

In the High Court At Calcutta
Civil Appellate Jurisdiction
Appellate Side

Present:

The Hon'ble Mr. Justice Jayanta Kumar Biswas
and
The Hon'ble Mr. Justice Ishan Chandra Das

AST No.378 of 2014
The Board of Trustees for the Port of Kolkata & Ors.
v.
Ripley & Co. Stevedoring Private Limited & Anr.
with
ASTA No.276 of 2014

Mr. S.K. Kapoor
Mr. Ashok Kumar Jena ... for the appellants.

Mr. Saktinath Mukherjee
Mr. Saptangshu Basu
Mr. Subhojit Roy ... for the respondents.

Heard on: September 3 & 4, 2014.

Judgment on: September 4, 2014.

Jayanta Kumar Biswas, J:- The appellants in the AST are aggrieved by an interim order of a single Judge dated August 11, 2014 passed in the respondents' WP No.22511 (W) of 2014 under Article 226 of the Constitution of India.

The Kolkata Port Trust (in short "KoPT") issued a tender notice dated July 21, 2014 putting the shore handling services for dry bulk cargo handling at its Haldia Dock Complex out to tender. The tender notice mentioned that KoPT would grant the successful bidder Handling Agency Licence for undertaking and performing the services charging their principals within the specified ceiling rates and paying the KoPT the quoted royalty.

Clause 7.12 of Section III of the notice is quoted below: –

"7.12 Only those bidders, who undertake to pay royalty to KoPT at the highest bid received, will be issued Handling Agency License and will be allowed to undertake shore handling or dry bulk cargo at HDC after obtaining Handling Agency License to be

so issued by KoPT. Bidders not submitting such undertaking will be debarred from undertaking shore handling of dry bulk cargo at HDC.”

Questioning the tender notice the respondents filed the WP stating the following case:-

The KoPT Traffic Manager granted them a Clearing & Forwarding Licence under Bylaw 55A of the Bylaws of the Port of Calcutta framed under the provisions of the Act concerned. The licence entitles them to transact shipping, clearing and forwarding business in the KoPT dock. The tender decision is intended to impose restrictions on their business activities as Shore Handling Agents. KoPT has no authority to fix ceiling rates for prices charged for the services. The scheme to levy royalty being contrary to the provisions of the Major Port Trusts Act, 1963 is illegal. KoPT has in effect sought to regulate the terms and conditions of private contracts between them and their customers. The notice is illegal also for the reason that the decision to issue it had not been approved by the requisite majority of the KoPT Board trustees.

The order of the single Judge dated August 11, 2014 is quoted below: –

“By order dated 5th August, 2014 a report was directed to be produced of the board resolution dated 18th July, 2014. This day, the respondent authorities have produced not only the board resolution dated 18th July, 2014 but also other related documents which resulted in the subject tender. From a reading of the said resolution, it appears that in principle the Board of Trustees had agreed to the introduction of the proposed scheme but were against it in view of legal and financial issues which had been discussed in the meeting. In spite of the said issues raised, the Chairman overruled the views of the majority of the Trustees and introduced the subject scheme. It may be true that the Board of Trustees right from 2012 agreed in principle to introduction of the said subject scheme but prior to giving the subject scheme a final shape raised certain objection which need to be addressed before issuance of the subject tender. Such working of the scheme has been questioned by a majority of the members of the Board of Trustees. Therefore the subject scheme cannot be allowed to stand as issued prima facie.

Accordingly, NIT dated 21st July, 2014 be not given effect to till 26th September, 2014. Directions are given for filing affidavits.

Let affidavit in opposition be filed within three weeks from date; reply thereto, if any, be filed within a fortnight thereafter. Matter to appear in the list on 22nd September, 2014.

Records produced are returned to Counsel for the respondent authorities.

Certified copy of this order, if applied for, be given to the parties on priority basis.”

By the impugned order the single Judge has restrained the appellants from proceeding further with the tender process on the grounds that the working of the scheme in execution whereof the notice has been issued was questioned by the majority members of the KoPT Board trustees, and that in the prima facie view of the single Judge the scheme cannot be allowed to stand.

Mr. Kapoor appearing for the appellants has submitted as follows:-

Sections 42 and 48 of the Major Port Trusts Act, 1963 provide a complete answer to the respondents' WP case. Section 42 has empowered the KoPT Board to authorise the successful bidder to perform the Shore Handling Services in question that the KoPT Board itself is empowered to undertake. The KoPT Board took decision on December 13, 2012 for authorizing persons chosen through appropriate process for rendering the services in its Haldia Dock Complex at the rates in consonance with the scale of rates framed by the authority under s.48 and on payment of a part of the charges to KoPT as royalty. The respondents have no right to question the decision and steps.

Mr. Mukherjee appearing for the respondents has submitted as follows:-

The KoPT Board does not render the services that the KoPT has put out to tender. KoPT can put out to tender only those services that its Board undertakes under s.42 and the successful bidder can perform only those services as the person authorised by the KoPT Board to perform them. The scale of rates framed by the authority under s.48 applies only to the KoPT Board and the person authorised by the KoPT Board under s.42(3), but not to the respondents who perform the Shore Handling Services on being engaged for the purpose by their customers. The provisions of cl.7.12 of s.III of the tender notice are bound to affect the respondents in that if the scheme in the tender is put into operation, the respondents will be debarred from performing the services they have been performing for long on the basis of requisite licence granted by the KoPT authority.

As noted hereinbefore, the single Judge has passed the interim order restraining the appellants from proceeding further with the tender notice on the grounds that the KoPT Board decision in execution whereof the tender process has been initiated was not ratified by a majority KPT Board Trustees.

In our, prima facie, opinion, the question whether the KoPT Board decision was a lawful decision cannot be an issue in the WP for the simple reason that the correctness or validity and legality of the KoPT decision is not justiciable under Article 226 of the Constitution of India, though the decision may be annulled according to the provisions of the Major Port Trusts Act, 1963. The persons filing the WP are not entitled to espouse the cause of any Board member.

The question really is whether the case stated in the WP constitutes a strong prima facie case for an interim relief. The single Judge has granted the respondents an interim relief. Hence we have to examine whether the

respondents are entitled to any interim relief, even if we are of the opinion that the single Judge was not justified in granting them the interim relief on the grounds stated in the order under appeal.

It seems to us that the real issue in the WP is whether KoPT was empowered to put the work in question out to tender on the terms and conditions mentioned in the tender notice.

Needless to say that the respondents cannot question the tender process, unless they establish a prima facie case that they are aggrieved thereby.

The case stated in the WP leads to a, prima facie, conclusion that, according to the respondents, they and others holding similar licence issued by the KoPT authority concerned have exclusive right to perform the work KoPT has put out to tender under the notice in question; that the scale of rates framed by the authority under s.48 cannot be applied to them; and that KoPT has no authority to ask them to make any payment except the licence fee that they have always paid and are paying.

The case raises the question whether s.42 or any other provision of the Act has given the KoPT Board exclusive power to undertake and perform the services put out to tender by the notice in question.

There is apparently no dispute that the services put out to tender fall within the meaning of s.42(1)(b); and that the KoPT Board or any person authorised by the Board under s.42(3) is bound to perform the services charging in accordance with the scale of rates framed by the authority under s.48; for the services put out to tender are apparently covered by s.48(1)(e).

Section 42(3) empowers the KoPT Board to authorise any person to perform the services in question on such terms and conditions as may be agreed upon. This leads to a prima facie conclusion that the KoPT Board is empowered

to levy royalty from the person authorised to perform the services charging in consonance with the scale of rates framed by the authority under s.48.

There is no material in the WP that constitutes a prima facie case that the respondents have exclusive right to perform the services mentioned in s.42(1)(b). Similarly, there is no provision that empowers or entitles the KoPT Board to perform the services as the only service provider.

In other words, the provisions of s.42 do not provide that only the KoPT Board is empowered or entitled to perform the services mentioned therein. The provisions, however, lead to a prima facie conclusion that the KoPT Board empowered to perform the services can perform them itself or can authorise a person to perform them under sub-s.(3) of s.42.

In the absence of anything that entitles the respondents and persons like them to perform the services exclusively, we are unable to see why the KoPT Board should be restrained from exercising its power to perform the same services through person authorised by it under sub-s.(3) of s.42.

The provisions of cl.7.12 of s.III of the tender notice are that once the person authorised by the KoPT Board through the tender process will undertake the services, the respondents and persons like them will no longer remain entitled to perform the services in the manner they have been performing now. The question is what empowers the KoPT Board to do this. In our prima facie opinion, the KoPT Board is not empowered to do this.

In view of the above-noted situation that indicates our prima facie opinions on the issues arising from the WP case examined in the context of the provisions of the Act, we are of the opinion that the respondents should be granted an appropriate interim relief that will protect their interests during pendency of the WP, but will not at once prevent the KoPT Board from exercising its power under s.42.

For these reasons, we dispose of the ASTA and the AST (dispensing with all formalities) ordering as follows:-

The KoPT Board shall be free to put the services in question out to tender in execution of its decision dated December 13, 2012; to proceed with the already initiated tender process making necessary amendments to the terms and conditions and taking other steps including extension of time; or to initiate fresh tender process. The person authorised by it, chosen through the tender process, will be free to undertake and perform the services in question. But these all shall not entitle the appellants to debar the respondents from undertaking and performing the services they have been performing in the manner they are performing them today till the disposal of the WP; and all steps and decisions in the tender process shall abide by the outcome of the WP. The order of the single Judge is modified accordingly. Certified xerox.

(Jayanta Kumar Biswas, J.)

S.R.

(Ishan Chandra Das, J.)