



HIGH COURT OF ANDHRA PRADESH
THURSDAY ,THE THIRD DAY OF MARCH
TWO THOUSAND AND TWENTY TWO

PRESENT

THE HONOURABLE SRI JUSTICE D.V.S.S.SOMAYAJULU

WRIT PETITION NO: 455 OF 2022

Between:

1. M/S. ADANI PORTS AND SPECIAL ECONOMIC ZONE LIMITED M/s
Adani Ports and Special Economic Zone Limited,
Having its registered office at
Adani Corporate House, Shantigram
Near Vaishno Devi Circle, S.G. Highway. Khodiyar,
Ahmedabad - 382 421.
Represented by its Authorized
Signatory - Mr. Arjun Doshi,
2. M/s Adani Ports and Special Economic Zone Limited, Having its
registered address at
Adani Corporate House,
Shantigram, Near Vaishno Devi Circle,
S.G. Highway, Khodiyar, Ahmedabad - 382 421.
Represented by Its Vice President,
Mergers and Acquisitions
Mr. Shanka Subrha Roy Choudhary

...PETITIONER(S)

AND:

1. THE VISHAKHPATNAM PORT TRUST The Vishakhpatnam Port Trust,
Represented by Its Senior Deputy Materials Manager, Mechanical and
Electrical Engineering Department, Administrative Office Building, Port
Area, Vishakhapatnam - 530035, Andhra Pradesh.

...RESPONDENTS

Counsel for the Petitioner(s): V HARISH KUMAR

Counsel for the Respondents: RAVITEJA PADIRI

The Court made the following: ORDER



*** HON'BLE SRI JUSTICE D.V.S.S. SOMAYAJULU**

+ WRIT PETITION No.455 of 2022

% 3rd March, 2022

M/s Adani Ports and Special Economic Zone Ltd., and
another

... Petitioners..

AND

\$ The Vishakhapatnam Port Trust

... Respondent.

! Counsel for the Petitioners

: Sri A. Satya Prasad
Senior Counsel
Sri V. Harish

^ Counsel for the respondent

: Sri P. Raghuram
Senior Counsel
Sri Raviteja Padiri
Standing counsel

< Gist:

> Head Note:

? Cases referred:

- 1) 2018 SCC Online 8269
- 2) Civil Appeal Nos.4862-4863 of 2021
- 3) Civil Appeal No.1949 of 2019
- 4) (2008) 16 SCC 215

**HON'BLE SRI JUSTICE D.V.S.S.SOMAYAJULU****WRIT PETITION No.455 of 2022****ORDER:**

With the consent of all the learned senior counsels and the learned standing counsel for the respondent-Visakhapatnam Port Trust the Writ Petition itself is heard.

The Writ Petition is filed by the petitioners seeking a Writ of Mandamus declaring the action of the respondent in disqualifying the petitioner from participating further in tender No.IM&EE/MOF/Mech-WQ-7&8/2021, dated 04.10.2021 as illegal, violative of principles of natural justice etc.

This Court has heard Sri A. Satya Prasad, learned senior counsel appearing for the petitioners and Sri P. Raghuram, learned senior counsel appearing for the respondent-Visakhapatnam Port Trust.

PETITIONER'S CASE:

Learned counsel for the petitioner Sri Satya Prasad points out that the petitioner is a company which wanted to participate in a tender bearing No.IM&EE/MOF/Mech-WQ-7&8/2021, for mechanization of WQ 7 & WQ 8 Berths. The said tender involved a multi stage process. The first stage was the qualification stage (RFQ stage). The bidders who qualified at this stage were entitled to participate in the second stage, which is the bidding stage (RFP). The petitioner was disqualified at the first stage itself on the ground that they did not disclose certain important material facts. Learned senior



counsel points out that this decision of disqualifying the petitioner is not communicated to the petitioner, and that after a caveat was filed and a notice of caveat was served on the petitioner, they realized the fact that they were disqualified. Learned senior counsel submits that the procedure adopted by respondent Visakhapatnam Port Trust is totally wrong. It is submitted that the ground on which the petitioner was disqualified is also not legally and factually tenable. Hence, he prayed for an appropriate order.

Learned senior counsel drew the attention of this Court to clause 2.2.2 of the tender conditions which describe the technical, financial and the O&M experience of the bidder. Learned senior counsel submits that the petitioner has fulfilled and met all the stipulations of Clause 2.2.2. Learned counsel submits that an entity called AVCTPL is a 100% subsidiary of the petitioner. The rejection of the petitioner's present bid by VPT was on the ground that the earlier contract between the said AVCTPL and VPT was terminated and this fact was not disclosed. Learned counsel submits that the caveat petition filed revealed (in paragraph 4 and 6) that Clause 2.2.8 of the bid condition was not fulfilled in the present case. Learned senior counsel argues that clause 2.2.8 is not applicable to the facts and circumstances of the case as AVCTPL has terminated the contract and not *vice versa*. Relying upon paragraphs 9 to 11 of the writ affidavit, senior counsel argues that it is the AVCTPL which terminated the agreement and not VPT.



Learned senior counsel also argues that the petitioner has faithfully and diligently disclosed all the particulars. He also argues that Annexure-I / Appendix-I, contains the following Clause 7 –

“7. A statement by the Applicant and each of the Members of its Consortium (where applicable) or any of their Associates disclosing material non-performance or contractual non-compliance in past projects, contractual disputes and litigation/arbitration in the recent past is given below (Attach extra sheets, if necessary).”

Learned senior counsel, therefore, argues in line with paragraph 11 of his writ affidavit that they have disclosed all the facts, arbitrations and there is no concealment of facts. He submits that the action of the respondent-VPT should be set aside for the following reasons –

- (A) That these clauses of bid are not contravened / there is no concealment and
- (B) That the respondent port trust did not intimate the rejection by a letter or document as required.

The learned senior counsel relying upon ***Atlanta Limited v Union of India***¹ argues that Clause 2.2.8 confers unbridled power on the respondent and therefore it is arbitrary and unreasonable.

RESPONDENTS SUBMISSIONS:

In reply to this, learned senior Counsel for VPT Sri P.Raghuram argues that there is clear concealment of facts, as

¹ 2018 SCC Online 8269



the contract with the coal terminal (AVCTPL) was also terminated by the VPT. He also submits that an arbitration was invoked basing on the non-performance of the contract, /failure to perform the contract and there are serious allegations leading to claims and counter claims. Learned senior counsel also argues that the clause 2.2.8 clearly deals with the disqualification as mentioned in the clause itself. He points out that no injustice is caused to the petitioner by the communication through the caveat. Admittedly, he points out that on 05.01.2022 a letter was also addressed to the petitioner informing them that their bid cannot be accepted due to termination of the earlier contract of the AVCTPL termination. He also argues that basing on Clause 2.7 and 2.7.3 of the bid document that the right to reject the bid is available with the respondent. They can reject the bid or annul the process without assigning any reason whatsoever. This power is not available both before the bid is accepted and after the bid is accepted as per Clause 2.7.3, if there is a material misrepresentation, material concealment facts or false information. Learned senior counsel also argues that the right of an employer to choose whom he wishes to enter into a contract cannot be taken away and that the past experience with the contractor / associates is a relevant factor to be taken into account by the State or the respondent. He points out that when the subsidiary's contract was terminated and this fact is not disclosed, VPT was within its right in refusing to enter into



further dealings with the petitioner. He points out that this is an essential condition of the contract. Relying upon the judgment of the Hon'ble Supreme Court of India in ***Uflex Ltd., v Government of Tamilnadu & Ors.***,² learned senior counsel argues that judicial review in such matters is permissible if there is arbitrariness, irrationality, unreasonableness, bias, *mala fides* in the decision making process. He points out that in these limited circumstances the Court can interfere. It is his contention that none of these factors are actually evident or present. He also argues that the words of a tender document must be given their own meaning and necessary importance. He contends that the same cannot be overlooked or ignored by the Court. The principles of judicial review as per the learned senior counsel are limited to reviewing the decision making process alone. Terms of the tender are fixed by domain experts and therefore he submits that the issue should be left to the experts. In conclusion, learned senior counsel submits that there is no mistake committed by the respondent-VPT.

COURT:

The long term alliance failed at the very beginning itself due to the alleged non-disclosure of clear details by the bidder.

In the opinion of this Court what needs to be considered for a decision in this case are Clauses 2.2.8, 2.7.1., 2.7.3 and Clause 7 in Annex-I, which are extracted hereunder

:

² Civil Appeal Nos.4862-4863 of 2021



“2.2.8: An Applicant including any Consortium Member or Associate should, in the last 3 (three) years, have neither failed to perform on any contract, as evidenced by imposition of a penalty by an arbitral or judicial authority or a judicial pronouncement or arbitration award against the Applicant, Consortium Member or Associate, as the case may be, nor has been expelled from any project or contract by any public entity nor have had any contract terminated by any public entity for breach by such Applicant, Consortium Member or Associate. Provided, however, that where an Applicant claims that its disqualification arising on account of any cause or event specified in this Clause 2.2.8 is such that it does not reflect (a) any malfeasance on its part in relation such cause or event; (b) any willful default or patent breach of the material terms of the relevant contract; (c) any fraud, deceit or misrepresentation in relation to such contract; or (d) any rescinding or abandoning of such contract, it may make a representation to this effect to the Authority for seeking a waiver from the disqualification hereunder and the Authority may, in its sole discretion and for reasons to be recorded in writing, grant such waiver if it is satisfied with the grounds of such representation and is further satisfied that such waiver is not in any manner likely to cause a material adverse impact on the Bidding Process or on the implementation of the Project.

– **2.7.1:** Notwithstanding anything contained in this RFQ, the Authority reserves the right to accept or reject any Application and to annul the Bidding Process and reject all Applications/ Bids, at any time without any liability or any obligation for such acceptance, rejection or annulment, and without assigning any reasons therefor. In the event that the Authority rejects or annuls all the Bids, it may, in its discretion, invite all eligible Bidders to submit fresh Bids hereunder.

.....

– **2.7.3:** In case it is found during the evaluation or at any time before signing of the Concession Agreement or after its execution and during the period of subsistence thereof,



including the concession thereby granted by the Authority, that one or more of the pre-qualification conditions have not been met by the Applicant, or the Applicant has made material misrepresentation or has given any materially incorrect or false information, the Applicant shall be disqualified forthwith if not yet appointed as the Concessionaire either by issue of the LOA or entering into of the Concession Agreement, and if the Applicant/SPV has already been issued the LOA or has entered into the Concession Agreement, as the case may be, the same shall, notwithstanding anything to the contrary contained therein or in this RFQ, be liable to be terminated, by a communication in writing by the Authority to the Applicant, without the Authority being liable in any manner whatsoever to the Applicant and without prejudice to any other right or remedy which the Authority may have under this RFQ, the Bidding Documents, the Concession Agreement under applicable law.

Annexure-1 Clause-7: A statement by the Applicant and each of the Members of its Consortium (where applicable) or any of their Associates disclosing material non-performance or contractual non-compliance in past projects, contractual disputes and litigation / arbitration in the recent past is given below (Attach extra sheets, if necessary).”

It is clear after considering the detailed submissions made that there was an earlier contract between the respondent VPT and AVCTPL and there are disputes with regard to the same. The said AVCTPL is a 100% subsidiary of the petitioner. This is admitted in the pleadings. A small written note, which is filed by the petitioners, also clearly shows that on 08.10.2020 the said AVCTPL alleging that force majeure continued for more than 120 days sought mutual termination of the agreement. Thereafter, on 21.10.2021 AVCTPL sent its own termination notice. Visakhapatnam Port



Trust in turn issued consultation notice under that contract on 03.10.2020 alleging failure to achieve minimum guaranteed contract. AVCTPL disputed this stating that there is force majeure intimation. VPT sent a consultation notice on 23.11.2020 and thereafter gave a notice of termination on 26.12.2020. The matter is now under arbitration before the three Hon'ble former judges of the Supreme Court of India. These are the facts that are disclosed from the written note itself.

Clause 7 of the Annexure thus assumes importance now. It clearly states that there should be a disclosure about any non-performance or contractual non-compliance in past projects along with contractual disputes and litigation / arbitration. In fact, the said clause itself states that the extra sheets are to be attached to the bid document to disclose these facts. As can be seen from the pleading in the affidavit itself (para 11 of the writ affidavit) the petitioner in this case merely disclosed that there is an arbitration pending between the said AVCTPL and VPT but did not disclose anything about the termination; the non-performance or contractual non-compliance etc., in the earlier contract (Clause 2.2.8 read with Clause 7 of Annexure-I).

Apart from that it is argued that Clause 2.2.8 is not dealing with "disqualification". Clause 2.2.8 has already been reproduced earlier. It is in two parts. Part (a) deals with failure to perform and as evidenced by an order passed by a judicial



authority, arbitrator, tribunal award etc. It also talks of the expulsion of the applicant and consortium member or associate from any contract or project or the termination of a contract by a public entity for any breach by the applicant consortium or association. Clause, 2.2.8 also has a proviso which states that if the applicant feels that this “disqualification on account of an event” specified under 2.2.8 is such that it does not reflect the malfeasance, willful default or the rescinding or remanding etc., of any such contract, it may make representation to the authority which can consider the same. Therefore, the submission on behalf of the petitioner that 2.2.8 and the failure to disclose these material facts is not a disqualification cannot be accepted by this Court. The clause is clear and if the applicant has been expelled from any project or if its contract has been terminated by any public entity for breach, then the applicant can make a representation, if it is of the opinion that such termination etc., is not valid or correct and the respondent has discretion to decide whether the same is a ground for disqualification or not. Clause 2.28 therefore is held to apply to disqualification also.

In addition, this Court also notices that Clause 2.7 gives the right to the respondent to accept or reject any bid without assigning any reasons. This power may appear on a first blush to be an unbridled power. As per the law State action must be based on reasons only otherwise it would be arbitrary. In the case on hand, it is a fact that the reasons for disqualification



“do exist” but the same was not actually communicated to the petitioner through a formal notice. It is only through the caveat that the petitioner is made aware of the reasons for the disqualification. The fact also remains that the Writ Petition has been filed on 05.01.2022 and the disqualification was also communicated to the petitioner by the letter of the CME on 05.01.2022. In the opinion of this Court, the respondent Port Trust should have communicated the reasons by a formal letter/notice. The reasons for the failure to formally communicate are given in paragraph 15 of the counter affidavit. In the opinion of this Court, this could have been handled better and a formal communication would have been communicated, but the mere failure to communicate this through a formal letter will not enure the benefit of the petitioner. In the opinion of this Court the petitioner is getting a “post decisional” hearing and no prejudice *per se* is caused to the lack of formal communication. In fact, the Writ itself does not strictly allege any prejudice due to this non-communication.

As per the settled law on the subject, this court, in contractual and tender matters, should look into the decision making process only. The law is well settled and need not be reproduced again. Even the case law relied upon by the learned counsel by the respondent is clear. In paragraph 2 of the ***Uflex ltd.***, (1 supra) following is laid down:



“2. The judicial review of such contractual matters has its own limitations. It is in this context of judicial review of administrative actions that this Court has opined that it is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fide. The purpose is to check whether the choice of decision is made lawfully and not to check whether the choice of decision is sound. In evaluating tenders and awarding contracts, the parties are to be governed by principles of commercial prudence. To that extent, principles of equity and natural justice have to stay at a distance.

This court also considers that paragraph 15 of ***Vidarbha Irrigation Development Corporation v M/s Anoj Kumar Garwala***³ which is to the following effect is also very important –

“15) It is clear even on a reading of this judgment that the words used in the tender document cannot be ignored or treated as redundant or superfluous – they must be given meaning and their necessary significance. Given the fact that in the present case, an essential tender condition which had to be strictly complied with was not so complied with, the appellant would have no power to condone lack of such strict compliance. Any such condonation, as has been done in the present case, would amount to perversity in the understanding or appreciation of the terms of the tender conditions, which must be interfered with by a constitutional court.”

If the current case is viewed against the backdrop of these two cases and other leading judgments on the subject, the right of the respondent to choose its own contractual partners cannot be ignored and for this purpose the past experience that the respondent had with its intending bidders

³ Civil Appeal No.1949 of 2019



and their consortiums, associates etc., cannot be totally overlooked. If it is for this reason alone that the bid document contains detailed clauses asking the intending bidders to disclose clearly the imposition of penalty, existing disputes etc., between the bidder and its consortium members, associates etc. The track record of the bidder, its associate members, its associates, consortium members etc., are matters of great importance particularly for such long term contracts with huge investments and consequently huge consequences for delay etc. This Court cannot lose sight of the fact that the port has to function 24x7 and 365 days in a year. It is for this reason the Clause 7, (which is reproduced earlier) requires the bidder to disclose the earlier disputes, litigations, material non-performance etc., by the bidder, its associates, consortium members etc. Clauses 2.2.7 and 2.2.8 which are also reproduced earlier deal with these similar issues. Clause 2.2.7 is of particular significance, because it clearly states that if any contract has been terminated the same should be mentioned clearly and brought to the notice of the respondent. This is not merely limited to the applicant but also includes within its ambit the applicant, associates, its consortium members etc. The proviso is in 2.2.8 which clearly states that if in the opinion of the applicant such a disqualification is not a material fact, it can also make an application to the respondent Port Trust stating that the same is not a very material fact and that it should be ignored. This was not done by the petitioner.



Apart from that Clause 2.7.3 to which this court's attention has also been drawn is also applicable. This clause gives special powers to the respondent Port to disqualify an applicant during the process of evaluation / before signing the concession agreement, if any materially incorrect or false information has been given by a prospective bidder / prospective concessionaire. This clause also empowers VPT to terminate the agreement after the agreement was signed / work is awarded notwithstanding anything contained in the terms if the concessionaire / applicant has made a material misrepresentation or has given material incorrect or false information. A reading of this clause which confers power of a wide amplitude makes it clear that if material misrepresentation is there, incorrect information, false information etc., are there the bid can be rejected before it is signed and the contract can also be terminated after it is signed on this sole ground alone. This is the importance attached to correct and clear disclosure under this bid /tender document and it clearly underscores the need for a full and complete disclosure.

The freedom in the joints or fair play in the joints means that a statutory authority like the respondent should have the right to choose with whom it would enter into contracts subject to a proper decision making process etc. It is for this reason these clauses are mentioned with clarity in the bid document.



Only if the respondent acts in an arbitrary manner and if its decision is vitiated by *mala fide* arbitrariness, irrationality, bias etc., a constitutional court can interfere. But if the action is not vitiated by arbitrariness, irrationality, unreasonableness, bias or *mala fides*, this Court cannot exercise the power under Article 226 to interfere. The principles of equity and natural justice have to stay at a distance and commercial prudence or the commercial market intelligence of the respondent should be allowed to have its own free play. Even if there is a procedural aberration the Courts should lightly interfere.

In ***Siemens Public Communication Networks (P) Ltd. v Union of India***⁴ it was held as follows:

“40. On examining the facts and circumstances of the present case, we are of the view that none of the criteria has been satisfied justifying Court's interference in the grant of contract in favour of the appellants. When the power of judicial review is invoked in the matters relating to tenders or award of contracts, certain special features have to be considered. A contract is a commercial transaction and evaluating tenders and awarding contracts are essentially commercial functions. In such cases principles of equity and natural justice stay at a distance. If the decision relating to award of contracts is bona fide and is in public interest, courts will not exercise the power of judicial review and interfere even if it is accepted for the sake of argument that there is a procedural lacuna.”

In the opinion of this Court arbitrariness, irrationality, unreasonableness, bias and *mala fides* are matters which have to be clearly pleaded and proved and demonstrated before this

⁴ (2008) 16 SCC 215



Court can interfere. If the present case is examined against the backdrop of the settled law on the subject, this Court is of the opinion that the action of the respondent cannot be faulted. In the counter affidavit filed the respondent has justified its action. In paragraphs 9 to 13 the respondent has clearly stated that with consortium member VCTPL (an associate of the petitioner) an agreement was entered into. There are allegations of breaches against the said consortium Member in not achieving the minimum guarantee that was promised in the previous contract. After issuing consultation notices the said contract was terminated. It is also clearly mentioned that as a counter blast to the said consultation notice AVCTPL issued notice of termination. If the note filed by the petitioners themselves is examined, it is clear that on 03.10.2020 respondent-VPT issued a consultation notice to AVCTPL on 03.10.2020. On 08.10.2020 AVCTPL rejected the same stating that the force measure conditions were continuing since long and, therefore, they sought for mutual termination of the agreement. On 21.10.2021 AVCTPL sent a termination notice for the contract with VPT (respondent). VPT in turn had sent a termination notice on 26.12.2020. VPT informed the AVCTPL that the contract was terminated with effect from 23.04.2021. The counter, the caveat and the note filed by the petitioner make these facts clear. Clause 7 of the appendix of Annexure-I clearly states that bidders should disclose if there is material non-performance or contractual non-compliance in the past



projects, apart from contractual disputes and representations. Each member of the consortium should disclose this fact. In the opinion of this Court clause 2.2.8 also enjoins upon the petitioner to disclose the termination of the contract of an associate by the VPT. In fact, in the counter affidavit these facts have been clearly pleaded but the petitioners have not chosen to file any rejoinder against the same or by controverting the same. In the opinion of this Court, mere disclosure of the pendency of an arbitration does not meet the mandatory requirements or the essential condition of this term. Any contractual non-performance or contractual non-compliance in past projects should have been disclosed with clarity. Clauses 2.2.8/2.7.3 of the bid document are clear. They are clearly applicable to the facts and circumstances of this case. The failure of the petitioner to disclose the same is rightly noticed by the VPT.

In the light of the above discussion, this Court is of the opinion that the decision making process leading to a disqualification of the petitioner cannot be found fault with. This Court does not find any arbitrariness; irrationality; bias; *mala fides* either. Their failure to disclose the termination of the contract of their 100% owned subsidiary in October, 2021 and the VPTs termination in December, 2020 / March, 2021 is a clear case of furnishing materially incorrect, false information. Allegation of material non-performance;



contractual non-compliance etc., are present from both sides in the earlier contract.

The petitioner who has chosen to participate in this bid cannot question the terms of the tender and say that arbitrary power is conferred on the respondents to disqualify the bidders.

Therefore, for all of the above reasons this Court holds that the petitioner has not made out any ground for interference.

The Writ Petition is dismissed. No costs.

Consequently, the Miscellaneous Applications pending, if any, shall stand closed.

D.V.S.S.SOMAYAJULU, J

Date:03.03.2022

Note: LR copy be marked.

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HON'BLE SRI JUSTICE D.V.S.S.SOMAYAJULU

WRIT PETITION No.455 of 2022

Date:03.03.2022

SSV