUMENTS ADVANCING OPEN COMPETITION OUGHT TO BE PREFERRED

1. (2012 C L D 832 (Sindh) Data Steel Pipe Industries (Pvt.) Ltd. v. Sui Southern Gas Co. Ltd. and another.

H. A PURPOSIVE RATHER THAN LITERAL APPROACH OF INTERPRETATION OF STATUTES IS TO BE ADOPTED

1. (1992 S C M R 710) Federation of Pakistan through Ministry of Finance and others v. M/s Noori Trading Corporation (Pvt.) Limited and 14 others.
2. (2018 S C M R 1885) Saif-ur-Rehman v. Additional District Judge, Toba Tek Singh and 2 others.
3. (2015 S C M R 1303) Dr. Raja Aamer Zaman v. Omar Ayub Khan and others.
4. (P L D 2014 Lahore 591) Rab Nawaz Dhadwana, Advocate and others v. Rana Muhammad Akram, Advocate and others.

I. LOCUS STANDI OF AN UNSUCCESSFUL BIDDER

1. (1971 S C M R 533) Munshi Muhammad and another v. Faizanul Haq and another.
2. (P L D 1972 Lahore 847) Ch. Muhammad Younus v. The Islamic Republic of Pakistan through the Secretary, Ministry of Communication, Government of Pakistan, Islamabad and 3 others.
3. (2014 Y L R 825 (Sindh) Saeed Ismail Burero v. Province of Sindh through Secretary Education, Government of Sindh and another.
4. (2015 C L C 1589) Sinotec Co. Limited v. Province of Khyber Pakhtunkhwa and 5 others.

J. DIRECT INJURY MANDATORY TO CLAIM LOCUS STANDI TO CHALLENGE TO PROCUREMENT PROCESS

1. (P L D 1958 (W.P.) Karachi 211) Dalmia Cement Limited v. District Local Board, Karachi and others.
2. (P L D 1961 Dacca 278) Standard Vacuum Oil Company v. The Trustees (in place of "the Commissioners" by amendment) for the Port of Chittagong.
3. (1994 C L C 2318) (Lahore) Mian Muhammad Nawaz Sharif v. Federation of Pakistan and 8 others.
4. (P L D 2007 SC 386) Province of Balochistan and 2 others v. Murree Brewery Company Ltd.
5. (P L D 2017 (Islamabad) 115) 7C's Corporate Services v. Oil and Gas Development Company Limited and others.
6. (2018 C L D 48) (Islamabad) Messrs SIS Corporation (Pvt) Limited v. Federation of Pakistan and others.
7. 2014 C L D 1185) (Islamabad) Aerotron (Pvt.) Limited and 2 others v. Federation of Pakistan and 9 others.
8. (P L D 1967 Dacca 6) Haji Mojakkir Ali v. Regional Transport Authority, Sylhet and others.
9. (AIR 1982 SC 149) S. P. Gupta v. Union of India and another.

K. SLIGHT DEVIATIONS FROM RULES / PROCEDURE WOULD NOT WARRANT JUDICIAL INTERFERENCE

1. (P L D 2011 SC 619) Suo Motu Case No. 13 of 2009.
2. (W.P. No. 3209 of 2011 (Islamabad) Malik Muhammad Ali v. OGDCL and others.
3. (2015 C L D 130 (Lahore) A. M. Construction Company (Pvt.) Limited v. The National Highway Authority and 2 others.
4. (2012 S C M R 455) Dr. Akhtar Hassan Khan and others v. Federation of Pakistan and others.

L. THE DOCTRINE OF SUBSTANTIAL COMPLIANCE

1. (PLD 1989 SC 222) Nishat Mills Ltd. v. Superintendent of Central Excise Circle II and 3 others.
2. (P L D 1972 SC 337) Ghulam Abbas v. Zohra Bibi and another.
3. (2018 S C M R 1944) Pakistan International Airlines Corporation and another v. Zaeem Aziz Qureshi and another.
4. (2018 P L C (C.S.) 12) Parks and Horticulture Authority v. Muhammad Saleem.

M. IN THE ABSENCE OF ANY ILLEGALITY, IRRATIONALITY OR PROCEDURAL IMPROPRIETY IN THE BIDDING PROCESS IT IS NOT LAWFUL TO CANCEL THE AWARD OF THE CONTRACT.

1. Writ Petition No. 8090 of 2 v. State of Tamil Nadu.
2. (2000 (2) SCC 617) Air India v. Cochin International Airport Ltd.
3. (2008 (3) CTC 675) Ion Exchange Waterleau Ltd. v. The Commissioner, Madurai.

N. PRESUMPTION OF LEGALITY ATTACHES TO PUBLIC OFFICE HOLDERS / MALA FIDE HAVE TO BE ESTABLISHES THROUGH RECORD

1. (2009 C L D 1542) State Bank of Pakistan v. Franklin Credit and Investment Company Ltd.
2. (1994 S C M R 782) Government of Sindh v. Khalil Ahmed and others.
3. (P L D 1983 SC 151) Syed Muhammad Khurshid Abbas Gardezi and others v. Multan Development Authority and others.
4. (P L D 1971 SC 811) Lahore Improvement Trust, Lahore v. The Custodian, Evacuee Property, West Pakistan, Lahore, Lahore and 4 others.
5. (2009 C L D 798) Afzal Motors Company (Pvt.) Ltd. v. Province of Sindh and others.
6. (P L D 1974 SC 151) The Federation of Pakistan through the Secretary, Establishment Division, Government of Pakistan Rawalpindi v. Saeed Ahmed Khan and others.
7. (P L D 2004 SC 191) Ch. Shabbir Hussain and others v. Registrar, Lahore High Court, Lahore and others.

5. Learned Counsel for Defendant No.4 in addition to adopting the arguments of Learned Counsel for CAA, has contended that the only dispute, which has been raised on behalf of the Plaintiff is that the SPV incorporated on 24.10.2018 is short of five years standing, which does not cause any substantial prejudice to any one; hence no case for an injunction is made out; that it is an effort on behalf of the Plaintiff to scuttle the Tender process and this is what in fact the substance of their case is; that Defendant No.4 is a combination / JV of Reliance Corporation and Aviation Tech, but within themselves, there is no deficiency and it only further enhances their ability by adding experience to it, whereas, with such an arrangement nothing is taken away; that Plaintiff while participating in Stage-I has consented to such formation of SPV and this Suit is an afterthought, after opening of the financial bids; that from 12.08.2018 till 05.11.2018, and even thereafter, no such objection was raised whereas, SAPS fully participated in the technical and financial bidding, hence no case is made out for an injunctive relief; that creation of SPV has only formalized the relationship with Principal Software Manufacturer and its two Agents in the Country, however, as required in RFP, only a single bid was filed; that after pre-bidding meeting on 30.8.2018, response was given by CAA via email on 5.9.2018, whereafter, Reliance and Aviation Tech jointly purchased the RFP on 6.9.2018 and the Technical Bid for Stage-I was jointly submitted on 12.9.2018; that minutes of the meeting held on 2.10.2018, reflect that to meet the legal requirements, either a JV was to be formed between Reliance Corporation and Aviation Tech; or a JV between them to act as Agent of RESA, the Principal Software Manufacturer; however, it was not realized by CAA at that point of time that a JV is not registered by SECP under the Companies Act, 2017; that on 10.10.2018 the Revised RFP for Stage-II was issued jointly without any objection conceding to the fact that both of them jointly stood qualified; that after an exchange of email(s) dated 12.10.2018 with SECP and CAA and a meeting held on 16.10.2018, wherein Plaintiff also participated, on 24.10.2018, the SPV i.e. Defendant No.4 was formed and immediately on 25.10.2018 a Tripartite Agreement was also entered into; hence, all requirements were met, whereas, the two partners in the SPV have all the experience to provide requisite services and it is only a formal arrangement for CAA; that the case of the Plaintiff for grant of injunction does not fulfill the three ingredients mandated for such relief as no irreparable loss is being caused to them, and at the most they only lose some profits, which are

quantifiable; hence no injunction can be granted as the alleged loss can be claimed at the trial; that presently since the Plaintiff is already in arrangement with CAA, further continuance of the ad-interim injunction only suits the Plaintiff as an ad-hoc arrangement is in field; that even otherwise the entire objection of the Plaintiff is only technical in nature; whereas, CAA is not going to lose anything; that the conduct of the Plaintiff is one, where they do not qualify for an equitable relief, which is not always available; that it is settled law that the courts must not interfere with such procurement proceedings; that through email dated 06.09.2018, it was clearly communicated by CAA that a group can participate and thereafter the SPV was also formed as a legal entity to meet the requirements of CAA; hence Ad-interim order is liable to be vacated as no serious prejudice would be caused to the Plaintiff, whereas, it is being caused to the defendants continuously since its grant on 29.11.2018. In support he has relied upon ***Puri Terminal Ltd. v. Government of Pakistan and 2 others. (2004 S C M R 1092), Marghub Siddiqi v. Hamid Ahmad Khan and 2 others (1974 S C M R 51), Punjab, Lahore v. Abdul Majeed and another (P L D 2015 SC 166), Province of The Punjab through Secretary, Health Department v. Dr. S. Muhammad Zafar Bukhari (P L D 1997 SC 351), Secretary to the Government of the Punjab, Forest Department, Punjab, Lahore v. Ghulam Nabi and 3 others ((2001 SLD EQUIV, CITATION 2001 P L D 415), Anwar khan v. Fazal Manan (2010 S C M R 973), Muhammad Bashir and another v. Province of Punjab and others (2003 S C M R 83), Mst. Suban v. Allah Ditta and others (2007 S C M R 635), Khiali Khan v. Haji Nazir and 4 others (1997 S C M R 304), Nawab Syed Raunaq Ali etc. v. Chief Settlement Commissioner and others (P L D 1973 SC 236), Dr. Akhtar Hassan Khan and others v. Federation of Pakistan and others (2012 S C M R 455), Montecario Limited v. NTPC Limited (S.L.P.(C) No. 29297 of 2016), Raunaq International Limited v. I.V.R. Construction Limited and others (1998 Indlaw SC 1819), Jagdish Mandal v. State of Orissa & others (2006 Indlaw SC 1285), Messrs Master Marine Services Private Limited v. Metcalfe and Hodgkinson Private Limited (2005 Indlaw SC 293), M/s Michigan Rubber (India) Ltd. v. The State of Karnataka & others (2012 Indlaw SC 449), Tata Cellular v. Union of India (1994 Indlaw SC 17), Sterling Computers Limited v. Messrs M. and N. Publications Limited and others (1993 Indlaw SC 1295), Afcons Infrastructure Limited v. Nagpur Metro Rail Corporation***

Limited and another (2016 Indlaw SC 648) and Allpay Consolidated investment and others v. The Chief Executive Offices of the South Africa Social Security Agency and others (Supreme Court South Africa Case No. 678/12).

6. Learned Assistant Attorney General has relied upon **PLD 2018 Sindh 303 (Sinotec Co. Limited Through Authorized Peson V. Province of Sindh through Secretary Sindh and 5 others)** and submits that the Courts must not interfere in procurement proceedings; that financial aspect of the lowest bid is to be considered with weightage as after all the Federal Government has to bear such higher costs, if any; that Plaintiff by itself is not a legal entity; hence, Suit is not maintainable and neither they can seek enforcement of entitlement or a contract and in support he has relied upon **2018 CLC note 9 (Messres Federal Handicraft through Proprietor v. Civil Aviation Authority through Director General and 2 others).**

7. While exercising his right of rebuttal, learned Counsel for the Plaintiff submits that approaching the Grievance Committee is not an appropriate remedy as it is constituted by the procurement agency itself; hence, such remedy is illusory in nature; that the Grievance Committee is not a judicial forum and has no power to grant any injunctive relief, therefore, no useful purpose could be served by approaching it; that insofar as the Plaintiff is concerned its status was not challenged in the past association of 17 years; hence this objection is untenable; that though an affidavit was given not to object such proceedings; however, there cannot be any estoppel against the law as it was obtained in violation of section 28 of the Contract Act, 1872, as the Plaintiff was coerced to do so; that all three ingredients of injunction are present in this case as a prima facie case regarding disqualification of Defendant No.4 is made out, whereas, balance of convenience also lies in favour of the Plaintiff and if the relief asked for is not granted, irreparable loss will be caused to the Plaintiff; that even otherwise, public functionaries are required to act in accordance with law and not in defiance; therefore, the application be allowed.

8. I have heard all the learned Counsel as well as the learned Assistant Attorney General and perused the record. Insofar as the facts are concerned, they have been briefly discussed hereinabove and the

Plaintiff's case is that Defendant No.4 was not qualified to participate as per the eligibility criteria laid down in Tender documents; hence the award of Tender or even the intention to do so must be restrained. The precise objection is based on the eligibility criteria in respect of 5 years' experience as well as being registered with the Tax Department and so also paying the relevant taxes to the Government. This is premised on the fact that admittedly Defendant No.4 was incorporated on 24.10.2018, that is even after the publication of the Tender; hence is disqualified. On the other hand Defendants have raised various objections including the maintainability of the Suit being filed without availing the alternate remedy; being incompetent to file the Suit as SAPS is not a legal entity; the participation in the proceedings till opening of the financial bids; consenting to the status of Defendant No.4 and its further participation in the bidding as well giving an Affidavit not to object any further including withdrawal of its earlier objections.

9. The first objection which I would like to deal with is in respect of the very maintainability of the Suit as the Plaintiff has apparently failed to avail the remedy of approaching the Grievance Redressal Committee, as provided in Rule 48 of the PPRA Rules, 2004. The said Rule provides that the procurement agency has to constitute a Committee of odd number of person with appropriate powers and authorization and any bidder aggrieved by any act of the Procuring Agency, after submission of his bid may lodge a complaint concerning his grievance not later than 15 days after the announcement of the bid evaluation report under rule 35. Though apparently the Plaintiff has failed to avail such remedy as provided under this Rule; however, it is not that in each and every case an aggrieved party has to compulsorily approach the Grievance Redressal Committee as it is entirely dependent on the independent facts and circumstances of each case. Moreover, as to maintainability of the Suit and the jurisdiction of this Court reference may be made to the dicta laid down by the Hon'ble Supreme Court in the case reported as ***Asaf Fasihuddin v Government of Pakistan (2014 SCMR 676)*** wherein the Apex Court has been pleased to hold that it is the duty of the Court to ensure that relevant laws are adhered to strictly, to exhibit transparency. It has been further held that it is universally recommended that the transaction involving public money must be made in a transparent manner for the satisfaction of the people who are the virtual owners of the national exchequer which is being invested in such projects. Further

reliance in repelling this objection regarding alternate remedy as provided under Rules 48 of the PPRA Rules, 2004, may be placed on the case of **GETZ Pharma (Pvt) Limited v Province of Sindh (PLD 2016 Sindh 479)**, which is though under the Sindh Public Procurement Rules, 2010; however, the same principle applies to the Plaintiffs case as well. Even otherwise, in these kind of procurements, a whistle blower can also approach the Court, and if the facts and circumstances so warrant, the Court can take note of, and proceed further. Though this is to be done in exceptional cases; however, the rule is flexible to a certain extent as and when needed. It is settled law that the very purposes of calling bids in respect of public funds is to ensure that the best and lowest price is quoted by the bidders; and at the same time, the process is transparent and without any ambiguity. It is also settled law that every state functionary, while dealing with public money is required to show ultimate fidelity and is burdened with extra-ordinary obligation to maintain fairness, equity, and impartiality. Its conduct must be without ailment of bias and doubt. The discretion of public functionaries in awarding tenders and spending of public money always requires a vigilant and vibrant scrutiny by the Courts. The public authority cannot mess up with public funds as it is not permitted to give largess in its arbitrary discretion or at its sweet will or in such terms as it chooses in its absolute discretion. The award of tenders by a Governmental agency always have a public interest, and therefore, it ought to have fairness and equality in its conduct. When it awards a tender, it must do so with fairness and without discrimination and favor, and must also follow the procedure as far transparent as possible. In these circumstances and for the fact that I have already heard the learned Counsel on merits of the case which I intend to decide thought this order, if would not be appropriate to non-suit the Plaintiff on this ground as the facts of this case warrant otherwise. Therefore, the applicability or otherwise, of Rule 48 *ibid*, is left open for an appropriate case and will be decided accordingly, if needed.

10. Insofar as the alleged disqualification of Defendant No.4, is concerned, the Plaintiff's Counsel has referred to the bidding documents more specifically clause A-4.1 and A-4.2 in respect of eligibility of bidders. He has also referred to the minutes of meeting held on 30.8.2018 and has contended that even in pre-bid meeting(s), the query of Defendant No.4 and its JV partners was responded by CAA that in this

manner they are not qualified. It would be advantageous to refer to the relevant clauses of the RFP as well as the minutes of meeting held on 30.8.2018 which reads as under:-

A4.1.1 The Bidder must be a Principal Software Manufacturer company or / and a Principal's Agent (hereinafter referred as "Company") or a Joint Venture (JV) / consortium having Principal Software Manufacturer as a Member (hereinafter referred as "Consortium"), however, no Bidder applying as a company or as a member of a JV / consortium, as the case may be, can be member of another Bidder. The term Bidder used herein would apply to both company and a Consortium.

Explanation: Principal's Agent for the purpose of this RFP means the authorized agent of a Principal Software Manufacturer company with minimum 05 years of experience as specified in A4.3.4.

A4.1.2 A Bidder may be company or JV / consortium and in case of JV / consortium, the Bidder must have a valid Joint Venture Agreement (JV) prior to the date of submission of bid proposal subject to consideration of law. The agreement should clearly define the roles and responsibilities of each member in the JV / consortium. The agreement should expressly certify that the Principal Software Manufacturer shall be responsible along with other member(s) for the provision and deployment of CUPPS, BRS and related services and its operation, maintenance, etc. During the license period and any extension thereof (if any). JV agreement must be duly notarized / attested by the concerned embassy and foreign office.

A4.1.3 A Bidder in case of a Principal's Agent must have a valid Agency Agreement as per applicable law with the Principle Software Manufacturer Company prior to the date of submission of bid proposal. The agreement should clearly certify that the Bidder possesses the explicit and exclusive authority of the Principal Software Manufacturer from the date of submission of bid for the purpose of this RFP. The agreement should also certify that the Principal Software Manufacturer shall be responsible along with Principal's Agent for the provision and deployment of CUPPS, BRS and related services and its operation, maintenance, etc. during the license period and any extensions thereof (if any), Agency agreement must be duly notarized / attested by the concerned embassy and foreign office.

A4.2. Other Eligibility conditions for the Bidders are to:-

A4.2.1 be a registered entity under the Company Laws or any other State and in case of a foreign company it should have its statutory office in Pakistan after grant of LOA;

A4.2.2 be registered entity with, Sales Tax and Income Tax Department of Federal and / or Provincial Governments and in case of a foreign company to get itself registered after grant of LOA and.;

A4.2.3 provide the certified audited financial statements of last three (03) years of the company or of JV / consortium member(s) as the case may be;

A4.2.4 provide source of investment for the scope of work, whether Bidder's / Companies own capital or bank loan; and

Minutes of the Meeting held on 30.8.2018

<p><u>Queries of M/s Reliance Corporation (Pvt.) Ltd. / M/s Aviation Tech Services' Ltd.</u></p>	
<p>5. Representative of M/s Reliance Corporation (Pvt.) Ltd. / M/s Aviation Tech Services Ltd. forwarded the following queries: (a) A4.1.3, pg 2 of 21 Please clarify for the purpose of bid submissions is</p>	

<p>the exclusive and explicit rights can be provided by the Principal Software Manufacturer to two its agent?</p> <p>Both the agents intend to combine their synergies to submit one bid. Also the Principal Software Manufacturer and its agents complies with the requirement of submitting a single bid as per clause A4.1.1.</p> <p>Under the same ownership, there can be different companies that do different work. If a Principal Software Manufacturer nominees two companies of an individual (registered in SECP under the same ownership) as Principal Agent exclusively to submit a single bid. Will PCAA have any issues with it? For this purpose, the bidding documents can be purchased under the joint platform of Reliance – ATS.</p> <p>What if Principal Software Manufacturer nominates one Principal Agent (the group) who then nominates two companies as Principal Agent within the same group?</p> <p>Kindly clarify, if the Principal Software Manufacturer nominates two companies with same ownership (or of same group), the bid shall be accepted under the above clause as the Principal Software Manufacturer is only appointing one group with the same ownership as their agent.</p> <p>Secondly, Principal Software Manufacturer provides exclusive and explicit rights to both the requirement of the bidding documents.</p>	<p>No, a Principal Software Manufacturer can provide exclusive and explicit rights to only one Principal Agent.</p> <p>A Principal Software Manufacturer cannot nominate two companies as its Principal Agent.</p> <p>A Principal Agent is duly nominated by a Principal Software Manufacturer cannot further nominate third company as Principal Agent.</p> <p>It is reiterated that a Principal Software Manufacturer cannot nominate two companies as its Principal Agent. However, a response will be provided after deliberation w.r.t, nomination of a Holding Company in a group of companies as a Principal's Agent.</p> <p>Exclusive right can be given to only one Company at a time.</p>
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11. The stance of the Plaintiff is to the effect that since Defendant No.4 is a Joint Venture of two separate Companies in the form of an SPV, therefore, is otherwise disqualified. According to the learned Counsel as per explanation of Clause A-4.1.1, the Principal's Agent for the purposes of this RFP means the authorized Agent of the Principal Software Manufacturer of the Company with minimum 05 years of experience as specified in clause A-4.3.4. According to him any Agent must have the requisite experience as above; and since admittedly, Defendant No.4 has participated as an Agent of the Principal Manufacturer, is therefore, disqualified. However, it is not in dispute that after publication of the Tender and issuance of RFP as above, several meetings were conducted

during Stage-1 (Technical Bids) of the Tender individually with the bidders as well as jointly. There were certain queries raised by interested parties including Defendant No.4 and their questions were answered by CAA. Finally after negotiations and discussions, Defendant No.4 was formed as an SPV which is a Joint Venture of two Agents working for the Principal Manufacturer of the Software in question i.e. RESA Airport Systems, France. The concern of CAA had been to the effect that there must be only one bid of the Principal Software Manufacturer and after conducting various meetings an understanding was reached, whereby, the idea of incorporating SPV was approved and on this an objection has been raised that the criteria of five years' experience is not fulfilled. However, it must be noted that in these kinds of procurements when there are International Bidders participating, formation of Joint Venture and SPV is a normal course, whereby, the Principal Manufacturer participates in the bidding process through a local partner and the procurement agency for its satisfaction requires that the bidder must be a local entity within the framework of the Local Laws. Here in this matter the Agent(s) of the Principal Software Manufacturer have formed the JV and have registered Defendant No.4 as an SPV for this special assignment. As per Wikipedia a special-purpose vehicle/SPV, is a legal entity (usually a limited company of some type or, sometimes, a limited partnership) created to fulfill narrow, specific or temporary objectives. A formal definition is The Special Purpose Entity (Vehicle) is a fenced organization having limited predefined purposes and a legal personality. A special-purpose Vehicle may be owned by one or more other entities and certain jurisdictions may require ownership by certain parties in specific percentages. Often it is important that the SPV is not owned by the entity on whose behalf the SPV is being set up (the sponsor). In other words formation of SPV by the Agents of the Principal Software Manufacturer was in fact to meet the legal requirement of the Country as well as CAA, so that in case of disputes proper legal recourse is available, which in the case of only JV would not have been possible. And in this regard there is correspondence available on record with SECP, which provides that either a Joint Venture be incorporated or a limited liability partnership concern can be formed under the Companies Act, 2017 and since the concept of a limited liability partnership is still in its infancy, CAA required that an SPV be incorporated to fulfill the requirements. Having said that, and notwithstanding, the Plaintiff was taken fully on board regarding this issue and record reflects that they consented to the formation of SPV and

their further participation in the Stage-II proceedings, i.e. the financial bids. Reference in this regard may be made to the discussion and the minutes of the meeting dated 16.10.2018, which reads as under:-

Minutes of the Meeting held on 16.10.2018

DISCUSSION / DECISIONS	RESPONSES & ACTION BY
<p>2. Director Commercial advised the companies that PCAA had invited them to submit their suggestions/ recommendations, which they feel, should be incorporated in the RFP for second stage. He further explained that because we haven't received any so we assume that the companies are happy with the RFP. He also said that as all four companies are here it means that you all accept the changes made by PCAA in the Second stage bidding documents, as no one has objected to any alterations, Director Commercial expressed his pleasure on the fact the all four companies who participated at stage one are still in the process and are willing to participate at stage two.</p>	
<p>g) Reliance-ATS submitted a question through email; Reliance and ATS want to combine their synergies to form a Limited Liability Partnership and the same LLP will act as an agent of the Principal Software Manufacturer for the subject project of PCAA has considered the query and the response is provided opposite.</p>	<p>It is pertinent to mention here that in this case, bidder has to submit a valid and effective agency agreement as per RFP along with the bid. If two companies intend to jointly obtain an agency of one principal, they are allowed to do so, but the agency agreement should be between the parties that are legal entities recognized by law, for all enforcement purposes. A valid agency agreement is must for technical evaluation of the bidder, in particular case.</p> <p>The joint venture of companies to be named an agency must a have form recognized by laws of Pakistan; to get notarized and later streamline tax registrations.</p> <p>In the given circumstances, the companies interested to form JV to act as an "Agency" should form an SPV.</p>

12. The above are the minutes of the meeting dated 16.10.2018 which was attended by all four participating companies and was also attended by SAPS. It is noted from the attendance sheet of the meeting that Aviation Tech and Reliance Corporation both attended this meeting through individual representatives, whereas, their participation in the bidding process was accepted by all. It further reflects from Para 4(g) as above, that CAA further clarified the issue that bidder must submit an Agency Agreement as per RFP along with the bid, whereas, if two companies have jointly obtained the Agency from the Principal, they are allowed to do so, but the Agency Agreement should be between the

parties that are legal entities recognized by law, for enforcement purposes. It was further held that the JV must also be a recognized company under the laws of Pakistan, and may form SPV. This all has happened before the Plaintiff, and is not denied. After this the bidding process has gone ahead for opening of Financial Bids, whereas, these minutes of the meeting were very much in the knowledge of SAPS as it has been filed with the Plaintiff as Annexure "K". However, in between SAPS lodged a complaint against JV members through its letter dated 6.11.2018 raising their concerns to this effect. Record further reflects that on 9.11.2018 another meeting was held wherein SAPS also participated, and it is further reflected that "*all bidders agreed that they were satisfied with the transparency of the bidding process*". As to their complaint dated 6.11.2018, another letter was issued by SAPS on 19.11.2018, whereby they informed CAA that their letter dated 6.11.2018 may be treated as cancelled. Not only that they also filed an Affidavit dated 20.11.2018 to this effect, which is a matter of record; however, while arguing the case, learned Counsel contended that it was a coercive measure and was not given willingly and was also in violation of s.28 of the Contract Act, 1872. The Affidavit is important and reads as under;

To,
 Director Commercial and Estate
 Headquarter,
 Pakistan Civil Aviation Authority,
 Jinnah International Airport,
 Karachi.

AFFIDAVIT WITH REGARD TO THE RFP FOR CUPPS AND BRS AT PCAA AIRPORTS, AUGUST 2018.

Air Cdre. Zafar Yasin (Retd.) being the deponent of this Affidavit state as under:

1. That M/s Shaheen Airport Service hereby unconditionally withdraws the letter and email, bearing reference HOSAPS/91/5/CUTE(PC) and NIL and dated 06th November 2018 and 15th November 2018, which were sent to Pakistan Civil Aviation Authority ("PCAA") by Air Cdre Zafar Yasin (Retd.) and Gp. Capt. Syed Mansoor Ali (Retd.)
2. **That M/s Shaheen Airport Service also undertakes to accept the results of the Bids Evaluation pertaining to the subject tender and shall not challenge the same. Any determination made by the Procuring Agency in relation to the technical and financial qualifications of the Parties would be considered as final and would only be impugned before the grievance committee as per PPRA Rules.**
3. That M/s Shaheen Airport Service assures and confirms the Procuring Agency / PCAA of its full corporation.

13. The Affidavit was given on a stamp paper, whereas, SAPS undertook not to challenge the technical and financial bids at any forum except the Grievance Redressal Committee. Though there is no cavil to

the proposition that it has to be read in juxtaposition with s.28 of the Contract Act; however, it is also of pivotal importance to note the conduct of the party seeking protection in terms thereof. This Affidavit was given much before opening of the financial bids, whereas, nothing prevented the Plaintiff to immediately approach this Court after being purportedly coerced as contended. No one was stopping SAPS from agitating this issue. However, SAPS chose not to do so, and on its volition participated in the financial bidding process, and after having lost the financial bid, SAPS chose to file this Suit by taking recourse to the argument that this was an outcome of coercive measures. I am not at all impressed with this argument as the conduct of the Plaintiff is not appreciable or which could be termed as approaching the Court with clean hands. Though it is a matter of record that this affidavit is annexed with the Plaint as an Annexure; however, I fully remember that while obtaining an ad-interim orders from this Court on 29.11.2018, this was never referred to or brought in the knowledge of the Court by the Plaintiff's Counsel. May be if this had been brought in notice, this Court might not have passed the ad-interim order. Be that as it may, for the present purposes, it can be safely said that Plaintiff came before the Court with unclean hands, and this resultantly, deprives it from calling for exercise of any discretion in its favor. It is not that simple just to say that they were coerced to file an Affidavit of such nature. The conduct at the same time is also to be noted and taken care of. The delay and timing in approaching the Court after losing the financial bid is one which cannot be ignored so lightly by calling for a shelter under s.28 *ibid*, which in fact is in relation to restraining a party to a "contract" from taking recourse to legal proceedings before a Court or Tribunal. Firstly, this is not a contract *per se*, to restrain SAPS from approaching the Court. And even if it is, as noted above, none prevented them from approaching the Court immediately to save such a right. But not at least after losing the financial bid. The Affidavit otherwise is not hit by the restraint provided in s.28 *ibid*, as it does not completely restrains SAPS from seeking legal remedy; but only provides that if aggrieved, they will approach the Grievance Rederessal Committee. This in fact is like an Arbitration Clause, whereby, parties agree to refer their disputes to Arbitration; but this does not mean that it is void in terms of s.28 of the Contract Act. Time and again the Courts have held that inclusion of an Arbitration Clause in Agreement is nothing; but a consent to refer the dispute to a forum of choice; and cannot be said to be void in terms of s.28 *ibid*.

Moreover, there are even cases wherein, Agreement not to appeal an order of compromise have been held not to be void in terms of s.28 of the Contract Act. And the simple reason being that a party after having taken the benefit of any such order or undertaking, cannot turnaround as the party is now estopped from acting contrary to its commitment. Reliance in this regard may be placed on the case of ***Bhirgunath Prasad Singh v Mt. Annapurna Dai Sjuarin*** (AIR 1934 Patna 644) and ***Protap Chunder Dass v Arathoon*** (1882 ILR 8 Cal 455). In this matter SAPS is in fact a beneficiary of such an Affidavit, as pursuant to this, the challenge to their status as well qualification has been ignored and they have been permitted to participate as well. In the circumstances, at least at this stage without any supporting evidence on record, it cannot be said that the Affidavit was given under coercion as pleaded, whereas, after having benefitted from it, its enforcement cannot be questioned by invoking s.28 of the Contract Act, which is not applicable in this given facts of this case.

14. To this Courts understanding in fact the doctrine of Acquiescence fully applies in this case. The plaintiff had full knowledge about status of the Defendant No.4 and in the entire proceedings in Stage-1, they never objected to, and even if objected, they withdrew their objections. Now after expressly waiving their right to this effect, could they claim the said right indirectly? The answer to this must be in the negative. It is well-settled that what cannot be done directly cannot be done indirectly. In Halsbury's Laws of England, 4th Edition (Reissue), Volume 16(2), the term 'Waiver' has been defined as "*abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted, and is either express or implied from conduct.....*" "*Waiver may also arise by virtue of equitable or promissory estoppel....*" "*A person who is entitled to rely on a stipulation, existing for his benefit alone, in a contract or of a statutory provision, may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist. Waiver of this kind depends upon consent and the fact that the other party has acted on it is sufficient consideration.*" If a party having a right stands by and sees another acting in a manner inconsistent with that right and makes no objection while the act is in progress he cannot afterwards complain. This principle is based on the doctrine of acquiescence implying that in such a case party who did not make any objection acquiesced into the alleged wrongful act of the other party and, therefore, has no right to complain against that alleged

wrong¹. However, it is to be kept in mind that acquiescence, being a principle of equity must be made applicable where a party knowing all the facts of bias etc., surrenders to the authority of the Court/Tribunal without raising any objection. Acquiescence, in fact, is sitting by, when another is invading the rights². One cannot remain willfully silent and passive, when such silence and passiveness is benefitting others as alleged, and then come to the Court by taking a U-turn. Such silence on the part of the Plaintiff may by his conduct regarded as waiving certain rights, or where such conduct, though not amounting to waiver has placed the other party in a situation from which it would not be reasonable to him to be called back, if the remedy is afterwards asserted. This is what has happened in this case. By withdrawing from the objections and filing of an Affidavit, SAPS has relinquished and waived its right to object again, as the situation has now changed. They have lost the financial bid. Would they had come to the Court even if they had been successful in the financial bid? Certainly not. If a man either by words or by conduct has intimated that he consents to an act which has been done and that he will not offer any opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that which they otherwise might have abstained from, he cannot question legality of the act he had sanctioned to the prejudice of those who have so given faith to his words or to the fair inference to be drawn from his conduct³.

15. Learned Counsel for the Plaintiff also made an effort to argue that in terms of Rule 36(c) of PPRA Rules, 2004, it is only Technical aspect of the Bid which could be modified or altered, but not the eligibility criteria. However, with utmost respect, this argument is fallacious as well as illogical. Rule 36(c)(iv) *ibid* provides that the “*procuring agency may revise, delete, modify or add any aspect of the technical requirements or evaluation criteria, or it may add new requirements or criteria not inconsistent with these rules, provided that such revisions, deletions, modifications or additions are communicated to all the bidders equally at the time of invitation to submit final bids, and that sufficient time is allowed to the bidders to prepare their revised bid:*” This sub-rule entitles a procuring agency to revise or modify *technical requirements* or *evaluation criteria*, and I am of the view that it is not restricted only to technical aspects of the bidding document, but so also the evaluation criteria, and this covers the

¹ Prabhakar vs. Joint Director Sericulture Department and Ors (AIR 2016 SC 2984)

² State of Punjab vs. Davinder Pal Singh Bhullar and Ors (AIR 2012 SC 364)

³ B.L. Sreedhar and Ors. vs. K.M. Munireddy (Dead) and Ors (AIR 2003 SC 578)

situation in hand. It is not the case of the Plaintiff that this revision or modification was done without notice to them and they were not taken on board in this regard; hence, this objection is also repelled being misconceived. Moreover, a minor deviation of Rules or Regulation, if any, in absence of any credible allegation of mala fides or corruption would not furnish a valid ground for interfering in judicial review⁴.

16. Lastly, though not necessarily to be discussed, but the status of SAPS itself is in serious doubts. The Plaintiff before the Court is “Shaheen Foundation”, which is claimed to be a legal entity and is incorporated pursuant to a Notification dated 8.8.1977 issued under the Charitable Endowment Act, 1890, whereby, it has been granted the status of a Non-Profitable Organization. SAPS is stated to be a project of the Plaintiff, which participated in the Tender. While confronted, learned Counsel for the Plaintiff argued that for all legal purposes, SAPS is working under the banner and control of “Shaheen Foundation” and for such purposes is utilizing the National Tax and Sales Tax Registration numbers issued to Shaheen Foundation. He also submitted that even Bank Accounts are opened on same numbers. This apparently is really confusing as well as unconvincing. It is not understandable as to how SAPS is working without any legal status, but under the umbrella of a Non-Profit Organization. This appears to be a serious question, to which no satisfactory answer has come forward at this stage of the proceedings. This Suit has been filed by Shaheen Foundation, whereas, the bid was filed by SAPS and not by Shaheen Foundation; hence, there appears to be no locus standi for Shaheen Foundation to file instant Suit. Though, this requires further adjudication; however, for the purposes of making out any case for exercise of discretion, this certainly goes against the Plaintiff. Therefore, I am of the view that at the trial stage, an issue must be formed as to the maintainability of the Suit by an Organization, which never participated in the bidding process.

17. In view of hereinabove facts and circumstances of this case, I am of the view that Plaintiff has failed to make out any prima facie case; whereas, balance of convenience also does not lie in its favour. Insofar as causing of any irreparable loss is concerned, it is the Defendants, who are going to suffer losses, if the injunctive relief is granted and confirmed. On the other hand, Plaintiff’s loss, if any, is a quantifiable

⁴ Dr. Akhtar Hasan Khan and others v Federation of Pakistan (2012 SCMR 455)

loss and can be claimed at the trial. Therefore, by means of a short order on 25.01.2019, listed application was dismissed and these are the reasons thereof.

Judge

Ayaz P.S.