

IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Original Side

Present :- Hon'ble Justice Amrita Sinha

WPO No. 215 of 2021

Pawan Beriwal
Vs.
Board of Trustees, Syama
Prasad Mookherjee Port

For the writ petitioner	:-	Mr. Mainak Bose, Adv. Mr. Rishab Karnani, Adv. Mr. Anurag Bagaria, Adv. Mr. Aniket Nanda, Adv.
For the respondent	:-	Mr. Probal Kumar Mukherjee, Adv. Mr. Snehashis Sen, Adv.
Heard on	:-	30.07.2024 & 07.08.2024
Judgment on	:-	03.09.2024

Amrita Sinha, J.:-

The petitioner challenges the act of the Kolkata Port Trust, rechristened as Syama Prasad Mookherjee Trust, hereinafter referred to as “KoPT” for the sake of brevity, in cancelling the first notice inviting tender and proceeding with the second.

The facts of the case are as follows: –

The petitioner is one of the partners of a partnership firm engaged in the business of iron and steel. He is already in occupation of a plot of land belonging to KoPT and claims to be running business from the said plot of land for nearly fifty years. The petitioner pays rent to KoPT as per the

schedule of rent notified by the Tariff Authority of Major Ports from time to time.

KoPT published a notice inviting tender on 10th July, 2020 for allotment of lease of the land possessed by the petitioner for thirty years on 'as is where is' basis with the first right of refusal. The last date of submission of the bid was initially fixed on 12th August, 2020, later extended to 1st September 2020. The petitioner participated in the said tender process and submitted his bid.

By communication dated 13th October, 2020 the petitioner was informed that the subject tender has been cancelled due to some unavoidable reason and he was requested to participate in the fresh tender process to get the benefit of the first right of refusal. The last date for submission of the bid i.e. 20th October, 2020 was also intimated to him. The petitioner, vide email communication dated 18th October, 2020, objected to the retendering of the subject plot of land. He sought for the reasons for cancellation and also requested for refund of the earnest money deposited by him.

On 28th October, 2020 the petitioner intimated KoPT that the second tender notice was not available in the website. By email communication dated 29th October, 2020, the petitioner was informed that the last date for submission of bid under the second e-tender was extended till 3rd November, 2020. The petitioner refused to participate in the second tender process on the ground that he was not given any reply to his

communication challenging cancellation of the first tender process. The earnest money was refunded in November, 2020.

By a further communication dated 12th April, 2021 the petitioner was informed that as he did not participate in the second tender process it was understood that he was not interested in the subject property. The petitioner was informed that the second tender has been finalised and the subject plot will be allotted to the bidder offering the highest bid. The petitioner was called upon to make over peaceful, vacant, clear and unencumbered possession of the subject property to KoPT within twenty-one days from the date of receipt of the letter. The petitioner immediately made a request to the authority not to take any steps without hearing him.

The primary ground for challenge of the second tender notice is that the first tender could not have been cancelled without specifying any valid reason for the same. The tender could not have been cancelled even if there is only one bidder because the land policy guidelines recognise the right of a single bidder. The second tender process is absolutely mala fide and has been floated only to frustrate the bid of the petitioner who participated in the first bid and not in the second. The highest bidder in the second bid has been handpicked by the authority to inflate the bid amount. The process of second tender is erroneous and not in conformity with the land policy guidelines of the port.

It has been contended that KoPT is not like any other landlord offering land on tender. KoPT is a government body and is guided by the

land policy guidelines framed by the Ministry of shipping. KoPT is bound by the schedule of rent fixed by the tariff authority of major ports. The guidelines do not authorise or permit cancellation of tender in such an arbitrary manner without disclosing any valid or genuine reason. The authority should act in a fair manner complying with the principles of natural justice.

The petitioner contends that KoPT ought to keep in mind that the petitioner is already in possession of the said plot of land and is using the same for business purpose. He has already invested a huge sum of money in making construction thereon. Several persons are employed and earning their living by engaging themselves in the business run by the petitioner. The act of the authority is iniquitous and is liable to be set aside by the Court.

Prayer has been made to set aside the second tender and all steps taken pursuant thereto.

The petitioner relies upon the following decisions in support of his submissions;

(1) Order dated 24.01.2019 passed in **WP No. 308 (W) of 2019 (M/s. Karim Construction Pvt. Ltd. & Anr. Vs. The State of West Bengal & Ors.)**.

(2) Order dated 24.01.2019 passed in **WP No. 309 (W) of 2019 (M/s. Debasish Chatterjee & Anr. Vs. The State of West Bengal & Ors.)**.

(3) Judgment delivered by the Hon'ble Division Bench of this Court on 13.02.2019 in ***CAN 1072 of 2019 in MAT 162 of 2019 (M/s. Karim Construction Company & Anr. Vs. The State of West Bengal & Ors.)***.

Learned senior counsel representing KoPT opposes the prayer of the petitioner. It has been submitted that despite the petitioner being made aware of the second tender process, he voluntarily and deliberately refused to participate in the same. He was also intimated about the last date of submission of bid. As the first tender process did not evoke much response, the authority with the view to generate more earning, decided to cancel the first tender process and proceed with the second one. There is no mala fide intension or arbitrariness on the part of the authority in going for the second tender. The bid amount offered by the bidders in the first tender has not been disclosed to any of the parties. In fact, the bid submitted by the bidders in the first tender process has not been opened at all.

It has been submitted that KoPT has every right to do business and to earn money from the same. The authority has the right to secure higher rate by leasing out its land. With a view to fetch a good rate of rent, the second tender process was floated. The petitioner did not acquire any right by participating in the first tender process. The authority is not obliged to put forth any reason at the time of cancellation of the tender.

The land policy guidelines permit the authority to cancel any bid without affording any reason. The reason for cancellation of the first tender

has been disclosed in the affidavit in opposition filed by the authority. The petitioner has not challenged the terms and conditions of the land policy guidelines which reserves the right of the authority to accept or reject any or all tenders without assigning any reason thereof.

The offers in the second tender have been opened and it has been seen that the highest bidder has offered an amount which is far above the current rent that is being paid by the petitioner. Despite being aware of the H-1 bid, the petitioner did not disclose the amount that he quoted in the first tender; neither did he disclose as to whether he is agreeable to match up to the bid that has been quoted by the highest bidder in the second tender process.

It has been submitted that the petitioner approached the Court late in the year 2021. The intimation regarding cancellation of the first tender was made to the petitioner in October, 2020. The writ petition ought not to be entertained as the petitioner chose to approach the Court long after cancellation of the first tender notice.

The successful bidder has not been impleaded as party respondent despite disclosure of his name in the affidavit in opposition. Any order that may be passed herein may prejudicially affect the successful bidder.

The respondent prays for dismissal of the writ petition.

In support of the aforesaid prayer the respondent relies upon the decision delivered by the Hon'ble Supreme Court in ***State of Jharkhand & Ors. Vs. CWE-Soma Consortium*** reported in ***(2016) 14 SCC 172*** wherein

the Court held that the right to refuse the lowest or any other tender is always available to the Government. So long as the bid has not been accepted, the highest bidder acquired no vested right to have the auction concluded in his favour. The State is well within its right to reject the bid without assigning any reason thereof. The Court reiterated that while exercising the power of judicial review, the Court does not sit as appellate Court over the decision of the Government but merely reviews the manner in which the decision was made.

Reliance has also been placed on the judgment delivered by the Division Bench of this Court in the matter of ***Biswanath Saha vs. State of West Bengal & Ors.*** reported in ***AIR 2022 Cal 279*** wherein the Court held that in each and every case State or its authority is not required to give reasons for cancellation of a bid.

I have heard and considered the rival submissions made on behalf of both the parties and have perused the documents placed before the Court.

Article 298 of the Constitution of India gives right to the State to carry on any trade or business and make contract for acquisition, holding and disposal of property.

According to Section 34 (1) of the Major Port Trust Act, 1963, ports are empowered to lease out land. KoPT is one of the major ports of this country. To regulate allotment of land and to maintain a competitive environment, the Government of India, Ministry of Shipping (Ports Wing)

issues guidelines from time to time and the guidelines are reviewed periodically. The Policy Guidelines for Land Management of Major Ports, 2015 is currently in operation.

The guidelines mention that as per the provisions contained in the Major Port Trust Act, 1963 ports are empowered to lease out their land for a period up to thirty years. The main objective of the policy is to ensure that the land resources are put to optimum use and optimum value is realised by licensing/leasing port land through a transparent tender cum auction methodology. The policy prescribes the procedure for revision of rates to enable maximum resource generation for the ports and the methodology for regular updating of the rates in line with the market value.

There is a specific provision for renewal of existing/earlier leases. In cases of renewal of existing leases, the land is to be put to tender cum auction with the first right of refusal to be extended to the existing lessee. The existing lessee is to be allowed to match the H-1 bid. The bidding option is only on the reserve price of the land. With a view to dissuade non-serious bids, earnest money deposit for a valid bid is fixed at 10% of the latest schedule of rent or the price quoted by the existing lessee in the tender cum auction, whichever is higher. The provision of first right applies to expired lease in addition to existing leases.

KoPT published a notice inviting tender on 10th July, 2020 inviting bids for allotment of subject land on long term lease on 'as is where is' basis. The reserved annual rent of the subject land which is occupied by the

petitioner is Rs. 1,23,357/-. In response to the notice inviting tender the petitioner submitted his bid but the tender floated on 10th July, 2020 was cancelled due to some unavoidable reason. The petitioner's firm was requested to participate in the fresh e-tender-cum-e-auction procedure and first right of refusal was granted. It was specifically mentioned that to exhaust the option of first right of refusal, the participation of the firm in the tender process was required.

The authority, in the affidavit in opposition, has disclosed that the petitioner along with one M/s. Jai Gurudev Creations participated in the first tender, but because the said tender did not draw adequate competition and participation of bidders, the competent authority of the respondent though it prudent to cancel the process and advised for fresh tender in anticipation of larger participation of bidders with a view to augment revenue for the subject plot of land.

What is to be answered is whether it was proper for the authority to cancel the tender process without disclosing any reason. Can the act of the authority be held to be so unreasonable, mala fide or arbitrary calling for interference by the writ court? The answer is an emphatic no for the following reasons.

The petitioner was duly intimated about the cancellation of the tender process. He was also intimated about the date and time for submission of bid in respect of the fresh tender. In case of any problem related to the tender the contact details of the person of the respondent

authority was mentioned. By reply mail the petitioner's firm categorically mentioned that it would not participate in the tender. The earnest money deposited by the petitioner was refunded on request.

Had it been a case that the tender in which the petitioner participated was cancelled and the petitioner was not intimated about the second tender, then the allegation of mala fide may have been accepted. Here, enough opportunity was provided to the petitioner to participate in the second tender process. No prejudice has been caused to the petitioner on cancellation of the first tender as he was afforded opportunity to participate in the second one.

In *Karim Construction (supra)* and *Debashis Chatterjee (supra)* relied upon by the petitioner, a coordinate Bench of this Court held that without communicating a reasoned order the authority ought not to have initiated the second e-tender process. The Hon'ble Division Bench affirmed the order passed by the learned Single Judge.

The Hon'ble Supreme Court in *CWE-Soma Consortium (supra)* relied upon various judgments of the Supreme Court and concluded that the decision of the tender committee not to proceed with the tender without any responsive bid available and to proceed with fresh tender to make the same more competitive, cannot be said to be arbitrary or unreasonable. It is the right of the authority to decide whether to enter into a contract or not subject only to the requirement of reasonableness under Article 14 of the Constitution of India. It was conclusively held that so long as the bid has not

been accepted, the highest bidder acquires no vested right to have the auction concluded in his favour.

In Biswanath Saha (supra) the Court held that in each and every case the State is not required to give reasons for cancellation of a bid.

The ratio laid down by the Hon'ble Supreme Court has to be followed as the law of the land.

In the instant case, the authority asserts that the bids of the first tender were not opened at all. As there wasn't much participation, the authority proceeded to float a second tender notice. The bidder who participated along with the petitioner in the first tender appears to have participated in the second one also and has emerged successful. As there was no participation from the end of the petitioner, KoPT went ahead with the tender process and finalized the same without the petitioner who is the existing lessee.

The evaluation criteria in the techno commercial bid of the notice inviting tender dated 22nd September, 2020 being annexure VII clearly mentions that participation of the bidder enjoying the first right of refusal in the tender is a must to exercise first right of refusal. The same implies that participation of the person who is in possession of the plot of land put up for tender is indispensable for finalizing the tender. (underlined to give emphasis)

The land policy guidelines of the authority and the tender document both disclose the importance of the participation of the existing

lessee. The land policy guidelines mentions that if the existing lessee is the only bidder then the annual lease rental would be determined on the basis of the latest schedule of rent or the price quoted by the existing lessee in the tender-cum-auction, whichever is higher. The same implies that the existing lessee is required to quote his bid in the tender-cum-auction. (underlined to give emphasis)

The respondent may not be compared to a private landlord who has the liberty to let out his land on his own terms and conditions; but the Constitution permits the State to do business and to enter into contract in the process of the business. The land policy guidelines of the respondent speak about resource generation. The very idea of allotment of land through the tender-cum-auction process is for the purpose of generation of maximum revenue for the Government. There is nothing wrong for the authority to reject a bid if the same does not meet the desired result. As long as the authority acts in a fair and transparent manner, the same ought not to be interfered with. The petitioner has not disclosed the bid amount that he quoted in response to the first tender. The bid amount of the second tender has, however, been disclosed by the authority in the affidavit in opposition.

It is noticed that the bidding process was initiated in July, 2020 and the second tender was floated in September, 2020, both in the midst of the Covid pandemic. It may be for the reason of the pandemic that adequate response to the notice inviting tender was not received.

Though the petitioner has alleged mala fide and arbitrariness on the part of the authority in cancelling the first tender and proceeding to finalise the second one, but it does not appear to the Court that the act of the authority was either mala fide or based on extraneous consideration, as alleged. The petitioner was duly intimated about his first right of refusal. He was also intimated about the last of submission of bid and the extension of time for the submission. The authority was not bound to disclose the reason for cancellation of the bid.

As per the land policy guidelines if the existing lessee quotes a rate lower than the H-1 bid, the authority is liable to give an opportunity to the existing lessee to match the H-1 bid. Giving such opportunity to the existing lessee cannot be said to cause any prejudice to the H-1 bidder. It is only when the existing lessee fails to match up the bid submitted by the successful bidder, does the successful bidder acquire a right to proceed with the bid. If the existing lessee refuses to match up the highest bid, he loses his right to continue with the lease.

The right of first refusal of the existing lessee has been recognized by the authority with a view to maintain the continuity of the lease. The very purpose for which the lease was obtained may be severely hampered if the lease is not extended or terminated midway. With the intension to not disturb the existing lessee, the said right has been preserved. In line with the said objective, opportunity was granted to the petitioner to submit his bid, which he plainly refused. He also sought for refund of his earnest money deposit which was duly refunded.

Ideally, on refusal to participate in the tender process, it has to be taken that the petitioner being the existing lessee waived or surrendered his right to continue with the lease, but for the first right of refusal mentioned in the land policy guidelines and the notice inviting tender, his right is saved.

The Court at the interim stage protected the rights of both the parties. The respondent was restrained from awarding the lease to anyone in terms of the second tender and further restrained from dispossessing the petitioner from the subject plot of land without due process of law during the pendency of the writ petition. The respondent was given liberty to recover the difference of the rate of rent from 9th June, 2021 till recovery of possession of the subject plot of land in the event the writ petition of the petitioner fails. No appeal being preferred by either of the parties, the said interim order has attained finality by now.

The Court is convinced that the participation of the existing lessee in the tender process is imperative. The petitioner has deliberately chosen not to participate in the second tender process despite opportunity granted to him. His bid in the first tender is yet to be opened. There is a requirement of quoting the bid by the existing lessee in the tender process. Because of non-participation in the second tender process there is no bid from the side of the existing lessee. The bidder who quoted the highest price in the second tender i.e, M/s. Jai Gurudev Creations was a participant in the first tender also. Had the bids in the first tender been opened, the competition would have been between the petitioner and M/s. Jai Gurudev.

As the petitioner has expressed his willingness to continue with the lease and as he claims to have invested a considerable sum for making structures at the subject plot of land used for business purpose where quite a few number of persons are employed, accordingly, for providing equitable justice and to preserve the right of first refusal, one opportunity should be given to the petitioner to match up the H-1 bid of the second tender. If the petitioner is able to match up the highest bid then the lease may be granted in his favour. If the petitioner is unable or fails to match up the highest bid, it will be open for the respondent authority to proceed to settle the land in accordance with its guidelines.

Though M/s. Jai Gurudev is not a party in the instant writ petition but the direction passed herein will not prejudice the said bidder in any manner as the bidder ought to be aware of the provision of the right of first refusal.

As the Court is of the considered opinion that there was no mala fide or arbitrariness in the decision making process of the respondent in cancelling the first tender and going ahead with the second one, accordingly, in terms of the interim order passed by the Court the respondent authority will be at liberty to recover the difference of rent from the petitioner on and from 9th June, 2021 till recovery of possession of land from the petitioner if he fails to match the H-1 bid or till the date of execution of fresh lease in his favour if he emerges successful. There should not be any loss of rent in the process.

The writ petition stands disposed of.

No costs.

Urgent certified photocopy of this judgment, if applied for, be supplied to the parties or their advocates on record expeditiously on compliance of usual legal formalities.

(Amrita Sinha, J.)