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WPA 15127 of 2021

Orissa Stevedores Limited

-Versus-

Syama Prasad Mookerjee Port & Ors.
(Via Video Conference)

**Mr. Saptangshu Basu,
Mr. Soumya Majumdar,
Mr. Rajnish Sinha,
Mr. Amitava Mitra,
Ms. Antara Chowdhury**

...for the petitioner

**Mr. Jishnu Saha, Id. Sr. Adv.
Mr. Pranit Bag,
Mr. S. Sen**

...for the KoPT

**Mr. Siddhartha Lahiri
...for the respondent nos. 5, 6 and 7**

A report has been received from the Home Ministry. The Union has objected to and has refused clearance to the petitioner to participate in the tender process.

The report mentions Criminal Cases against one of the largest shareholders that have also been disclosed in the writ petition. It is also admitted by Mr. Saptangshu Basu, learned Senior Counsel for the petitioner, that the said shareholder was required to be deported from Thailand to India to face criminal charges.

Learned Counsel for the petitioner would submit before this Court that the person against whom the criminal proceedings are pending and the order of deportation is mentioned by the Ministry, is only a shareholder having 38.16% of the Writ Petitioner. He has been enlarged on bail and is at liberty in India.

Reference is made to paragraph 49 of the judgement of the Hon'ble Supreme Court in the case of ***Manohar Lal Sharma vs. Union of India*** in WP (Crl.) No. 314 of 2021 dated October 27, 2021. It is submitted that a mere assertion of threat to National Security would not suffice. The objection must be duly supported by records, documents and figures.

It is further submitted that the petitioner is a Juristic person separate from that of an individual shareholder. The pendency of the criminal proceedings against one shareholder, should not stand in the way of the petitioner competing in the said tender process.

Mr. Jishnu Saha, learned Senior Counsel appearing for the Port Trust submits that the petitioner has submitted a bid in partnership with two other international consortium members. The said partners have formed a Special Purpose Company/Vehicle called "M/s. Gopalpur Ports

Limited". It is therefore submitted that the Criminal proceedings against a 38.16% shareholder of one Indian partner would seriously affect the whole consortium.

Mr. Saha relies upon a decision of the Hon'ble Supreme Court in the case of ***Ex-Armymen's Protection Services Private Limited vs. Union of India & Ors.*** reported in **(2014) 5 SCC 409**. It has been laid down that National Security is a question of policy and not law. Courts should not normally intervene in matter concerning National Security or the decision of the Executive based on the same. At paragraphs 15, 16 and 17 it was held as follows:-

"..15. It is difficult to define in exact terms as to what is "national security". However, the same would generally include socio-political stability, territorial integrity, economic solidarity and strength, ecological balance, cultural cohesiveness, external peace, etc.

16. What is in the interest of national security is not a question of law. It is a matter of policy. It is not for the court to decide whether something is in the interest of the State or not. It should be left to the executive. To quote Lord Hoffman in *Secy. of State for Home Deptt. v. Rehman* [(2003) 1 AC 153 : (2001) 3 WLR 877 : (2002) 1 All ER 122 (HL)] : (AC p. 192C)

"... [in the matter] of national security is not a question of law. It is a matter of judgment and policy. Under the Constitution of the United Kingdom and most other countries, decisions as to whether something is or is not in the interests of national security are not a matter for judicial decision. They are entrusted to the executive."

17. Thus, in a situation of national security, a party cannot insist for the strict observance of the principles of natural justice. In such cases, it is the duty of the court to read into and provide for statutory exclusion, if not expressly

provided in the rules governing the field. Depending on the facts of the particular case, it will however be open to the court to satisfy itself whether there were justifiable facts, and in that regard, the court is entitled to call for the files and see whether it is a case where the interest of national security is involved. Once the State is of the stand that the issue involves national security, the court shall not disclose the reasons to the affected party.”

It appears that there are three separate criminal proceedings instituted against the said partner of the petitioner and charge sheets have also been filed. One fact in the report, which stands out is that the said shareholder of the petitioner was deported from Thailand to India to face criminal prosecution thereby meaning that he was fugitive and had fled the country to avoid the legal regime here.

Indeed, a shareholder is a distinct personality from the company which is a juristic person. However, a 38.16 % shareholder can and should exercise a controlling interest in the petitioner. It may be too artificial to distinguish the said shareholder from the writ petitioner in the facts of this case. It would be clear if the Corporate Veil of the petitioner is lifted that the real person in control and management of the Writ Petition is the said particular shareholder having 38.16% shares and hence a controlling interest.

The Hon’ble Supreme Court in the case of ***New Horizons Ltd. vs. Union of India*** reported

in **1995 (1) SCC 478**, a shareholder in a consortium that is bidding for State largess must be treated as a partner of the bidder.

At paragraphs 36, 37 and 38 it has been held as follows:-

“...36. After making a special study of this branch of the law, a learned scholar has discerned four different attitudes towards the company in judicial pronouncements. According to him these categories, in progressive order, are (i) peeping behind the veil; (ii) penetrating the veil; (iii) extending the veil; and (iv) ignoring the veil. The decisions relating to determination of residence or enemy status of a company have been placed by him in the category of “peeping behind the veil” where the court peeps behind the veil and concludes from the shareholders or from the people in control of the company, something about the nature of the company. (See S. Ottolenghi : *From Peeping Behind the Corporate Veil to Ignoring it Completely* [(1990) 53 Mod L Rev 338, 340] .)

37. This Court has adopted a similar approach and in some cases it has seen through the corporate veil. In *Central Inland Water Transport Corpn. Ltd. v. Brojo Nath Ganguly* [(1986) 3 SCC 156 : 1986 SCC (L&S) 429 : (1986) 1 ATC 103 : (1986) 2 SCR 278] the Court was considering the question whether the appellant company was an agency or instrumentality of the State for the purpose of Article 12 of the Constitution. It was said: (SCR p. 349 : SCC p. 202, para 67) “For the purpose of Article 12 one must necessarily see through the corporate veil to ascertain whether behind that veil is the face of an instrumentality or agency of the State.”

So also in *State of U.P. v. Renusagar Power Co.* [(1988) 4 SCC 59 : 1988 Supp (1) SCR 627] it has been observed : (SCR p. 668 : SCC p. 95, para 68)

“The veil on corporate personality even though not lifted sometimes, is becoming more and more transparent in modern company jurisprudence.”

38. Seeing through the veil covering the face of NHL it will be found that as a result of reorganisation in 1992 the Company is functioning as a joint venture wherein the Indian group (TPI, LMI and WML) and Mr Aroon Purie hold 60% shares and the Singapore-based company (IIPL) holds 40% shares. Both the groups have contributed towards the resources of the joint venture in the form of machines, equipment and expertise in the field. The Company is in the nature of a partnership

between the Indian group of companies and the Singapore-based company who have jointly undertaken this commercial enterprise wherein they will contribute to the assets and share the risks. In respect of such a joint venture company the experience of the company can only mean the experience of the constituents of the joint venture, i.e., the Indian group of companies (TPI, LMI and WML) and the Singapore-based company (IIPL).”

If one looks at the subject matter of tender, which is Mechanisation of Berth 2 on “Design, Build, Finance, Operate and Transfer (DBFOT)”, this Court cannot brush the objection of the Union. The awardee would have to oversee a huge amount of cargo moving in and out of India. The withholding of clearance of the petition by the Union, in this regard, therefore, is not found without basis.

In that view of the matter this Court is of the view that the petitioner with its 38.16% shareholder, against whom criminal proceedings are pending, was rightly not given clearance by the Union. The Tender process may go ahead excluding the petitioner from participation.

Nothing further remains to be adjudicated in the writ petition. Hence, WPA 15127 of 2021 is dismissed.

Interim order, if any, shall stand vacated.

There shall be no order as to costs.

Since the report produced by the Union refers to the matters already discussed in the writ

petition and submitted by their counsel, the petitioner does not need copies of the same.

The report of the Ministry of Home Affairs is returned back after being resealed by this Court.

Urgent photostat certified copy of this judgment, if applied for, be given to the parties upon compliance of all formalities.

(Rajasekhar Mantha, J.)