

A ADANI PORTS AND SPECIAL ECONOMIC ZONE LIMITED

v.

THE BOARD OF TRUSTEES OF JAWAHARLAL NEHRU PORT
AUTHORITY & ORS.

B (Civil Appeal No. 5878 of 2022)

SEPTEMBER 05, 2022

[M. R. SHAH AND KRISHNA MURARI, JJ.]

- Tender: Grievance of appellant/petitioner was that in respect of two tenders, it was considered disqualified and/or was held C ineligible in view of the termination of the Concession Agreement by the Visakhapatnam Port Authority – Termination of Concession Agreement was subject matter of dispute pending before the Arbitral Tribunal – Held: The issue of termination of Concession Agreement is at large before the Arbitral Tribunal – There is a broad consensus D between the appellant/petitioner and respondent No. 1 that these proceedings be disposed of by observing that the termination of the Concession Agreement by the Visakhapatnam Port Authority shall not be treated as a disqualification or ineligibility for the purpose of participating in any other tender issued by any public authorities in view of the peculiar facts and circumstances and, more E particularly, when the appellant/petitioner has undertaken not to participate and will have no claims in respect of the above two tenders – Writ Petition is dismissed as withdrawn with the liberty in favour of the petitioner to challenge the validity of Clause 2.2.8 of the RFQ documents or any other identical clauses before the High F Court and as and when such a challenge is made, the same be decided and disposed of in accordance with law and on its own merits and uninfluenced by the impugned judgment passed by the High Court as the validity of Clause 2.2.8 was not the subject matter before the High Court.*

G CIVIL APPELLATE JURISDICTION: Civil Appeal No. 5878 of 2022.

From the Judgment and Order dated 27.06.2022 of the High Court of Judicature at Bombay in Writ Petition (L) No.14657 of 2022.

With

H Writ Petition (C) No. 569 of 2022.

ADANI PORTS AND SPECIAL ECONOMIC ZONE LTD. v. THE 917
BOARD OF TRUSTEES OF J.N.P.A.

Dr. A.M.Singhvi, Neeraj Kishan Kaul, Vikram Nankani, Sr. Advs., A
Mahesh Agarwal, Ankur Saigal, Arshit Anand, Ms. Geetika Sharma,
Shashwat Singh, Dhruv Sharma, Siddharth Seem, Nidhiram Sharma, E.
C. Agrawala, Advs. for the Appellant.

Tushar Mehta, SG, Shyam Divan, Mr. Huzefa Ahmadi, Sr. Advs.,
Saket Mone, Ms. Jaikriti S. Jadeja, Abishek Salian, Devansh Shah, Ms. B
Prapti Allagh, Ninad Laud, Ms. Ranjeeta Rohatgi, Aditya Pratap Swain,
Avinash Mathews, Ivo D'Costa, Advs. for the Respondents.

The Order of the Court was passed by

M. R. SHAH, J.

1. Feeling aggrieved and dissatisfied with the impugned judgment C
and order dated 27.06.2022 passed by the High Court of Judicature at
Bombay in Writ Petition No. 14657 of 2022 by which the Division Bench
of the High Court has dismissed the said writ petition with respect to the
Tender No. JNP/TRAFFIC/MCB/PPP/2021/01, the original writ
petitioner – Adani Ports and Special Economic Zone Limited has preferred
the present Civil Appeal No. 5878 of 2022. D

1.1 Writ Petition No. 569 of 2022 under Article 32 of the
Constitution of India has been preferred by the petitioner – M/s. Adani
Port and Special Economic Zone Limited seeking following prayers:-

- “a. to declare Petitioner’s disqualification under the Tender as illegal, wrongful and /or revoke Petitioner’s disqualification under Tender No. JNP/T/BT/SWB-CB/2021-22/T-03 dated 4.2.2022 (Annexure P-1); E
- b. to issue a Writ of Mandamus or any other writ in the nature of Mandamus or any other appropriate writ, order or directions under Article 32 of the Constitution of India to Respondent No. 1 and 2: (i) to forthwith withdraw and/or cancel the impugned communications dated 15.7.2022 (Annexure P-5) (ii) to permit the Petitioner to participate in the bidding process as provided under Tender No. JNP/T/ BT/SWB-CB/2021-22/T-03 dated 4.2.2022; and (iii) to open and evaluate the Petitioner’s bid, when submitted, on merits; F
- c. to declare Clause 2.2.8 of the RFQ unconstitutional and ultra vires Article 14 of the Constitution of India and quash and strike down the same; G

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- A 2. At the outset, it is required to be noted that with respect to the aforesaid two tenders namely Tender No. JNP/TRAFFIC/MCB/PPP/ 2021/01 and Tender No. JNP/T/BT/SWB-CB/2021-22/T-03, the appellant/petitioner has been considered disqualified and/or ineligible in view of the termination of the Concession Agreement dated 01.08.2011
- B pursuant to the termination letter dated 26.12.2020 issued by the Visakhapatnam Port Authority. While disqualifying the appellant/petitioner, the respondent No. 1 [the Board of Trustees of Jawaharlal Nehru Port Authority(JNPA)] has relied upon Clause 2.2.8 of the Request for Qualification (RFQ) documents.
- C 3. Dr. A.M. Singhvi, learned Senior Advocate has appeared with Shri Neeraj Kishan Kaul, learned Senior Advocate on behalf of the appellant/petitioner. Shri Tushar Mehta, learned Solicitor General has appeared on behalf of the respondent No.1 – Board of Trustees of Jawaharlal Nehru Port Authority and Shri Shyam Divan and Shri Huzefa Ahmadi, learned Senior Advocates have appeared on behalf of the D contesting respondent namely M/s. J.M. Baxi Ports & Logistics Ltd.
- E 4. Dr. A.M. Singhvi, learned Senior Advocate appearing on behalf of the appellant/petitioner has vehemently submitted that as such the respondent No. 1 first terminated the contract/Concession Agreement dated 01.08.2011 on 21.10.2020 and only thereafter as a counterblast, the Visakhapatnam Port Authority terminated the very said Concession Agreement vide letter dated 26.12.2020. It is submitted that the termination of the Concession Agreement is the subject matter of dispute pending before the Arbitral Tribunal. It is submitted that therefore the termination of the Concession agreement dated 01.08.2011 with the F appellant/petitioner cannot be treated as a disqualification or ineligibility for the purpose of participating in any other tender issued by any public authorities.
- G 4.1 Dr. Singhvi, learned Senior Advocate has stated at the Bar that in view of the passage of the time and the contract entered into/ granted/in process of being granted by the respondent No. 1 with respect to the aforesaid two tenders, the appellant/petitioner does not claim any right to participate in respect of the aforesaid two tenders. However, has prayed to pass an appropriate order that the termination of the Concession Agreement dated 01.08.2011 by the Visakhapatnam Port H Authority may/shall not be treated as a disqualification/ineligibility for

the purpose of participating in any other tender issued by the public authorities in view of the peculiar facts and circumstances. A

4.2 Dr. Singhvi, learned Senior advocate has stated at the Bar that the petitioner withdraws the Writ Petition No. 569 of 2022 with the liberty to challenge the validity of Clause 2.2.8 of the RFQ Documents or any other identical clauses before the High Court and it may be observed that the same be decided and disposed of in accordance with law and on its own merits and uninfluenced by the impugned judgment and order passed by the High Court dated 27.06.2022 passed in Writ Petition No. 14657 of 2022. B

5. Shri Tushar Mehta, learned Solicitor General appearing on behalf of the respondent No. 1 has stated at the Bar that there is a broad consensus between the appellant and the respondents to dispose of the present proceedings in terms of the prayer made by Dr. Singhvi appearing on behalf of the appellant/petitioner, however, has requested to observe that the termination of the Concession Agreement dated 01.08.2011 by the Visakhapatnam Port Authority shall not be treated as a disqualification or ineligibility for the purpose of participating in any other tender issued by any public authorities, in view of the peculiar facts and circumstances of the case and that this Court has not expressed anything on the validity of the Clause 2.2.8 of the RFQ documents. C

6. Shri Shyam Divan, learned Senior Advocate appearing with Shri Huzefa Ahmadi, learned Senior Advocate, appearing on behalf of the contesting respondent namely M/s. J.M. Baxi Ports & Logistics Ltd. has stated that as the appellant/petitioner has declared that the appellant/petitioner undertakes not to participate and will have no claims in respect of the aforesaid two tenders, which is granted/in process of being granted, they have no objection if appropriate order is passed in view of the broad consensus arrived at between the appellant/petitioner and the respondent No. 1 - Board of Trustees of Jawaharlal Nehru Port Authority. D F

7. We have heard Dr. A.M. Singhvi, learned Senior Advocate appearing with Shri Neeraj Kishan Kaul, learned Senior Advocate on behalf of the appellant/petitioner, Shri Tushar Mehta, learned Solicitor General appearing on behalf of the respondent – Board of Trustees of Jawaharlal Nehru Port Authority and Shri Shyam Divan and Shri Huzefa Ahmadi, learned Senior Advocates appearing on behalf of the contesting respondent namely M/s. J.M. Baxi Ports & Logistics Ltd. G H

- A 8. At the outset, it is required to be noted that the appellant/petitioner is disqualified and/or is held ineligible to participate in any tender issued by the respondent No. 1 and/or any other public authorities in view of the termination of the Concession agreement dated 01.08.2011 by the Visakhapatnam Port Authority and for which Clause 2.2.8 of the RFQ documents has been relied upon. However, it is required to be noted that it is the case on behalf of the appellant/petitioner that the respondents first terminated the Concession Agreement on 21.10.2020 and only thereafter and as a counterblast, the Visakhapatnam Port Authority terminated the Concession agreement vide termination letter dated 26.12.2020. It is also required to be noted that the termination of the Concession Agreement dated 01.08.2011 is the subject matter of dispute pending before the Arbitral Tribunal. Therefore, the issue of termination of Concession Agreement is at large before the Arbitral Tribunal. Be that as it may, there is a broad consensus between the appellant/petitioner and the respondent No. 1 that the present proceedings be disposed of by observing that the termination of the Concession Agreement dated 01.08.2011 by the Visakhapatnam Port Authority shall not be treated as a disqualification or ineligibility for the purpose of participating in any other tender issued by any public authorities in view of the peculiar facts and circumstances and, more particularly, when the appellant/petitioner has undertaken not to participate and will have no claims in respect of the above two tenders issued and granted/in process of being granted by the respondents namely, the Board of Trustees of Jawaharlal Nehru Port Authority and M/s. J.M. Baxi Ports & Logistics Ltd., we dispose of the Civil Appeal No. 5878 of 2022 as under:-
- F (i) That the appellant/petitioner shall have no claims in respect of the two tenders namely Tender No. JNP/TRAFFIC/MCB/PPP/2021/01 and Tender No. JNP/T/BT/SWB-CB/2021-22/T-03 as undertaken on behalf of the appellant/petitioner;
- G (ii) That in the peculiar facts and circumstances of the case and as agreed between the parties, termination of the Concession Agreement dated 01.08.2011 by Visakhapatnam Port Authority shall not be treated as a disqualification or ineligibility of the appellant/petitioner for the purpose of participating in any other tender issued by any public authorities in future.
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9. Writ Petition No. 569 of 2022 is dismissed as withdrawn with A
the liberty in favour of the petitioner to challenge the validity of Clause
2.2.8 of the RFQ documents or any other identical clauses before the
High Court and as and when such a challenge is made, the same be
decided and disposed of in accordance with law and on its own merits
and uninfluenced by the impugned judgment and order dated 27.06.2022 B
passed by the High Court of Judicature at Bombay in Writ Petition No.
14657 of 32022 as the validity of Clause 2.2.8 was not the subject matter
before the High Court and we have also not examined the validity or
otherwise of Clause 2.2.8 of the RFQ documents.

Present Civil Appeal No. 5878 of 2022 and the Writ Petition No. C
569 of 2022 stand disposed of in terms of the above.

Devika Gujral
(Assisted by : Deepak Panwar, LCRA)

Matters disposed of.