BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 24.08.2022

Pronounced on : 01.09.2022

CORAM

THE HON'BLE MR.JUSTICE G.R.SWAMINATHAN

WP(MD)No.17904 of 2022
and
WMP(MD)Nos.13055, 13058,13059 , 13060 & 13067,
& 14131 to 14133 of 2022 of 2022

1.Bollore Africa Logistics,
31-32, quai de Dion Bouton,
92811, Puteaux, France.

2.India Ports & Logistics Private Limited,
141, 14th Floor, Jolly Maker Chambers II,
Nariman Point, Mumbai 400021, India.

3.Highgate Terminals Private Limited,
3B, 2nd Floor, Shree Pant Bhuvan,
SVP Road, Mumbai – 400007, India. ... Petitioner

v.

1.V.C.Chidambaranar Port Trust,
Rep.by the Chief Mechanical Engineer,
Mechanical & Electrical Engineering Department,
Planning and Monitoring Division,
Tuticorin – 628 004.

2.M/s.JM Baxi Ports and Logistics Limited
Godrej Coliseum, 1001-B Wing,
Everard Nagar, Soin (E),
Mumbai – 400 022, India. ... Respondents
(R2 suo motu impleaded vide order dated 08.08.22)

Prayer : Writ Petition filed under Article 226 of the Constitution of India, praying this Court to issue a Writ of Certiorarified Mandamus to call for the records and quash the impugned order viz., the letter bearing No.MEE-CMEP1-MIS-CONVE-V1-20(60768) D.2156 dated 02.08.2022 issued by the respondent to the petitioners' consortium and consequentially hold that the petitioners' consortium is a qualified applicant as per the request for Qualification and the Bidding Documents issued in connection with Public Notice dated 05.05.2021 bearing No.MEE-CMEP1-MIS-CONVE-V1-20(60768) for the project - "Conversion of 9th Berth as Container Terminal through P.P.P. on D.B.F.O.T. basis" during May, 2021 and "to consequentially declare that the Bid Opening held on 04.08.2022 as null and void and to direct the first respondent to conduct the second stage (bid stage) of the bidding process afresh by including the petitioners as the pre-qualified applicant" .
(Prayer was amended vide court order dated 24.08.2022)

For Petitioners : Mr.S.R.Rajagopal for Mr.S.Vengatesh,
Tatva Legal Chennai

For Respondents : Mr.R.Venkatavaradhan
for Mr.V.R.Shanmuganathan for R1

Mr.T.Mohan for Mr.Raghuvaran Gopalan for R2

ORDER

V.O.Chidambaranar Port Trust, the first respondent herein, issued notification dated 05.05.2021 inviting applications from interested parties for the project "Conversion of 9th Berth as Container Terminal through Public

Private Partnership on Design, Build, Finance, Operate and Transfer (DBFOT) basis". The petitioner, a consortium of three companies, submitted their bid in response thereto. The first respondent herein vide communication dated 16.12.2021 informed the petitioner-consortium that it stood disqualified from taking part in the tender process. Questioning the same, the petitioner filed WP(MD)No.295 of 2022. Direction was also sought for permission to take part in the second stage of the bidding process. Vide order dated 10.01.2022, the writ petition was dismissed. Aggrieved by the same, the petitioner filed WA(MD)No.39 of 2022. On 17.02.2022, the Hon'ble Division Bench granted interim order in favour of the petitioner. When the matter was taken up for final hearing, it was represented by the first respondent that the disqualification order dated 16.12.2021 stood withdrawn without prejudice to their right to consider the petitioners' case in accordance with the relevant tender conditions and the applicable laws. Recording the said stand of the port trust, the writ appeal was disposed of reserving the petitioners' liberty to challenge any action that may be taken by the respondent. Thereafter, there was a regular exchange of correspondence between the petitioner-consortium on the one hand and the port trust on the other. Finally, the impugned order dated 02.08.2022 came to be passed once again disqualifying the petitioner. It is put to challenge in this writ petition.

2.The writ petition was listed for admission on 08.08.2022. When it was taken up for hearing, the learned standing counsel for port trust submitted that "letter of acceptance" has already been issued in favour of M/s.JM.Baxi Ports and Logistics Limited. Thereupon, in the interest of justice, the successful bidder was impleaded as the second respondent. The matter was taken up for final hearing on 24.08.2022. The learned counsel for the petitioner took me through the contents of the affidavit filed in support of the writ petition as well as the typed set of papers and contended that the disqualification order is to be quashed and that the petitioner-consortium must be permitted to participate in the second stage of bidding process. Per contra, the learned standing counsel for the first respondent-port trust as well as the learned counsel for the second respondent/successful bidder submitted that the impugned order does not call for any interference. They pressed for dismissal of the writ petition.

3.I carefully considered the rival contentions and went through the materials on record. Before taking up the issue that has been raised for analysis, I deem it necessary to briefly narrate the basic facts.

4.The petitioner is a consortium formed for the purpose of submission of bids in the tender floated by the first respondent for Conversion of 9th Berth as Container Terminal. The consortium comprises the following companies :

"1.Bollore Africa Logistics, 31-32, quai de Dion Bouton,

92811, Puteaux, France.

2.India Ports & Logistics Private Limited, 141, 14th Floor, Jolly Maker Chambers II, Nariman Point, Mumbai 400021, India.

3.Highgate Terminals Private Limited, 3B, 2nd Floor, Shree Pant Bhuvan,

SVP Road, Mumbai – 400007, India."

The tender notification issued by the first respondent clearly states that to be eligible for pre-qualification, an applicant must have technical capacity as well as financial capacity as defined in Clause 2.2.2. There are also disqualification clauses. Clause 2.2.8 reads as follows :

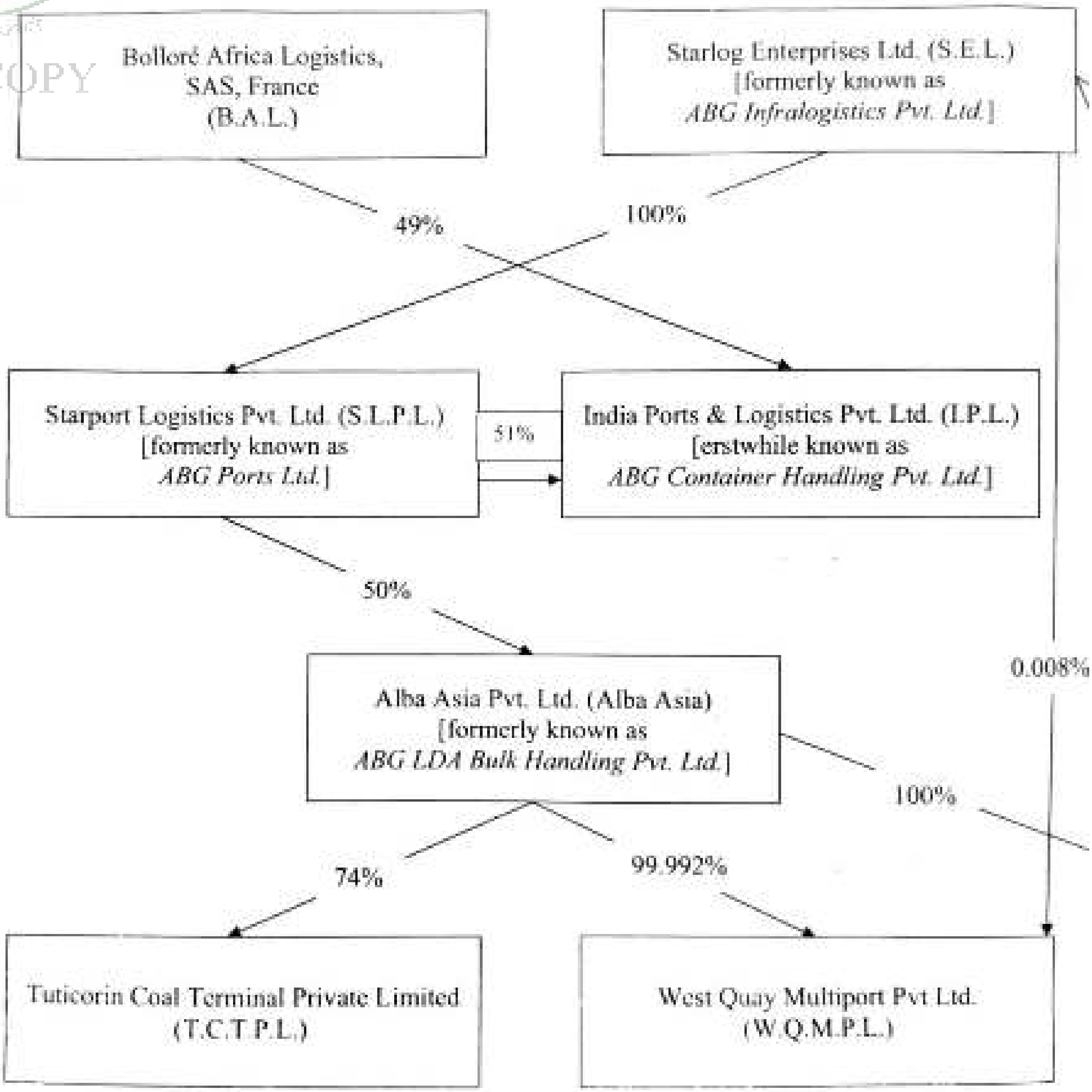
> "An Applicant including any Consortium Member or Associate should, in the last 3 (three) years, have neither failed to perform on any contract, as evidenced by imposition of a penalty by an arbitral or judicial authority or a judicial pronouncement or arbitration award against the Applicant, Consortium 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 to such cause or event; (b) any wilful 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."

The expression "associate" has been defined in Clause 2.2.9 which reads as follows :

"For purposes of this RFQ, Associate means, in relation to the Applicant/ Consortium Member, a person who controls, is controlled by, or is under the common control with such Applicant/ Consortium Member (the "Associate"). As used in this definition, the expression "control" means, with respect to a person which is a company or corporation, the ownership, directly or indirectly, of more than 50% (fifty per cent) of the voting shares of such person, and with respect to a person which is not a company or corporation, the power to direct the management and policies of such person by operation of law."

5.The petitioners submitted the following organogram indicating the network of companies :



The stand of the first respondent is that West Quay Multiport Pvt Ltd (WQMPL) is an associate of the petitioner-consortium and that it had a concession agreement with Vishakapatnam Port Authority and that it was terminated on 13.02.2020 due to events of default on the part of the concessionaire and that it also paid regular damages to VPA; hence, the petitioners attracted disqualification under Section 2.2.8 of the RFQ. India Ports and Logistics Pvt Ltd (IPLPL) is a member of the consortium. From the above organogram, it is seen that Starlog Enterprises Pvt. Ltd (SEL) holds 51% equity shareholding in WQMPL. Starlog also holds 92% shareholding in Star Port Ltd., Star Port holds 51% equity shares in IPLPL. Thus, IPLPL and Starlog Enterprises Ltd are associates of each other and under the common control over WQMPL and IPLPL and the chain of control is not broken. As a result, WQMPL and IPLPL are associates of each other.

6.The only question that arises for consideration is whether the aforesaid stand of the first respondent that WQMPL whose concession agreement with Vishakapatnam Port Trust was terminated is an associate of IPLPL, the second petitioner herein is correct. The basic facts are not in dispute. The primary contention put forth by the learned counsel appearing for the petitioners is that while it is true that Starlog has 51% equity shareholding in WQMPL, one Alba Asia Pvt Ltd is not only holding the remaining equity shares but also almost 100% of the preference shares. Since no dividend was paid in respect of the preference shares, the voting rights of Alba Asia Pvt Ltd. ballooned to 99.992%. As per clause 2.2.9, only if the applicant owned more than 50% of the voting shares in the concerned company, then and then alone, it can be characterized as its associate and not otherwise. In this case, Alba Asia controlled 99.992% of the voting shares and the voting shares held by Starlog was almost negligible. Relying on Section 47(2) of the Companies Act, 2013 and the opinion expressed by some eminent authors, he contended that declaration of dividend is not a sine qua non and that the preference shareholders will have a right to vote on all the resolutions placed before the company if dividend was not paid for a period of two years or more. He repeatedly emphasized that the disqualification clause speaks about "voting shares" and that therefore the equity shareholding is irrelevant. The learned counsel for the petitioners relied on the decisions reported in (2007) 14 SCC 517 (Jagdish Mandal v. State of Orissa and ors), (2000) 2 SCC 617 (Air India Ltd v. Cochin International Airport Ltd). and (2009) 8 SCC 709 (Ram Parshotam Mittal and Ors. vs. Hillcrest Realty Sdn. Bhd. and Ors).

7.I am not persuaded by the aforesaid submission of the learned counsel appearing for the petitioners. As rightly pointed out by the learned counsel appearing for the Port Trust and endorsed by the learned counsel for the successful bidder, in the facts and circumstances of this case, the second proviso to Section 47(2) of the Companies Act, 2013 will kick in only if the dividend is payable and not paid. From the financial statement for the year ended 31.03.2017 submitted by WQMPL, one can note that the preference shares carry a 1% coupon rate and same shall be payable only if the company is profitable in the said financial year. The coupon is not subject to be cumulative. The stand of the first respondent is that the preference shares have been allotted on such terms and that the preference shareholder will not be entitled to dividend if the company is not profitable in the financial year concerned. In other words, the stand of the Port Trust is that as per the terms of allotment of preference shares, dividend was clearly not payable. The learned counsel for the petitioners had not placed any material to show that the preference shareholder of WQMPL was entitled to dividend even if the company did not make any profits. The petitioners are relying exclusively on the second proviso to Section 47(2) of the Act. Since no contra materials have been placed, I have no hesitation to accept the stand of the first respondent. It is beyond dispute that WQMPL was suffering consecutive losses. Only if dividend is payable and not paid, the preference shareholder shall have a right to vote on all resolutions placed before the company.

8.Section 87 of the Companies Act, 1956 is the provision corresponding to Section 47 of the Companies Act, 2013. Section 87 of the repealed Act is as follows :

“87.Voting rights.

(1)Subject to the provisions of section 89 and sub- section (2) of section 92-

(a)every member of a company limited by shares and holding any equity share capital therein shall have a right to vote, in respect of such capital, on every resolution placed before the company; and

(b)his voting right on a poll shall be in proportion to his share of the paid up equity capital of the company.

(2)(a) Subject as aforesaid and save as provided in clause (b) of this sub- section, every member of a company limited by shares and holding any preference share capital therein shall, in respect of such capital, have a right to vote only on resolutions placed before the company which directly affect the rights attached to his preference shares. Explanation.- Any resolution for winding up the company or for the repayment or reduction of its share capital shall be deemed directly to affect the rights attached to preference shares within the meaning of this clause.

(b)Subject as aforesaid, every member of a company limited by shares and holding any preference share capital therein shall, in respect of such capital, be entitled to vote on every resolution placed before the company at any meeting, if the dividend due on such capital or any part of such dividend has remained unpaid-

(i)in the case of cumulative preference shares, in respect of an aggregate period of not less than two years preceding the date of commencement of the meeting; and

(ii)in the case of non- cumulative preference shares, either in respect of a period of not less than two years ending with the expiry of the financial year immediately preceding the commencement of the meeting or in respect of an aggregate period of not less than three years comprised in the six years ending with the expiry of the financial year aforesaid. Explanation.- For the purposes of this clause, dividend shall be deemed to be due on preference shares in respect of any period, whether a dividend has been declared by the company on such shares for such period or not,-

(a)on the last day specified for the payment of such dividend for such period, in the articles or other instrument executed by the company in that behalf; or

(b)in case no day is so specified, on the day immediately following such period.

(c)Where the holder of any preference share has a right to vote on any resolution in accordance with the provisions of this sub- section, his voting right on a poll, as the holder of such share, shall, subject to the provisions of section 89 and sub- section (2) of section 92, be in the same proportion as the capital paid up in respect of the preference share bears to the total paid up equity capital of the company."

Section 47 of the 2013 Act is as follows :

47.Voting rights.—

(1)Subject to the provisions of section 43 and sub-section (2) of section 50,— (a) every member of a company limited by shares and holding equity share capital therein, shall have a right to vote on every resolution placed before the company; and (b) his voting right on a poll shall be in proportion to his share in the paid-up equity share capital of the company.

(2)Every member of a company limited by shares and holding any preference share capital therein shall, in respect of such capital, have a right to vote only on resolutions placed before the company which directly affect the rights attached to his preference shares and, any resolution for the winding up of the company or for the repayment or reduction of its equity or preference share capital and his voting right on a poll shall be in proportion to his share in the paid-up preference share capital of the company: Provided that the proportion of the voting rights of equity shareholders to the voting rights of the preference shareholders shall be in the same proportion as the paid-up capital in respect of the equity shares bears to the paid-up capital in respect of the preference shares:

Provided further that where the dividend in respect of a class of preference shares has not been paid for a period of two years or more, such class of preference shareholders shall have a right to vote on all the resolutions placed before the company."

In Ramaiya's Guide to the Companies Act, 2013, the eminent revising author (Shri.Aravind P Datar, Senior Advocate) had opined as follows :

"Now, with the omission of this Explanation in the 2013 Act, and section 123 therein providing that no dividend shall be declared or paid by a company except out of profit, the issue as to whether a preference shareholder of a company which has no profits can exercise voting rights on the preference shares has been kept open. In the author's view, the preference shareholders cannot be deprived of dividends and voting rights at the same time. If the dividends are not being declared (and ultimately not being paid), and then the preference shareholders are not even allowed to have a say in management of the company; such a situation may work against the interest of preference shareholders. In essence, what the author views is that the position remains the same notwithstanding

the omission of the explanation. Therefore, it should not make any difference whether the dividend is declared or not; a mere fact that preference shareholders have not been paid dividend will vest them with the power to vote on all resolutions."

While the aforesaid opinion is entitled to the highest weight, the position will be different where the preference shareholder had consciously accepted at the time of allotment itself that he or she will not be entitled to dividend if the company does not make profit in the concerned financial year. The principle of waiver will not apply only to fundamental rights guaranteed under Part III of the Constitution of India. Several statutory rights are derogable and subject to contract to the contrary. The rights of the preference shareholder would fall under such category. The petitioners could not rebut the contention of the learned counsel for the Port Trust that as per the terms of allotment, Alba Asia as the preference shareholder in WQMPL was entitled to dividend only out of profits. If the company had been making losses and as per the terms of allotment, dividend was not payable, merely on account of non-payment of dividend for two years or more, the preference shareholder will not acquire a right to vote on all resolutions placed before the company.

9.In this view of the matter, obviously, the voting share of Starlog in WQMPL was rightly quantified at 51%. As 50% threshold had been crossed, WQMPL becomes an associate of IPLPL. The petitioners therefore attracted the disqualification set out in clause 2.2.8. This disqualification clause cannot casually be brushed aside. As strongly emphasized by the learned counsel for the first respondent, it has a larger object behind it. The tender works in question are of fundamental infrastructural importance. The project must be successfully executed. The tender inviting authority cannot afford to deal with an applicant whose track record is not good. Therefore, these clauses will have to be applied by keeping the larger purpose in mind. WQMPL was a concessionaire with Vishakapatnam Port Trust. It could not fulfil its obligations. Its contract was terminated. It paid damages to VPA. Since WQMPL is an associate of IPLPL which is a Member of the petitioner-consortium, the first respondent was justified in concluding that it will not deal with such an applicant.

10.The first respondent rightly approached the issue by applying the relevant provisions of law to the facts on hand. I do not see any ground to interfere. The learned counsel for the petitioner tried to make much out of the fact that in the impugned order, the petitioner was also denied the benefit of waiver. He pointed out that clause 2.2.8 provides for relaxation. In the earlier disqualification order dated 16.12.2021, the request for waiver was specifically rejected. According to the learned counsel for the petitioners, while passing the impugned order, in all fairness, the first respondent must have independently considered the issue regarding relaxation and not mechanically gone by the earlier rejection of waiver ; This is all the more so because the earlier order was specifically withdrawn by filing a memo before the Hon'ble Division Bench. I do not find much force in this contention. Whether to relax a particular requirement or not in matters such as this should be left to the prerogative of the tender inviting authority. Rigorous standards of judicial review cannot be applied to the decision of the authority declining to relax or waive disqualification. The petitioner cannot demand as a matter of right that his request for waiver must be considered.

11.The writ petition is dismissed. No costs. Connected miscellaneous petitions are closed.

01.09.2022

Index : Yes / No
Internet : Yes / No

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G.R.SWAMINATHAN, J.

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