Jsw Infrastructure Limited And Anr vs Kakinada Seaports Limited And Ors on 1 March, 2017

Equivalent citations: AIR 2017 SC 1175, 2017 (4) SCC 170, 2017 AJR 248, (2017) 172 ALLINDCAS 7 (SC), (2017) 1 WLC(SC)CVL 620, (2017) 3 KCCR 267, (2017) 4 MAH LJ 855, (2017) 2 CURCC 118, (2017) 3 MAD LJ 731, (2017) 3 SCALE 216, (2017) 2 CGLJ 163, (2017) 3 MPLJ 312, AIR 2017 SC (CIV) 1428, (2017) 1 CLR 700 (SC), AIR 2017 SUPREME COURT 1175, 2017 (3) AJR 248, AIR 2017 SC (CIVIL) 1428, (2017) 121 ALL LR 867

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Bench: Deepak Gupta, Madan B. Lokur

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURSIDICTION

CIVIL APPEAL NO. 3422 OF 2017
(Arising out of Special Leave Petition (Civil)No.23241 of 2016)

JSW Infrastructure Limited and Anr. .. Appellant(s)

Versus

Kakinada Seaports Limited and Ors. ..Respondent(s)

With

CIVIL APPEAL NO. 3424 OF 2017
(Arising out of Special Leave Petition (Civil)No. 23695 of 2016)

J U D G M E N T

DEEPAK GUPTA, J.

Leave granted.

2. These two Civil Appeals are directed against the judgment of the Division Bench of the Orissa High Court dated 14th July, 2016, whereby Writ Petition No.4895 of 2016, filed by the consortium comprising of M/s Kakinada Seaports Limited, M/s Bothra Shipping Service Pvt. Ltd.,M/s MBG Commodities Pvt. Ltd., (hereinafter referred to as the second consortium) Respondent Nos. 1-3 herein, was allowed and the High Court held that the consortium of the appellants JSW Infrastructure Limited and South West Port Limited, (hereinafter referred to as the first

consortium) was not entitled to take part in the bid and, therefore, the acceptance of its bid was also held to be illegal and set aside.

3. The facts necessary for decision of these appeals are that the Paradip Port Trust, issued Request For Qualification (RFQ) on 31.10.2015 inviting global invitations for Mechanisation of EQ-1-2 and EQ-3 berths at Paradip Port Trust of 30 MTPS Capacity on BOT basis under PPP mode for concession period of Thirty (30) years. It is not disputed that in response to the said RFQ, 4 parties including the first and second consortium, submitted their bids. All the four parties were duly qualified and were asked to participate in the next stage of bid, that is, Request For Proposal (RFP) and submit their offers with regard to revenue sharing. Only two parties, i.e., the first consortium and the second consortium submitted the RFP. The bid quoted by the first consortium was 31.70% as against 28.70% bid quoted by the second consortium. Since the first consortium were the highest bidders their proposal was recommended for acceptance by the tender committee of the Paradip Port Trust on 26.02.2016. At this stage, on 27.02.16 the second consortium submitted objections to the consideration of the application of the first consortium on the ground that in terms of the Policy Clause against creation of monopoly the appellants were not entitled to take part in this entire bidding process since they were already operating one berth for dry cargo. The Clause which is subject matter of interpretation reads as follows :-

> "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." It would also be pertinent to mention that specific cargo in this very Policy has been defined to be (i) containers, (ii) liquid, (iii)dry bulk. Letter of Award was issued in favour of the appellant of the first Consortium by the Paradip Port Trust on 29.02.2016.

4. Aggrieved by this action, the second consortium filed a writ petition before the Orissa High Court. The submission of unsuccessful bidders was that since the first consortium was already operating a berth for dry cargo it could not have submitted its application to bid for the berth in question which is also admittedly meant for dry cargo. It was contended that as per the policy quoted above, if a private operator is operating a berth he cannot be allowed to bid for the next berth for handling the same cargo in the same port. This contention of the original writ petitioners was accepted by the Orissa High Court which interpreted the Policy clause by holding that the word "next" in the Clause indicated that a private operator cannot take part or bid for next successive berth for the same cargo. The High Court, therefore, held that the application for the first consortium JSW Infrastructure Limited, was wrongly considered and consequently set aside the award of Letter of Award in favour of the first consortium and further directed that the Paradip Port Trust may either accept the single remaining bid of the second consortium of Respondent Nos. 1-3 after negotiating the price which should not be less than the price offered by the consortium of JSW Infrastructure, or it may invite fresh bids for the berth in question.

5. Aggrieved by the judgment of the High Court the first consortium and the Paradip Sea Port have filed the two appeals.

6. We have heard learned senior counsel for the appearing parties. The contention of Mr. Kapil Sibal, learned senior counsel appearing for first consortium is that the High Court has misinterpreted the Clause in question. According to him a plain and simple reading of the Clause clearly indicates that this Clause will only apply when a single private berth in port for a specific cargo is being run by a private operator. He submitted that in the present case there are as many as 16 berths in Paradip Port Trust, out of which 8 are being run by the Paradip Port Trust. One dry cargo berth is being run by the Indian Oil Corporation, a Public Sector Undertaking, 5 are being run by private operators and one was being run by the appellant. Letter of Award for another berth was issued in favour of the first consortium, which is the subject matter of dispute. He submitted that the purpose of this clause is to avoid monopoly and the judgment of the High Court is erroneous because it does not do away with the monopoly but only restricts a private operator from bidding in the next successive berth for the same type of cargo. Dr. A.M. Singhvi, learned senior counsel appearing on behalf of Paradip Port Trust submitted that the employer i.e., Paradip Port Trust is best qualified to interpret the terms and meaning of the terms of the tender and the High Court should not have interfered in the decision taken by the Paradip Port Trust. On the other hand, Mr. Gopal Subramaniam, learned senior counsel for the second consortium submitted that the word "next" in the Clause cannot be treated to be superfluous and, according to him, the clause which is the subject matter of interpretation in this case clearly envisages that the private operator operating a berth cannot bid for the next successful berth for similar type of cargo.

7. We have given our careful consideration to the arguments. This Court in Ramana Dayaram Shetty vs. International Airport Authority of India[1] held that the words used in documents cannot be treated to be surplusage or superfluous or redundant and must be given some meaning and weightage. It was held as follows:-

> ".....It is a well-settled rule of interpretation applicable alike to documents as to statutes that, save for compelling necessity, the Court should be prompt to ascribe superfluity to the language of a document "and should be rather at the outset inclined to suppose every word intended to have some effect or be of some use". To reject words as insensible should be the last resort of judicial interpretation, for it is an elementary rule based on common sense that no author of a formal document intended to be acted upon by the others should be presumed to use words without a meaning. The court must, as far as possible, avoid a construction which would render the words used by the author of the document meaningless and futile or reduce to silence any part of the document and make it altogether inapplicable." This view has consistently held the field and was recently reiterated in Central Coal Fields Limited and Another vs. SLL-SML (Joint Venture Consortium and Others)[2].

8. On a bare reading of the Policy Clause some weightage and meaning has to be given not only to the word "next" as done by the High Court but also to the words "only one private operator" appearing in the opening part of the Clause. The words "only one private operator" cannot be treated as surplusage. The entire clause has to be read as a whole in the context of the purpose of the policy which is to avoid and restrict monopoly. In our opinion, this Clause will apply only when there is one single private operator in a port. If this single private operator is operating a berth,

dealing with one specific cargo then alone will he not be allowed to bid for next berth for handling the same specific cargo. The High Court erred in interpreting the clause only in the context of the word "next" and ignored the opening part of the Clause which clearly indicates that the Clause is only applicable when there is only one private berth operator. It appears to us that the intention is that when a port is started, if the first berth for a specific cargo is awarded in favour of one private operator then he cannot be permitted to bid for the next berth for the same type of cargo. However, once there are more than one private operators operating in the port then any one of them can be permitted to bid even for successive berths. In the present case, as pointed out above there already 5 private operators other than the first consortium.

9. We may also add that the law is well settled that superior courts while exercising their power of judicial review must act with restraint while dealing with contractual matters. A Three Judge Bench of this Court in Tata Cellular vs. Union of India[3] held that (i) there should be judicial restraint in review of administrative action; (ii) the court should not act like court of appeal; it cannot review the decision but can only review the decision making process (iii) the court does not usually have the necessary expertise to correct such technical decisions.; (iv) the employer must have play in the joints i.e., necessary freedom to take administrative decisions within certain boundaries.

10. In Jagdish Mandal vs. State of Orissa[4] this Court held that evaluation of tenders and awarding contracts are essentially commercial functions and if the decision is bonafide and taken in the public interest the superior courts should refrain from exercising their power of judicial review. In the present case there are no allegations of mala fides and the appellant consortium has offered better revenue sharing to the employer.

11. In Afcons Infrastructure Ltd. Vs. Nagpur Metro Rail Corporation Ltd. & Anr.[5] This Court held as follows :-

> "14.....a mere disagreement with the decision making process or the decision of the administrative authority is no reason for a constitutional Court to interfere. The threshold of mala fides, intention to favour someone or arbitrariness, irrationality or perversity must be met before the constitutional Court interferes with the decision making process or the decision.
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> xxx xxx xxx
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> 16. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional Courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional Courts but that by itself is not a reason for interfering with the interpretation given.

> 17. In the present appeals, although there does not appear to be any ambiguity or doubt about the interpretation given by NMRCL to the tender conditions, we are of the view that even if there was such an ambiguity or doubt, the High Court ought to have refrained from giving its own interpretation unless it had come to a clear conclusion that the interpretation given by NMRCL was perverse or mala fide or intended to favour one of the bidders. This was certainly not the case either before the High Court or before this Court....” The view taken in Afcons (supra) was followed in Monte Carlo Ltd. Vs. NTPC Ltd.[6] . Thus it is apparent that in contractual matters, the Writ Courts should not interfere unless the decision taken is totally arbitrary, perverse or mala fide.

12. Strong reliance has been placed on behalf of the second consortium on the judgment rendered in APM Terminals B.V. vs. Union of India and Another[7] . We are of the considered view that the said judgment cannot be applied to the present case because in that case this court considered the clauses of the contract. The policy which was applicable in APM Terminal, was not the policy of 2010 but the policy of 2007, the wording of which is totally different. True it is, that in the said judgment reference has also been made to the new policy but that was not specifically dealt with by the Court, and the matter was decided on an interpretation of the terms of the contract and the policy of 2007.

13. In view of the above discussion we are clearly of the view that the High Court erred in interpreting the Clause in the manner which it is done. As explained above, the Clause will apply only when there is single private operator operating a single berth. Once there are more than one private operators then the Clause will not apply. The decision taken by Paradip Port Trust could not be termed to be arbitrary, perverse or mala fide. Therefore, the High Court was not justified in setting aside the same. In this view of the matter, both the Civil Appeals are allowed. The Judgment of the High Court is set aside and the writ petition filed by the second consortium before the High Court is dismissed.

.....J. (MADAN B. LOKUR) .....J. (DEEPAK GUPTA) New Delhi March 01, 2017

(1979) 3 SCC 489

[2] (2016) 8 SCC 622
[3] (1994) 6 SCC 651
[4] (2007) 14 SCC 517

[5] 2016 SCC Online SC 940
[6] 2016 SCC Online SC 1149
[7] (2011) 6 SCC 756