

(2014) 07 BOM CK 0171

In the Bombay High Court

Case No : Public Interest Litigation (L) No. 58 of 2014

Mandar Narhari Parab

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 15-07-2014

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Citation : (2014) 07 BOM CK 0171

Hon'ble Judges : Mohit S. Shah, C.J.; M.S. Sonak, J

Bench : Division Bench

Advocate : Aspi Chinoy, Sr. Advocate, Chirag Balsara, Deepan Dixit, Kartikaya Desai i/b Kartikaye and Associates, Advocate for the Appellant; S.V. Bharucha, Radhina Mawalmani, Janak Dwarkadas, Sr. Advocate, Poornima Advani, Omprakash Jha, S. Bhansali, Anubhav Ghosh i/b The Law Point, Darius Khambata, Sr. Advocate, Nikhil Sakhardande, Rajendra Barot, Adhip Iyer and Ayushi Agarwal i/b AZB and Partners, Advocate for the Respondent

Judgement

Mohit S. Shah, C.J.—In this petition purporting to be public interest litigation, the petitioner, claiming to be a journalist, has challenged the decision of respondent No. 3-Jawaharlal Nehru Port Trust (JNPT) to award the contract for construction of 4th Container Terminal at JNPT on DBFOT basis to respondent No. 4 [PSA International Pte. Ltd. (PSA)]. Apart from such challenge, the petitioner has also prayed for a direction to JNPT to blacklist respondent No. 4 from submitting any bid for any tender or contract floated by the Government or any agency or instrumentality of the Government for any purpose whatsoever. The petitioner has also prayed for a direction to JNPT to initiate legal proceedings against respondent No. 4 and such other entities as may be necessary to recover the losses incurred by JNPT on account of failure of respondent No. 4 by itself and its consortium controlled by it to perform their obligation under the tender floated by respondent No. 3 in 2010 for the aforesaid Container Terminal Project. At the hearing of the petition, however, learned counsel for the petitioner did not press the relief concerning blacklisting of respondent No. 4.

2. The facts leading to filing of this petition, broadly stated, are as under:-

I

(a) On 2 March 2009, JNPT issued Global Invitation of Request for Qualification (RFQ) vide a tender inviting application for development of the 4th Container Terminal Project on Design, Build, Finance, Operate and Transfer (DBFOT) basis. The estimated cost of the project was Rs. 6,700 crores. In response to the same, JNPT received two valid bids. Respondent No. 4 herein in consortium with M/s. ABG Ports Pvt. Ltd. submitted a bid in October 2010, under which the consortium agreed to carry out the above contract and to give revenue share of 50.79%. The only other valid bid was by Sterlite Industries which offered 35.51% revenue share;

(b) The Letter of Award (LoA) was awarded by JNPT on 26 September 2011 to the consortium of respondent No. 4 with ABG Ports Pvt. Ltd. As per the LoA, concession agreement was required to be signed within 30 days. The consortium led by respondent No. 4 disputed its obligation to pay the stamp duty payable on the concession agreement. With the result, the concession agreement was not executed immediately.

(c) However, in April 2012 respondent No. 4 agreed to pay Rs. 5.95 crores towards stamp duty payable on the concession agreement but informed JNPT that respondent No. 4 having 76% share in the consortium wanted to drop ABG Ports Limited having 24% share from the consortium. In August 2012, JNPT informed respondent No. 4 that the Government of India had decided that there could not be any change in the consortium at that stage and required the consortium to execute the concession agreement.

(d) In September 2012, respondent No. 4 stated that it was willing to sign the concession agreement subject to its being allowed to execute the contract on its own without any partition. Since the above condition was not acceptable to the Government of India, on 10 October 2012, JNPT withdrew the LoA and forfeited the bid security of Rs. 67 crores (US \$ 13.5 million) and reserved its right to invoke tender conditions for recovery of further loss caused to it by respondent No. 4;

II

(e) Thereafter, in June 2013, JNPT floated a fresh tender for the 4th Container Terminal at JNPT. This time the tender notice indicated that the estimated cost of the project would be Rs. 7915 crores i.e. Rs. 1215 crores higher than the previous tender;

(f) In response to the above tender notice, JNPT received two valid bids. The bid offered by respondent No. 4 was for giving 35.7% revenue share to JNPT. The other bidder submitted bid offering 29% revenue share;

(g) JNPT accepted the bid of respondent No. 4, LoA was issued in February 2014

and concession agreement between JNPT and respondent No. 4 was executed on 6 May 2014. The Board of Directors of JNPT also resolved that question of taking any action against respondent No. 4 for recovery of damage for not executing the concession agreement pursuant to the first tender notice, may be considered;

(h) It is the aforesaid decisions of JNPT, which are under challenge in this petition, filed in purported public interest.

3. At the out set, we may note that the learned counsel for respondents Nos. 3 & 4 have raised a preliminary objection disputing bonafides of the petitioner in filing this PIL. However, since we do not find any substance in the issues raised by the PIL petitioner on merits of the controversy, we do not propose to dwell upon the preliminary objection, as raised.

4. Mr. Chinoy, learned senior counsel for the petitioner has made the following submissions;

(a) The impugned decision to award the contract for construction of the Container Terminal Project to respondent No. 4 is contrary to public interest, as respondent No. 4 had earlier submitted a bid offering revenue share of 50.8% for the very same project and was also awarded the LoA dated 26 September 2011 for the said purpose. Instead of executing the concession agreement, respondent No. 4 upon flimsy grounds wriggled out of the said LoA and failed to execute the concession agreement. JNPT, in such circumstances, could not have rested content by mere forfeiture of bid security, but ought to have proceeded to blacklist respondent No. 4 from submitting any bid to JNPT in future. In any case, respondent No. 4 ought to have been barred from submitting any bid at least in respect of the tender for the very same project;

(b) Respondent No. 4, by refusing to execute the concession agreement in pursuance of its bid offering 50.79% revenue share, had delayed the construction of the 4th Container Terminal Project, by almost four years. Further, respondent No. 4 by reducing its bid to revenue share of 35.7% has caused revenue loss to the extent of almost 15% in the next 30 years. Such loss, if computed even conservatively, works out to Rs. 9850 crores over the concession period. A party, which had already caused such loss and is going to cause so much loss to JNPT, which is a public authority, has been virtually offered a premium for its illegal and irresponsible actions. Such approach on the part of JNPT, which is a public authority spells out arbitrariness and negation of Article 14 of the Constitution of India;

(c) By reference to Clause 3.3.3 and 3.3.4 of the Request For Qualification (RFQ)-2010, it was submitted that in the event the highest bidder withdraws or is not selected for any reason in the first instance, JNPT may invite all the remaining bidders for second round of bidding. If in the second round, any bidder matches the highest bidder, it shall be selected bidder. Further, in the event, that no bidder offers to match the highest bidder in the second round of bidding, JNPT may invite fresh bids from all bidders, except the highest bidder of first round of

bidding. Mr. Chinoy submits that from this it is clear that the highest bidder who withdraws his bid or is not selected for any reason, cannot be permitted to take part in the further bidding process occasioned primarily on account of such highest bidder's default. Such salutary principle cannot be defeated by inviting fresh bids and permitting the defaulting highest bidder of the previous bid, to take part in the second tender process. Such an approach would be contrary to the RFQ or in any case, the salutary principle incorporated in Clauses 3.3.3 and 3.3.4 of the RFQ. For this reason, also, Mr. Chinoy submitted that the decision to permit respondent No. 4 to take part in the fresh bid and consequently award the contract to respondent No. 4 stands vitiated.

5. On basis of the aforesaid submissions, Mr. Chinoy submitted that the award of contract to respondent No. 4 ought to be struck down and other eligible bidders should be called upon to match the bid offered by respondent No. 4. Further appropriate proceedings ought to be initiated by JNPT to recover the losses incurred by JNPT on account of acts of omission and commission attributable to respondent No. 4.

6. PIL has been seriously opposed by JNPT and respondents No. 4 by filing separate affidavits in reply. Respondent No. 3, in its affidavit-in-reply, has pointed out as follows:

(i) 2013 RFQ is an entirely new and restructured project wherein there has been substantial change in the scope of work as more particularly stated hereinafter;

a. Shifting of existing BPCL jetty and landing jetty is cancelled.

b. 19 degree kink of the container berth is removed for better operational efficiency.

c. The alignment of the berth is shifted towards landside by 250 mtrs.

d. Reclamation for the back-up facilities is designed in such a way, so as to accommodate 1500m rail of double stack rail corridor instead of earlier 800m rail corridor.

e. 12 Nos. Super Post Panama cranes having 63 meters outreach have been considered as against the 8 Nos. panama having 54 meters outreach and 4 Nos. super post panama cranes in the earlier proposal.

(ii) The traffic projections for the 4th Container Terminal were conceived in 2008 based on the projections made in the business plan prepared by M/s. KPMG in 2006. At that time the economy was optimistic and thus huge volume of trade was anticipated. However, the capacity addition projects of the Port could not be materialized in time and JNPT's traffic growth remained stagnant at about 4.2 million TEUS which is the handling capacity of the Port till date. Further, new ports have subsequently come up at Mundra and Hazira, making the port sector highly competitive. As a mark of extra caution, JNPT has carried out a study by Tata Consulting Engineers Ltd. which further strengthened and confirmed the

revised traffic projections. As a result, the Minimum Guaranteed Throughput had to be reworked in the 2013 proposal;

(iii) As regards the action to be taken by JNPT against respondent No. 4, it has been specifically stated in paragraph 24 of the affidavit dated 8 July 2014 that JNPT reserved its rights of claiming additional damages against consortium of respondent No. 4 depending upon close legal scrutiny of facts of the case and cost benefits analysis;

7. Similarly, respondent No. 4, in its affidavit-in-reply, has pointed out as follows:

(i) The difference in the estimated cost assessed by JNPT between the 2009 RFP and 2013 RFP is because while the subject of the 2009 RFP and 2013 RFP is the same i.e. the construction & operation of the 4th Container Terminal at its port at Nhava Sheva, the key differences in the scope of work have resulted, in essence, a different project under the 2013 RFP than it was under the 2009 RFP. For e.g. The dredging foot print i.e. the area where dredging work is to be carried out has more than doubled in the 2013 RFP as compared to 2009 RFP. Further, the material to be dredged is not suited for reclamation and will result in substantial increase in the cost. As another example, the cost for reclamation in the Project has also increased because under the 2009 RFP, a developed land of about 26,110 sq.m. was to have been provided by JNPT. However, this is no longer part of the Project under the 2013 RFP, which is totally on water spread area 350 meters away from existing facilities at the port translating to high reclamation costs;

(ii) In 2009, when the major world economies were reeling under the effect of recession, India had a GDP growth of 6%. The future projections at that time indicated a much brighter picture for the growth of container shipment industry in India. However, such future projections did not materialize, leading to slowdown in growth of the container shipment industry in India;

(iii) Competition has increased in the container shipment industry in India between the time of the 2009 RFP and 2013 RFP. This is due in part to the development of smaller non-major ports such as Mundra, Pipavav and Hazira which were responsible for drawing container traffic away from major ports such as JNP. This has a direct impact on the revenue earning capacity of activities in a major port;

(iv) India has experienced a slowdown in import-export trade in the intervening years between the 2009 RFP and the 2013 RFP. As JNP is predominantly a Gateway Port, i.e. it mainly handles container traffic for import or export purposes, and not for transshipment purposes, a downward slope in import-export affects the revenues that can be earned from the activities at JNP, thus causing a lower revenue share to be quoted;

(v) The aforementioned weakening of Indian economy coupled with increase in current account deficit which was worsened by international factors relating to

the withdrawal of quantitative causing by the United States of America resulted in significant depreciation of Indian currency against the United States Dollar in 2013. The Indian currency depreciated by approximately 20% between the time of issuance of 2009 RFP and the 2013 RFP. Since, most of the equipments used for Port activities in India are imported, the drop in currency translates into higher project costs.

8. On the basis of the aforesaid pleadings, learned counsel for respondents Nos. 3 & 4 have submitted that the scope of work as envisaged in RFQ-2009 and RFQ-2013 is entirely different. Moreover, on account of significant change in the economic scenario, the bid submitted by respondent No. 4 offering 35.79% revenue share was reasonable and competitive and in fact, sufficient to establish bonafides of respondent No. 4 on both occasions. Moreover, the only other eligible bidder on this occasion was Adani Ports and SEZ Ltd., which has offered revenue share of only 29% i.e. 6.79% less than the bid offered by respondent No. 4. Learned counsel for JNPT and for respondent No. 4 further submitted that the petition as filed is not bonafide, in as much as the petitioner has been put up as a front by a rival bidder. It was submitted that the entire attempt was to eliminate respondent No. 4 from competition, so that the rival bidder can walk away with the contract, thereby causing greater harm to public interest.

9. As regards the action to be taken by JNPT against respondent No. 4, the petitioner had relied upon the opinion of the then Additional Solicitor General taking the view that the acts of omission on the part of respondent No. 4 and its consortium partner warranted their black listing. On the other hand, the Board of Directors of JNPT have placed reliance upon the opinion of the then Solicitor General taking the view that though the acts or omission on the part of respondent No. 4 were irresponsible, they were not such as to warrant any action of blacklisting. Nevertheless, Mr. Janak Dwarkadas, learned senior counsel for JNPT reiterated the statement made in the affidavit to the effect that JNPT reserved its rights to recover any additional damages from respondent No. 4 over and above recovering Rs. 67 crores by way of forfeiture of bid security given at the time of submitting the first bid.

10. Mr. Khambata, learned senior counsel for respondent No. 4, however, made an endeavour to submit that JNPT had no cause of action for making any further claim against respondent No. 4, in terms of RFQ-2009 and LoA. This is because both the instruments provided for pre-determined liquidated damages by way of forfeiture of bid security in an amount of Rs. 67 crores. Learned counsel further submitted that respondent no. 4 had 76% share as the leading partner of the consortium with ABG Ports Ltd., on the earlier occasion. However, on account of differences with the consortium partner, respondent No. 4 had made reasonable request to JNPT to permit respondent No. 4 to go ahead with the concession agreement on its own, by dropping ABG Port Ltd. from the consortium. Learned counsel submitted that the documents would bear out that JNPT was ready to permit such change, but the matter was referred to the Government of India in

the Ministry of Shipping Transport, which turned down the request of respondent No. 4 and that is how the concession agreement could not be executed at the relevant time. By reference to various clauses of RFQ and the LoA, learned counsel submitted that the forfeiture of the bid security was mutually agreed as genuine pre-estimated liquidated damages for loss and damages. Accordingly, there would arise no question of recovery of any further amounts towards loss or damages.

11. We may note that although we have heard the learned counsel for the parties on the issue of action which JNPT may take against respondent No. 4 for recoveries, we do not propose to express any opinion on the said issue. We however, record the statement made by learned counsel for respondent No. 3 on the basis of averments in the affidavit dated 8 July 2014, that respondent No. 3 has reserved its right of claiming additional damages against respondent No. 4 and/or its consortium headed by respondent No. 4 depending upon close legal scrutiny of the facts of the case and cost analysis.

12. We see no merit in any of the other contentions raised by and on behalf of the petitioner. At this stage, no public interest would be served by either directing JNPT to remove respondent No. 4 from the zone of consideration or for that matter, striking down the award of contract in favour of respondent No. 4. As noted earlier, respondent No. 4 in spite of the varied scope of the project and the changed economic scenario has offered revenue share of 35.79% as against the revenue share of only 29% offered by the next and only other eligible bidder. It is necessary to note that the contract in this case has been awarded on Design, Build, Finance, Operate and Transfer (DBFOT) basis and hence JNPT is not required to contribute any funds for development of 4th Container Terminal Project. The very fact that estimated cost of the project in 2009-10 was Rs. 6,700 crores and the estimated cost has now been revised to Rs. 7915 crores, i.e. upward revision of 1215 crores is one explanation offered by JNPT and respondent No. 4 for reduction in the revenue share. Apart from that both respondents have pointed out the significant differences in 2009 RFQ and 2013 RFQ, which are already set out hereinabove. So also the said respondents have referred to the change in the economic scenario.

13. Initially, the averments in the petition projected the revenue loss to JNPT, on account of acts of omission and commission attributable to respondent No. 4 at Rs. 1215 crores on the basis that the estimated cost of project had gone up from Rs. 6,700 crores in RFQ-2009 to Rs. 7915 crores in RFQ-2013. Upon JNPT placing material on record to establish that the contract is to be awarded on DBFOT basis and, the increase in estimated cost shall have to be borne by the bidder, the petitioner by way of affidavit-in-rejoinder has come up with the projected losses of RS. 9850 crores over the concession period of 30 years. As noted earlier, there is no basis for such projections particularly on account of significant difference in the project parameters of 2009 and 2013.

14. In this case, no factual mala-fides have been alleged. As per the settled legal

position, this Court whilst exercising its powers of judicial review is neither expected to sit in appeal over the decision of the administrative authority, nor weigh technical issues in a golden scale. This Court is only concerned with the challenge to legality of the decision making process. Applying such parameters, we find that in the facts and circumstances of this case, JNPT has offered plausible explanation for taking the impugned decision and there is no arbitrariness or unreasonableness involved in the decision making process. JNPT has already obtained an amount of Rs. 67 crores by forfeiture of the bid security of respondent No. 4. There is plausible explanation with regard to cancellation of LoA to respondent No. 4 in the year 2012. If on account of changes in project parameters and the economic scenario, JNPT is going to get a revenue share lower than what was offered by respondent No. 4 in the year 2011, that by itself would not be sufficient to stigmatize the impugned decision as being arbitrary or unreasonable.

15. In *Tata Cellular Vs. Union of India*, the Supreme Court observed that very often judicial interference in economic issues may result in delay in execution of project and occasion further cost escalation. This was reiterated in *Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others*, of the said judgment are relevant and they read as under:-

11. "When a writ petition is filed in the High court challenging the award of a contract by a public authority or the State, the court must be satisfied that there is some element of public interest involved in entertaining such a petition. If, for example, the dispute is purely between two tenderers, the court must be very careful to see if there is any element of public interest involved in the litigation. A mere difference in the prices offered by the two tenderers may or may not be decisive in deciding whether any public interest is involved in intervening in such a commercial transaction. It is important to bear in mind that by court intervention, the proposed project may be considerably delayed thus escalating the cost far more than any saving which the court would ultimately effect in public money by deciding the dispute in favour of one tenderer or the other tenderer. Therefore, unless the court is satisfied that there is a substantial amount of public interest, or the transaction is entered into mala fide the court should not intervene under Article 226 in disputes between two rival tenderers.

12. When a petition is filed as a public interest litigation challenging the award of a contract by the State or any public body to a particular tenderer, the court must satisfy itself that party which has brought the litigation is litigating bona fide for public good. The public interest litigation should not be merely a cloak for attaining private ends of a third party or of the party bringing the petition. The court can examine the previous record of public service rendered by the organisation bringing public interest litigation. Even when a public interest litigation is entertained the court must be careful to weigh conflicting public interests before intervening. Intervention by the court may ultimately result in delay in the execution of the project The obvious: consequence of such delay is

price escalation. If any re-tendering is prescribed, cost of the project can escalate substantially. What is more important, ultimately the public would have to pay a much higher price in the form of delay in the commissioning of the project and the consequent delay in the contemplated public service becoming available to the public. If it is a power project which is thus delayed, the public may lose substantially because of shortage in electric supply and the consequent obstruction in industrial development. If the project is for the construction of a road, or an irrigation canal, the delay in transportation facility becoming available or the delay in water supply for agriculture being available, can be a substantial set back to the country's economic development. Where the decision has been taken bona fide and a choice has been exercised on legitimate considerations and not arbitrarily, there is no reason why the court should entertain a petition under Article 226."

16. The contention premised upon clauses 3.3.3 and 3.3.4 of RFQ-2009, in the facts and circumstances of the present case, is misplaced. In the first place, the said clauses, cannot apply in the context of RFQ-2013. Secondly, even Clause 3.3.4 merely conferred a discretion upon JNPT to invite fresh bids from all bidders except the highest bidder of first round bidding. Further the said Clause also conferred discretion upon respondent No. 3 to annul the bidding process, in which case there was no Clause or provision to bar the highest bidder of the earlier bid, to take part in the bidding process. The question of blacklisting would arise if respondent No. 4 was found to have indulged into fraud and corrupt practices as set out in Clause 4 of RFQ-2009. There is, accordingly, no merit in the contentions raised by and on behalf of the petitioner.

17. In view of the above discussion, we do not find any merit in this PIL. Accordingly, PIL is dismissed. We do, however, record the statement made by the learned counsel for respondent No. 3 on the basis of averments in the affidavit dated 8 July 2014 on behalf of respondent No. 3 that respondent No. 3 has reserved its rights of claiming additional damages against the consortium (which was headed by respondent No. 4) depending upon close legal scrutiny of facts of the case and cost basis analysis. We also record the submission made by the learned counsel for respondent No. 4 that JNPT has no such right to claim any additional damages in view of provisions of the agreement between parties.

18. At this stage, learned counsel for the petitioner requests that the order made on 9 May 2014 may continue for some time in order to enable the petitioner to have further recourse in accordance with law.

19. On 9 May 2014, while issuing notice to respondents, following order was passed:-

In the meantime, any action taken by the respondents in furtherance with the impugned decision will be at the sole risk costs and consequence of the respondents.

20. The aforesaid order was made on 9 May 2014, when the matter was

circulated for the first time. The matter was not on Board. It was mentioned at 3 p.m. Respondents did not have any opportunity as they were not served with any notice. Moreover, order was made in view of the submission made by the learned counsel for the petitioner that the project cost was going to escalate from Rs. 6,700 crores to Rs. 7925 crores and that respondent No. 4 was awarded the contract in spite of the default committed by it in the year 2012. The facts thereafter brought to our notice about the difference between two projects and other relevant facts were not before the Court. Under the circumstances, we do not think any cloud should continue to remain over the execution of a project of public importance. The request is, therefore, rejected.