D/L. 20.
August 8, 2023.
MNS.

WPA No. 15472 of 2023

Hindustan Steelworks Construction Limited
Vs.
The Board of Trustees For the Syama Prasad Mookerjee Port, Kolkata and others

Mr. Saptangshu Basu,
Ms. Susmita Adhikary

… for the petitioner.

Mr. Subhankar Nag,
Mr. Amit Kumar Nag,
Mr. Swarajit Dey

…for the respondent nos. 1 & 4.

Affidavit-of-service filed in Court today be kept on record.

Learned senior counsel appearing for the petitioner contends that the Kolkata Port Trust (KoPT) has insisted upon the petitioner paying service charges, without the Port Trust having made any capital investments.

It is contended, by placing reliance on Clause (ii) of the lease granted to the petitioner by the KoPT, that, in terms of the same, the petitioner would be required to pay service charge for each of the five sites on the capital employed as well as cost of equipment, cost of installation and cost of structure, *if any*, along with cost of network connectivity etc. every year to the KoPT.

It is argued that, as is obvious from the said Clause, the service charge is payable only if there is any capital investment and cost of structure incurred by the KoPT and not the petitioner.

As such, a dispute arose between the parties regarding such payment. The matter was referred to the Tariff Authority for Major Ports (TAMP) within the purview of Sections 48 and 49 of the Major Port Trusts Act, 1963 (1963 Act). When the said authorities wrote to the KoPT asking for certain clarifications, the KoPT, however, refused to give such clarifications on the ground that the contract was concluded between the parties and possession had been handed over to the petitioner on December 10, 2013 in respect of the five sites.

It is argued that the petitioner is not liable to pay any service charge since there was no capital investment on the part of the KoPT. That apart, even if any such amount was payable, the same was required to be decided by the TAMP and/or any other appropriate authority or this Court.

Learned counsel appearing for the KoPT, at the outset, submits that the dispute sought to be raised by the petitioner is to be decided by a competent civil court. In view of the factual nitty-gritties involved in the matter, the writ court is not the appropriate forum for deciding the same without taking evidence.

Learned counsel places reliance on a judgment of the Supreme Court reported at *2023 SCC OnLine SC 671 (Tata Motors Limited Vs. Brihan Mumbai Electric Supply & Transport Undertaking (BEST) and others*), wherein the Apex Court held that the Court, being the guardian of fundamental rights, is duty-bound to interfere when there is arbitrariness, irrationality, *mala fides* and bias. This court is normally loathe to interfere in any contractual matter unless a clear-cut case of arbitrariness or *mala fides* or bias or irrationality is made out. One must remember, it was held, that today many public sector undertakings compete with the private industry and the contracts entered into between private parties are not subject to scrutiny under the writ jurisdiction.

The court further observed that the courts must realize their limitations and the havoc which needless interference in commercial matters can cause. In contracts involving technical issues, the courts should be even more reluctant, it was observed.

Learned counsel for the KoPT further contends that Clause (ii) of the contract stipulates that service charge is required to be paid by the petitioner, even on capital employed or cost of structure invested by the petitioner.

Learned counsel, by placing reliance on Sections 48 and 49 of the 1963 Act, argues that it is beyond the jurisdiction and authority of the TAMP to decide issues as involved in the present case, particularly since the parties entered into contract with their eyes wide open.

Heard learned counsel for the parties.

As rightly contended by learned counsel appearing for the KoPT, the petitioner, in one of its communications to the KoPT, dated December 26, 2012, stated *inter alia* that the petitioner would revenue share with KoPT @ 16.5% of the capital cost, which is identical to the Tuticorin model. In addition, it was stated, the petitioner would compensate KoPT the land rental as per TAMP scale of rates based on the actual usage of land on a monthly basis. This amount, it was stated, may increase or decrease over the year as land usage may periodically vary.

It is apparent from the said Clause of the communication made by the petitioner dated December 26, 2012, that even the petitioner proceeded to interpret the contract between the parties to signify that service charge was payable by the petitioner even if the capital was employed by the petitioner. Clause (ii) of the lease clearly stipulates that the petitioner would be required to pay service charge @ 16.5% on the capital employed, including cost of structure, if any. The expression “service charge”, as opposed to the contention of the petitioner, does not necessarily imply that the cost of structure would have to be incurred by the KoPT for the purpose of levying service charge. Payment of service charge, from the outset, was a necessary and integral part of the contract between the parties. The allotment of land contemplated under the agreement was for installation of weigh bridges by the petitioner, which, obviously, involves substantial amount of capital investment by the petitioner.

Read from the perspective of the above discussions, there cannot be any doubt that the petitioner was well aware of the correct interpretation of the clause-in-question, that is, the petitioner is required pay service charge on the capital employed and cost of structure, even if incurred by the petitioner and not the KoPT.

In such background, the KoPT is justified in arguing that in view of the parties having acted on a concluded contract, cannot now reopen the issue of payability of service charges on capital investment by the petitioner and/or direct the KoPT to the TAMP, which is not the appropriate authority to decide on contractual matters.

Sections 48 of the 1963 Act stipulates, *inter alia*, that the TAMP shall, from time to time, frame a scale of rates at which, and a statement of conditions under which, any of the services specified thereunder shall be performed by a Board.

Section 49 of the 1963 Act stipulates that the authority, from time to time, shall, by notification in the Official Gazette, also frame a scale of rates on payment of which, and a statement of conditions under which, any property belonging to or in the possession or occupation of the Board or any place within the limits of the port or the port approaches may be used for the purposes specified thereunder.

The tariff thus fixed under Section 48, in particular Section 49 of the 1963 Act, can at best be a yardstick for assessment of the amount payable by the petitioner in the instant case.

However, as rightly argued by the KoPT, the TAMP is not the competent authority to decide on contractually payable amounts between the parties. In the event the petitioner has a dispute as to the quantum of payment to be made by the petitioner, the competent civil court is the only appropriate authority to decide such issues. In any event, nothing in this order shall prevent the petitioner or the respondents from approaching a competent civil court for decision on such issues.

However, in so far as the present writ petition is concerned, there is no scope of interference on the grounds as discussed above.

Accordingly, WPA No. 15472 of 2023 is dismissed on contest without any order as to costs.

It is clarified that none of the observations advert to the merits of the allegations and counter allegations between the parties and it will be open to the competent civil court and/or any other authority to decide such issue independently and in accordance with law.

Urgent photostat certified copies of this order, if applied for, be made available to the parties upon compliance with the requisite formalities.

(Sabyasachi Bhattacharyya, J.)