

(2016) 07 OHC CK 0021

In the Orissa High Court

Case No : Writ Petition (Civil) No. 4895 of 2016

Kakinada Seaports Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 14-07-2016

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2016) 2 ILRCuttack 502

Hon'ble Judges : Vineet Saran, CJ. and Dr. B.R. Sarangi, J.

Bench : Division Bench

Advocate : Mr. R.K. Rath, Senior Advocate, Mr. Jaydeep Pal, B.K. Mishra, A. Dash and L. Dash, Advocates, for the Petitioners; Mr. R.K. Mohanty, Senior Advocate, Mr. Partha Mukherjee, M. Chatterjee, Mr. Sanjit Mohanty, Senior Advocates, Mr. I.A. Acharya, A. Dash and

Final Decision : Allowed

Judgement

Vineet Saran, C.J.—;This is a petition filed by a consortium of companies formed by the petitioners, which had jointly made a bid for operating a berth of the Paradip Port. On the Opposite parties No. 5 and 6, which also formed a consortium of companies, having been found to be the highest bidder and Letter of Intent having been issued in their favour, the petitioners have approached this Court challenging the same, primarily on the ground that the consortium of companies of opposite parties No.5 and 6 was not eligible for grant of such contract.

2. Admitted facts of the case, on the basis of the pleadings of the parties, are that the opposite party-Paradip Port Trust (PPT) invited tenders for "Mechanization of EQ-1, EQ-2 and EQ-3 berths at Paradip Port of 30 MTPA Capacity on BOT basis under PPP mode" for a concession period of Thirty (30) years. The operators eligible to bid, could be an individual company or a consortium of companies. In the present case, one consortium of companies is of petitioners no. 1, 2 and 3 (herein after referred to as "Kakinada Seaports Ltd")

and the other consortium of companies is of opposite parties no. 5 and 6 (hereinafter referred to as "JSW Infrastructure Ltd."). It is not disputed that paragraph - 2.26 of the bid document, i.e. Request for Qualification (RFQ) dated 31.10.2015 provided for "Prevention of Private Sector Monopoly in Major Ports". The said para-2.26 of the RFQ states that policy dated 2nd August, 2010 relating to "Policy for Preventing Private Sector Monopoly in the Major Ports" would be applicable.

According to the petitioners, the opposite party - JSW Infrastructure Ltd. would not be eligible for participation in the bid/tender process for the berth in question of Paradip Port on account of the fact that their consortium company had successfully participated and were allotted a berth for the same "Dry Bulk" Cargo in the immediate previous auction held on 29.05.2015.

3. Para-2.26 of the Request for Qualification dated 31.10.2015, as well as the relevant para-2 of the Policy for Preventing Private Sector Monopoly in Major Ports, dated 2nd August, 2010 are reproduced below:

RFQ dated 31.10.2015

"2.26 - Prevention of Private Sector Monopoly in Major Parts

Ministry of Shipping, Government of India vide its letter No.PD- 24018/8/2009-PD.III dated 2nd August, 2010 has issued the policy (see Appendix VIII) to be followed by all Major Ports while awarding projects to private parties through Public Private Partnership (PPP) route so as to avoid private sector monopoly in the Major Ports. The aforesaid policy or any other, [*Issued by the Ministry of Shipping to avoid private sector monopoly in the Major Ports], applicable policy shall apply mutatis and mutandis to this Bidding Process and the authority shall be entitled to disqualify any bidder in accordance with the aforementioned policy."

Anti Monopoly Policy dated 2.8.2010

"2. Policy

If there is only one private terminal/berth operator in a port for a specific cargo, the operator of that berth or his associates shall not be allowed to bid for the next terminal/berth for handling the same cargo in the same port.

For the purpose of this policy, the terms

(i) "Operator" includes consortium members of the bidder:

(ii) "Associates" means, in relation to the Applicant/Consortium member, a person who controls, is controlled by, or is under common control with such Applicant/Consortium member (the Associate). As used in the definition, the expression "control" means, with respect to a person which is a company or corporation, the ownership, directly or indirectly or more than 50% (fifty percent) of the voting shares of such person and with respect to a person which is not a company or corporation, the power to direct the management and

policies of such person by operation of law.

(iii) "Berth" shall have the same meaning as "Wharf" given in Section 2 (za) of the MPT Act, 1963.

(iv) "Specific Cargo" means (i) containers, (ii) liquid bulk, (iii) dry bulk or (iv) multipurpose/other general cargo.

3. The policy shall be applicable with immediate effect and shall apply to Request for Qualification (RFQs) issued on or after this date.

4. It is also directed that the above provisions may be incorporated by the Major Ports in the Request for Qualification and Request for Proposal to give effect to the policy in relevant cases.

5. This issues with the concurrence of the Ministry of Law and Justice, Department of Legal Affairs and approval of Hon"ble Ministry Shipping."

(emphasis supplied)

4. In the light of the aforesaid policy, we have to examine the facts of the present case. It is not disputed that Paradip Port has 16 berths, out of which 13 are for Dry Bulk cargo and 3 for other specified cargoes. It is also not disputed that out of these 13 berths, 12 are operational or under construction which are already allotted, and the 13th one, which has now been put to auction, is the one in question. It is also admitted that out of 12 berths of dry bulk cargo, which have already been auctioned and settled, 7 are being operated by Paradip Port Trust itself, and the remaining five by the private operators, namely, Paradip Phosphates Ltd., IFFCO, ESSAR Bulk Terminal Paradip Pvt. Ltd., Essar Paradip Terminals Ltd. and JSW Paradip Terminal Pvt. Ltd. The last one operator is of the same consortium of companies as the opposite party consortium.

5. In response to the Tender Call Notice in question and the RFQ dated 31.10.2015, four operators had participated, including the petitioner-Kakinada Seaports Ltd. and the opposite party-JSW Infrastructure Ltd. All the four operators qualified in the technical bid, but the other two did not give their financial bid and thus, it was the petitioner-Kakinada Seaports Ltd. and opposite party-JSW Infrastructure Ltd which had given their financial bid and were the only ones to be considered for being awarded the contract. The financial bids were opened on 25.2.2016, where after it was found that the opposite party-JSW Infrastructure Ltd had offered 31.7% revenue sharing, whereas the petitioner had offered 28.7% revenue sharing. The tender of opposite party-JSW Infrastructure Ltd., being for higher price, was accepted on 29.02.2016 and Letter of Intent (LOI) issued on the same date.

6. The case of the petitioner-Kakinada Seaports Ltd. is that it was for the first time on 25.02.2016 that they learnt that the opposite party-JSW Infrastructure Ltd. was participating in the tender process, and according to the petitioner-Kakinada Seaports Ltd., opposite party-JSW Infrastructure Ltd. was not qualified,

as its consortium company had got the immediate last contract for the Dry Bulk berth. The petitioner-Kakinada Seaports Ltd. thus orally objected to the eligibility of opposite party-JSW Infrastructure Ltd. on the day of opening of financial bids. The written objection was submitted by the petitioners on 27.02.2016, on which, according to the petitioner-Kakinada Seaports Ltd., no orders were passed and, even then, the bid of the opposite party-JSW Infrastructure Ltd. was accepted on 29.02.2016.

7. In the backdrop of the aforesaid facts, we have now to consider the question of eligibility of opposite party-JSW Infrastructure Ltd. in participating in the tender process. It is not disputed by the parties that the opposite party-JSW Infrastructure Ltd. is a consortium belonging to the same consortium as JSW Paradip Terminal Private Ltd. and as such, for the purpose of this case, they are to be considered as one consortium of companies. It is also admitted that the immediate earlier tender, invited for Dry Bulk berths, was finalised on 29.5.2015 in favour of JSW Paradip Terminal, which is of the same group of consortium of companies, i.e. opposite party-JSW Infrastructure Ltd. The question to be considered by us is that in such facts, could the opposite party-JSW Infrastructure Ltd. participate in the tender process for operating the Dry Bulk berth in question, when in the just earlier tender called for Dry Bulk berth, it was a successful bidder and contract has already been awarded in its favour.

8. We have heard Sri R.K. Rath, learned Senior Counsel appearing along with Mr. J. Pal, learned counsel for the petitioners as well as Sri A.K. Bose, learned Asst. Solicitor General of India for the formal opposite party No. 1-Union of India, Sri R.K. Mohanty, learned Senior Counsel along with Mr. P. Mukherjee, for the contesting opposite parties No. 2, 3 and 4-Paradip Port Trust and Mr. Sanjit Mohanty, learned Senior Counsel appearing along with Mr. I.A. Acharya, learned counsel for the private opposite parties No.5 and 6, and perused the record. Pleadings between the parties have been exchanged, and with consent of learned counsel for the parties, this writ petition is being disposed of finally at this stage.

9. On the basis of the above pleadings, this Court has to first consider the policy for preventing private sector monopoly in Major Ports, issued by the Government of India, Ministry of Shipping dated 2nd August, 2010, as the crux of the matter revolves around the said policy. The question of interfering with the policy is not within the domain of the Court. In *Villianur v. U.O.I.* (2009) 7 SCC 651, the apex Court held that unless any illegality is committed in execution of the policy or the same is contrary to law or mala fide, a decision bringing about change in the policy with a change in Government, cannot per se be interfered with by the Court.

In *State of Maharashtra v. Prakash Prahlad Patil*, (2009) AIR SCW 6985, the apex Court held that the Courts cannot be called upon to undertake governmental duties and functions. Courts should not ordinarily interfere with a policy decision of the State. While exercising power of judicial review, the Court is more concerned with the decision making process than the merit of the decision itself.

Similar view has also been taken in *Balco Employees Union v. Union of India* (2002) 2 SCC 333.

In *Jayant Achyut Sathe v. Joseph Bain D'Souza*, AIR 2008 SC (Supp) 502, the apex Court held that no interference is called for unless policy is contrary to law or mala fide or illegality is committed in its execution.

In *Premium Granites v. State of T.N.*, 1994 AIR SCW 2048, while considering the Court's power in interfering with the policy decision, the apex Court observed:

"It is not the domain of the Court to embark upon uncharted ocean of public policy in an exercise to consider as to whether a particular public policy is wise or a better public policy can be evolved. Such exercise must be left to the discretion of the executive and legislative authorities as the case may be.

In a democracy, it is the prerogative of each elected Government to follow its own policy. Often a change in Government may result in the shift in focus or change in economic policies. Any such change may result in adversely affecting some vested interests. Unless any illegality is committed in the execution of the policy or the same is contrary to law or mala fide, a decision bringing about change cannot per se be interfered with by the court."

Similar view has been taken by the apex Court in its recent decision in the case of *Centre for Public Interest Litigation v. Union of India*, (2016) 6 SCC 408.

10. In view of the aforesaid, this Court considers it just and proper to take a decision on the basis of the policy as evolved by the Government, on its plain reading, giving a purposive interpretation, so that the aims and objects of the authority, which have been reflected in the policy, are achieved.

11. In *Joseph Joseph v. State of Kerala*, AIR 2002 SC 1117, *Commissioner of Income-tax v. Anjuman M.H. Ghaswala*, AIR 2001 SC 3868, *Ambalal Sarabhai Enterprises Ltd. v. Amrit Lal & Co.*, AIR 2001 SC 3580 as well as in other plethora of decisions, the apex Court held that Rules of interpretation require that construction, which carries on objectives of the Statute, protects interest of the party and keeps the remedy alive, should be preferred, looking into the text and context of the Statute. It must be so as to further the ends of justice and not to frustrate the same. Construction given by the Court must promote the object of the Statute and serve the purpose, for which it has been enacted, and should not efface its very purpose.

In *Durga Oil Company v. State of Uttar Pradesh*, (1998) 6 SCC 299, the apex Court held that while interpreting the provisions of a statute or Rules, the purposive interpretation should always be borne in mind. Similar view has also been taken by the in *Forest Range Officer v. P. Mohammed Ali*, AIR 1994 SC 120.

In *Bharat Petroleum Corporation Ltd. v. Maddula Ratnavalli*, (2007) 6 SCC 8, *Oriental Insurance Co. Ltd. v. Brij Mohan*, AIR 2007 SC 1971 and *New India Assurance Co. Ltd. v. Nusli Neville Wadia*, (2008) 3 SCC 279, the apex Court held

that the purpose of doctrine of purposive construction may be taken recourse to for giving effect in full to the statutory provisions.

12. In view of the above, taking into consideration the policy for preventing private sector monopoly in Major Ports dated 2nd August, 2010 issued by the Government of India, Ministry of Shipping, this Court has not to examine the merits and demerits of the policy laid down by the Rule making body, rather, applying the principle of purposive construction to the same, has to give interpretation to the words employed to achieve the purpose of the policy itself, knowing fully well its power of judicial review to interfere with the policy decision framed by the Government.

13. We have already extracted the relevant para-2 of the policy dated 2nd August, 2010. In terms of the said policy, the petitioner-Kakinada Seaports Ltd. contends that the opposite party-JSW Infrastructure Ltd. would not be eligible to participate in the tender process in question. The first part of para- 2 of the said policy, in clearer terms, relevant for the purpose of this case, could be read as: "If there is only one private berth operator in a port for dry bulk cargo, the operator of that berth cannot be allowed to bid for the next berth for handling the dry bulk cargo in the same port."

14. As we have already mentioned above, there is no dispute about the fact that JSW Infrastructure Ltd. has participated in the bid/tender for the very next berth for handling Dry Bulk cargo in the same port, i.e., PPT. According to the petitioner-Kakinada Seaports Ltd., the anti monopoly policy has been framed by the Government of India to place a restriction on the allocation of berths in a port in favour of private operators. It is their case that, permitting one particular private operator to participate in the successive bid for the berth for the same Dry Bulk cargo in the same port, would amount to creation of monopoly and thus, the policy has to be interpreted to mean that no operator can be permitted to participate in the very next tender for operating the berth for handling Dry Bulk cargo. According to Sri Rath, learned Senior Counsel, monopoly would not mean exclusive rights, but substantial control over the berths of the Port for a specific cargo.

15. Per contra, Sri R.K. Mohanty and Sri Sanjit Mohanty, learned Senior Counsel representing the contesting opposite parties-Paradip Port Trust and JSW Infrastructure Ltd. respectively, have strenuously contended that the policy in question would apply only when there is "only one private berth operator" for the Dry Bulk cargo, whereas in the present case, there are already four other private operators for Dry Bulk cargo at Paradip Port. It has been contended that monopoly would be there only when one company or private operator is permitted to operate the berth for a specific cargo and not when other private operators are already operating other berths for the same cargo. The contention is that the word "only" in the first part of the policy has to be strictly considered to mean that when there is only one private berth operator in the port, then alone the second contract for the same type of berth cannot be awarded to such

operator. According to learned counsel, the sentence starts with the word "if", which would create a condition precedent for qualifying the phrase "only one private berth operator in the Port". His submission thus is that when there is a specific policy for awarding contract to operate a berth for a specific cargo, then the same should be strictly construed and complied, and that it would not be permissible to enlarge its scope, or giving it a different meaning.

16. In the light of the aforesaid submission made by the learned counsel for the parties, we have now to consider the interpretation of the words "monopoly", "only" and "next" in the context of this case.

17. In the strict sense, meaning of monopoly, as per the Oxford Dictionary would be "the exclusive possession or control of the supply of or trade in a commodity or service." As per the Collins Co-build English Dictionary for Advanced Learners, "monopoly" would mean "(i) if a company, person, or state has a monopoly on something such as an industry, they have complete control over it, so that it is impossible for others to become involved in it. (ii) A monopoly is a company which is the only one providing a particular product or service." The Apex Court in the case of *Union of India v. Hindustan Development Corporation*, (1993) 3 SCC 499 has held that monopoly is the power to control prices or exclude competition from any part of the trade or commerce among the producers.

18. Thus, strictly speaking, there should be exclusivity for there to be monopoly. However, the same has to be interpreted in the facts and context of this case while considering the Policy of the Government of India dated 2.8.2010, to give it a purposive construction which fulfils the object of the policy.

19. The bid document, i.e., Request for Qualification speaks about preventing private sector monopoly in Major Ports. In the context of this case, monopoly, in our view, would not mean exclusivity but would be restrictive, so that no one operator gets an occasion to operate majority of the Dry Bulk berth for the specific cargo. If the idea of the policy was to permit only one private operator to operate one berth, then in plain and simple words the policy would have said that no private operator would be permitted to operate another berth for the specified cargo in a port. Such is not the term laid down in the policy. However, it is also not stated in the policy that all berths of a specified cargo will not be given to one private operator. The restriction in the policy is that one private operator would not be allowed to participate in the next contract for a berth for handling the same cargo.

20. The submission of learned counsel for the opposite parties is that when there is only one private berth operator for a specified cargo then alone the private berth operator will not be permitted to participate in the next tender process. Such interpretation, if accepted, would, in our opinion, defeat the object and purpose of the policy.

In *Ramesh Rout v. Rabindra Nath Rout*, (2012) 1 SCC 762, the apex Court observed that the word "only" is ordinarily used as an exclusionary term and in

ascertaining its meaning its placement is material, as also context in which the word is used.

In *Saru Smelting (P) Ltd. v. CST*, 1993 Supp (3) SCC 97, the apex Court explained that the expression "only" is very material for understanding the meaning of the entry.

21. The use of word "next" in the policy under consideration is also very material and has to be given a purposive meaning. The word "next" has been considered in P. Ramanatha Aiyar's *Advanced Law Lexicon*, 4th Edition at page 3240 as follows:

"The word "next" means nearest; closest; immediately following."

If the restriction in the policy was not for a private operator from being permitted to bid for the next berth for the same specified cargo, then it could have been simply mentioned that if there were more than one private operators for the same cargo in a port, then there would be no restriction for the private operators to bid for as many number of berths for the same cargo in a port. But such is not the language of the policy. Hence this Court is of the opinion that giving the word next a purposive meaning in the policy, restriction would be for one private operator from being allowed to bid for the next berth of the same cargo.

22. In our view, every policy has to be given a purposeful meaning in the context of the case. From a complete reading of the Policy in question, we can conclude that it is not exclusivity which is the purpose, but the intention is that there should be restriction in the allotment of berths for one specific cargo so that one operator may not get majority of the berths in a port.

23. We may explain the situation by way of an example. Say for instance, there are 15 berths of specific cargo in a port and are to be given to private operators in successive auctions. If the first berth is given to "X", then as per the Policy, in the next auction for the second berth of the same cargo "X" will not be permitted to participate. If we assume "Y" gets the second berth, then as per the submission of the learned counsel for the opposite parties, the first operator i.e. "X" would be eligible to participate in all other auctions for remaining 13 berths and could hypothetically operate the remaining 13 berths also, meaning thereby that out of 15 berths, the first operator "X" could operate 14 berths in a port, which would come to 93% of the berths being operated by one operator.

24. The heading of the Policy may have mentioned "monopoly", but in the body, said expression has not been used. Restriction for awarding berths of one specified cargo in a port has been provided for in the opening part of para-2 of the Policy which has to be interpreted by this Court. The essence of the Policy is to prevent any one private operator to monopolise the operations of the berths available at the Port. In the strict sense of the word "monopoly" may mean exclusivity. However, what we find is that though the word "monopoly" may have been used in the heading, but not in the Policy, and as such it would be a

restrictive policy and for that reason, it has been provided that one operator of a berth shall not be allowed to bid for the next berth for handling the same cargo in the same port.

25. Applying the said meaning to para-2 of the policy, dated 2nd August, 2010, it is clear that it puts a restriction on the berth operators to bid for the immediately following berth for the same specified cargo. Therefore, it is clear that policy does not provide that one operator cannot get a second or more berths, but the only restriction provided for is that one operator cannot participate in successive auctions. As such, we are of the opinion, that the strict interpretation of the word "monopoly" is not required to be given for the present Policy dated 2.8.2010. If such interpretation is given, it would make the said Policy unworkable and not further the ends of justice, and on the contrary it would defeat the object and purpose of the policy. We are also of the opinion that if two interpretations of the contents of a Policy are possible, then one which makes the Policy effective and promotes the object of the Policy, should be accepted. We have already opined that the above Policy can be effective only if it is treated as restrictive policy and not taken as a Policy to do away the monopoly of any operator in the strict sense of the word.

26. In a similar case of ABG - LDA Bulk Handling Pvt. Ltd. v. Union of India (Writ Appeal (MD) No. 1543 of 2011) decided on 12.01.2012, a Division Bench of the Madras High Court, while considering the same policy dated 2.8.2010, has held as follows:

"14. Learned Senior Counsel appearing for the appellant laid great emphasis on the words "next terminal/berth" signifying the point of time when RFQ would be called for, for the same cargo. According to him, "next terminal" does not mean the geographical position, but the point of time at which the bid is called for. We do not think such reasoning of the appellant/petitioner could find support either in the policy laid down by the Government of India as a general policy allowing private participation, or in the specific policy dated 02.08.2010. The anti-monopoly circular dated 02.08.2010, defines "specific cargo" to mean (1) container (2) liquid bulk (3) dry bulk or (4) multipurpose/other general cargo. In the context of the definition given to "specific cargo", a reading of the policy along with the definition of "specific cargo" thus, makes it clear that a private operator of a berth, handling specific goods, is not allowed to bid for the terminal handling the "same cargo" in the same port, meaning thereby that if there are more than one berth which are to deal with a particular cargo which is falling under a particular sub-heading under the definition of "specific cargo", the terminal or berth operator or his associate shall not have the chance to bid for the immediate next terminal handling the same cargo. As already pointed out in the preceding paragraphs, given the fact that the policy aims at promoting competitiveness to give better services to the users, monopolisation on the construction or the operation of a particular terminal handling the same cargo was rightly looked at as having a hampering effect on the good intention of

liberalisation or private participation. Thus, justifiably, the respondents took the stand that the emphasis herein is on the handling of specific cargo. In the circumstances, if one reads the policies and definition of "specific cargo" and the reasoning given by the learned single Judge, we have no hesitation in confirming the said view that the emphasis is more on the location of the berth handling the specific cargo and not as to the point of time at which the next terminal is taken up for a bid or RFQ.

xx xx xx

20. As far as the present appellant's case before this Court is concerned, as the Apex Court pointed out, the claim of the appellant has to be tested necessarily with reference to the object of the policy of the Government, which, in clear terms, point out that an operator of the berth/terminal in the specific cargo shall not be allowed to bid for the next terminal/berth for handling the same cargo in the same port. If the contention of the appellant that the emphasis to be given to the "same" "specific cargo" has to be with reference to the sequential bid alone, then, the very idea of prevention of monopolisation would practically make the policy intent a paper ideology, which we do not think, goes with the object of bringing in such a policy. In the context of the clear terms of the policy, we have no hesitation in accepting the contention of the respondents that the policy being supreme, the understanding of the same has to go by the plain words used in the policy as disclosed in the policy declaration dated 02.08.2010. Thus we have no hesitation in accepting the plea of the respondents herein that the emphasis in the matter of considering the grant of bid, has to be looked at from the angle of specific goods and not from the point of what the next bid was. Consequently, we have no hesitation in confirming the view of the learned single Judge."

27. In view of the aforesaid discussion, we may conclude that giving purposive construction/interpretation to the terms of the policy in question (dated 2.8.2010), the restriction provided for is clearly that one private berth operator in a port for a specified cargo will not be permitted to bid for the next (successive) berth for handling the same specified cargo in the same port.

28. Accordingly, the writ petition stands allowed to the extent that acceptance of the bid of the opposite party-JSW Infrastructure Ltd. on 29.02.2016, as well as the Letter of Intent issued in its favour by the Paradip Port Trust on the same date and agreement, if any, executed in pursuance thereof, are quashed. The opposite party-Paradip Port Trust shall be at liberty to either accept the single remaining bid of the petitioner-Kakinada Seaports Ltd., after negotiating the price, which should not be less than the price offered by opposite party-JSW Infrastructure Ltd., or invite fresh bids for the berth in question, in accordance with law. The opposite party-JSW Infrastructure Ltd. shall be entitled for refund of any amount deposited by it for participating in the tender process. No order as to costs.