

(2009) 03 DEL CK 0309**Delhi High Court****Case No:** LPA No. 120 of 2009

Prakash Atlanta JV and Others

APPELLANT

Vs

NHAI and Others

RESPONDENT

Date of Decision: March 30, 2009**Hon'ble Judges:** A.P. Shah, C.J; Sanjiv Khanna, J**Bench:** Division Bench**Advocate:** Rajiv Nayar and Sandeep Sharma, for the Appellant; Sandeep Sethi Padma Priya and Mohit Bakshi, for the Respondent**Judgement**

@JUDGMENTTAG-ORDER

1. The appellants in the present appeal, in the Writ Petition (C) No. 7443/2009 have challenged order dated 24.2.2009 blacklisting them for period of two years from participating or bidding in any future projects to be undertaken by National Highways Authority of India (NHAI) either directly in the name of Prakash Atlanta Joint Venture or indirectly in any other name or in association with any other person or entity. By order dated 13.3.2009, learned single Judge of this Court was pleased to issue notice in the writ petition as well as the stay application CM No. 3400/2009 but no interim order/protection has been granted. The present intra court appeal under Clause X of the Letters Patent is directed against refusal/rejection of the prayer of the appellant to grant interim protection/stay, which was (Signer's identity unknown) Signed by Naresh Mehta MEHTANARESH@REDIFFMAIL.COM Time: 2009.03.31 15:30:57 +05"30" Reason: Location: refused by the learned single Judge in order dated 13.3.2009.

2. The appellants have filed before this Court additional affidavit dated 25th March, 2009 stating inter alia, that NHAI would be inviting/receiving bids from various tenderers for projects of the value of Rs. 36,000 crore approximately till 30.4.2009. Further various other public authorities as per tabulated details given in Annexure ♦B to the affidavit dated 25th March, 2009 are undertaking development, improvement and road projects of about Rs. 32,000 crore till 30th of April, 2009.

3. In view of the averments made in the additional affidavit dated 25th March, 2009, we are satisfied that this intra court appeal under Clause X of the Letters Patent can be entertained and overrule the objection of the respondents. The present case is an exception and a rare case where an order directing notice can be regarded as a judgment as explained in Shah Babulal Khimji Vs. Jayaben D. Kania and Another . The said order refusing to grant interim protection on the first date of hearing adversely affects the appellants and there is no scope of restitution or retrieval even if CM No. 3400/2009 for stay is allowed on a subsequent date as the last date for submission of bids for tenders for projects worth more than Rs. 36000 crore issued by NHAI would have expired on 30th April, 2009, i.e. the next date of hearing. Applying the ratio of the decision in Shah Babulal Khimji (supra) and a Division Bench decision of this Court in Nisha Raj and Another Vs. Pratap K. Kaula and Others , we hold that the present appeal is maintainable.

4. Learned Counsel for the appellants has drawn our attention to the impugned order of blacklisting dated 24.2.2009 and has submitted that the said order is a non-speaking order and does not specifically deal with the contentions and issues raised. The reply and written submissions of the appellants have been rejected in two words by stating that they were "wholly unsatisfactory". It is also stated that personal hearing was granted to the appellants before one Mr. Nirmaljeet Singh, Member (T) on 18.10.2008 and the impugned order was passed after more than four months on 24.2.2009 by Mr. B.K. Sharma, General Manager (DK-I).

5. Learned Counsel for the respondents in rebuttal, however, claimed that Mr. B.K. Sharma, General Manager (DK-I) is the authorised officer and was also present in the hearing held on 18.10.2008. However, the time gap between the hearing and passing of the order dated 24.2.2009 is not disputed. Learned Counsel for the respondents has also drawn our attention to the show cause notice dated 27.6.2008 and the averments and allegations made therein. It is stated that work for construction of segment of Lucknow bypass was awarded to the appellant No. 1 vide contact agreement dated 10.8.2001 and the work was not completed till 2008 and the appellant had failed to abide by the revised schedule as was agreed. Learned Counsel for the respondents also relied upon the Clause 2.2.8, office memorandum dated 5th December, 2007 and earlier letter dated 13.10.2008 written to Valecha ♦ PDA JV referring to Clause 2.2.8 and holding that the Request for Qualification (ROQ) cannot be considered in view of termination of the contract in question by NHAI.

6. Learned Counsel for the appellant has vehemently denied and controverted the said allegations and contentions. It is stated that the respondents are guilty of repeatedly making amendments and ordering variation of the contract agreement. It is stated that 106 variation orders were issued till April, 2008 in a contract containing 115BOQ items" 58 variation orders were issued after efflux of original time. It is stated that the value of the work ordered by variation orders exceeds Rs.

82 crore as per the rates mentioned in the variation orders themselves. It is also pointed out that the disputes regarding the contract agreement in question have been referred to arbitration. Learned Counsel for the appellants further submitted that the impugned order of blacklisting dated 24.2.2009 does not specifically deal with the reply and the averments made therein to the following effect:

PAJV submits that the entire designing and estimation of the present project was totally defective and without any application of mind. The fact of the matter is that the entire scope of work was not only increased but was changed drastically. It is pertinent to mention that variation order totalling 106 were issued to PAJV by NHAI and some more were to be issued in a work totally containing 115BOQ items. The fact is that as many as 58 variation orders were issued after stipulated date of completion. The cost of work ordered by NHAI by way of variation order was over Rs. 82.00 crores as per the rates shown in the variation orders issued by the Engineer which were much less than the actual market rates. The fact of the matter is that Rs. 82.00 crores as mentioned in the variation orders is far less than the market rates and the quantities as mentioned in the variation orders has in fact far exceeded and therefore the procedure of issuing variation orders continued and became endless. Not only an abnormally larger number of variation orders were issued but during the course of execution of the work the whole design was changed by the NHAI from time to time. A length of 1500 m of road originally planned as "RES Structure" was converted into a Viaduct by the NHAI. PAJV submits that the contract categorically stipulated issuance of variation orders at mutually agreed rates. However, not even one variation order was issued by NHAI in terms of the agreement. The rates recommended by the Engineer in the first instance were at market rate but were subsequently illegally reduced at the instance of NHAI.

7. It is stated that there is a procedural defect and lapse in the decision making process as the above quoted contentions have been ignored and not taken into consideration. Our attention is also drawn to pages 227 and 228 of the appeal paper book and it is submitted that between 10th 3rd November, 2008 and February, 2009 joint venture partners individually and with other third parties were permitted to submit their bids and the bids were not rejected relying upon Clause 2.2.8 and the office memorandum dated 5th December, 2007.

8. There is a distinction between blacklisting which debars and prohibits a contractor/party from submitting bids as directed in the impugned order dated 24th February, 2009 and Clause 2.2.8 referred to in the guidelines dated 5th December, 2007 which deal with Request for Qualification. We are not concerned with Clause 2.2.8 and the office memorandum dated 5th December, 2007. These are not subject matters of the writ petition also. The Clause 2.2.8 and the office memorandum dated 5th December, 2007 pertain to a stage after bid is tendered and is being examined. Order of blacklisting like the impugned order dated 24.2.2009 bars and prohibits the appellant from submitting his tender or giving bids. This is the subject

matter before u/s BOQ is not a subject matter of the appeal or the writ petition.

9. Having heard the Counsel at length, we feel that interest of justice and fair play requires that the appellants should be permitted to submit their tenders/bids individually or with others, in spite of the blacklisting order dated 24.2.2009 as otherwise they will lose right to participate and give bids for tenders worth Rs. 36,000 crores till 30.4.2009. Submission of bids will not create any special equities and will also be subject to the outcome and decision in CM No. 3400/2009 and Writ Petition (C) No. 7443/2009 by the single Judge on 30th of April, 2009, the next date of hearing or on any other subsequent date. We also clarify that Clause 2.2.8 and 5th office memorandum dated December, 2007 are not subject matter of the present appeal and the respondents will be entitled to rely upon the said Clause and office memorandum while considering the Request for Qualification. Of course, the appellants will also be entitled to put forth their case before the respondents in respect of 5th Clause 2.2.8 and the office memorandum dated December, 2007. This order is being passed as last date for submission of tenders in several cases is expiring on or before the next date of hearing before the learned single Judge and, therefore, even if the appellants are to succeed they will be deprived of their right to submit bids for tenders of about Rs. 36,000 crore. Further, if the interim application or the writ petition is dismissed the respondents will be at liberty to not consider the case/bid of the appellants or third parties. The appeal is accordingly disposed of, with the request to the learned single Judge to dispose of the interim application and the writ petition expeditiously. It is clarified that this Court has not expressed any opinion on the merits of the case of the parties and learned single Judge will decide the interim application and the writ petition without being influenced by any observation made in this order.