

....Petitioner Vs. Board of Trustees for the Port of Kolkata and ors

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Court : Kolkata

Decided On : Sep-01-2014

Judge : I. P. Mukerji

Appellant : Petitioner

Respondent : Board of Trustees for the Port of Kolkata and ors

Judgement :

W.P.No.748 OF 2014 IN THE HIGH COURT AT CALCUTTA Constitutional Writ Jurisdiction ORIGINAL SIDE In the Matter of : Nupur Sarkar .Petitioner - VersusBoard of Trustees for the Port of Kolkata & Ors Respondents Appearance: Mr.Shaktinath Mukherjee,Sr.Adv.Mr.Kishore Dutt, Mr.Soumya Majumdar, for the Writ petitioners Mr.Arunava Ghosh.

Sr.Adv.Mr.Somnath Bose for the Respondent Heard On: - 26.08.2014 Judgement On: - 01.09.2014 I.P.Mukerji, J.

The Legal Advisor of Kolkata Port Trust is the Writ Petitioner.

The question in this writ application is whether the two show cause notices against the legal advisor of Kolkata Port Trust are to be quashed at the threshold, without requiring her to face the adjudication.

The problem arises in this way.

The Kolkata Port Trust had, as early as on 27th December, 2002 taken the decision to invite offerers through global notice for supply of two mobile harbour cranes together with necessary back up support equipment on own operate and maintain basis.

The notice was ultimately circulated on 13th June, 2003.

According to the tender conditions, tender could be by individuals, corporates or through a consortium.

The tender process had many stages.

Four offerers had qualified at the Techno Commercial Stage.

They were : A.

ABG Heavy Industries Limited, B.

Capstan Shipping and Estates Limited, B.

Roadwings International PVT.LTD.and C.T.P.

Roy Chowdhury & Company PVT.LTD.Out of them Roadwings International PVT.LTD.qualified in the price bid.

They out-bid the others.However, it so happened that at the time of grant of the contract Roadwings International PVT.LTD.wanted ABG Heavy Industries Limited to be their partner and constitute a consortium or a special purpose vehicle amongst them.

This was approved by Kolkata Port Trust.

The contract was awarded accordingly.

Mr.Shaktinath Mukherjee, learned Senior Advocate appearing for the petitioner tells me that these two mobile cranes are in operation in the Kolkata port area, operated by this consortium.

By a memorandum dated 15th June, 2011 a departmental enquiry was started against the legal advisor.

The charge against her was that she did not disclose to learned counsel who gave an opinion regarding the tender that ABG Heavy Industries Limited was the unsuccessful bidder at the price bid stage.

On 16th June, 2011 the writ petitioner received the charges.

On 14th July, 2011 she submitted her reply denying them.

The departmental enquiry proceeding was constituted by appointing Mr.A.K.Bagchi, DMD as the enquiry officer and Mr.B.Ray Chowdhury General Manager (M&S) HDC, Ko PT as the presenting officer.

On 3rd September, 2012 Mr.Bagchi submitted his enquiry report.

He said that the charges were not established.

The Chairman of the Port Trust was not satisfied with this report and ordered a fresh enquiry with.

Mr.P.N.

Ray Chowdhury (GM (m+s) as the enquiry Officer.

Mr.B.Ray Chowdhury remained as the presenting officer.

The writ petitioner submitted another representation on 5th February, 2013.

She argued that a fresh enquiry could not be held.

This representation was accepted.

Only a further enquiry was ordered.

On 7th May, 2013 Mr.Bagchi submitted a further enquiry report.

He once again opined that the charges were not established.

The Chairman and Disciplinary Authority considered the findings of the Enquiry Officer.

He agreed that Charge-I which accused the Legal Advisor of misleading the Board by not disclosing that ABG was one of the unsuccessful bidders was without any basis as it was the responsibility of other officers to advise the Board.

But charge-II had basis.

This charge related to the alleged fault of the legal advisor in not obtaining a specific opinion of counsel regarding formation of a consortium with an unsuccessful bidder and her refraining to express her opinion in the matter.

The Legal Advisor was charged with the accusations in the second charge by a show cause notice dated 16th August, 2013.

Minor penalty was proposed to be inflicted on her.

She was directed to submit her written representation within 15 days.

The Chairman and Disciplinary Authority had a dramatic change of mind after the writ petitioner submitted her replies dated 9th September 2013 and 12th September, 2013.

At this time he put his finger on the draft board note and found that it was vetted by the Legal Advisor.

During the official enquiry also the self same documents were gone into by the Chairman and Disciplinary Authority.

He had found then that it was not the responsibility of the Legal Advisor to apprise the Board whether an unsuccessful bidder was being considered.

He now started believing that she had such responsibility and must be charged.

The disciplinary authority hit upon a resolution described as 85 dated 31 March, 2004, according to which a list of unsuccessful bidders was to be maintained by the Kolkata Port Trust.

New ideas entered his head.

Since there was such a resolution, the legal advisor should have been aware of it and advised the Board accordingly.

Therefore, according to the Disciplinary Authority both charges I and II were provisionally proved.

A show cause dated 23rd July, 2014 was issued.

The Legal Advisor was asked to submit her written representation within 15 days from the date of receipt of the notice.

The question which arises before this Court now is whether the show cause notices should be quashed or stayed at the threshold or should the Kolkata Port Trust Authorities be permitted to adjudicate upon them and express their decision.

It would appear from the authorities cited by Mr. Mukherjee learned Senior Advocate for the petitioner as well as Mr. Ghosh learned counsel appearing for the Kolkata Port Trust that usually the Court does not interfere with a show cause notice.

This is so because normally the Courts have not viewed a show cause notice as giving rise to a cause of action.

It is a notice to show cause.

The recipient of a show cause notice has to answer it (See para-13 of Union of India And Another versus Kunisetty Satyanarayana reported in (2006) 12 SCC28) It is only when the recipient of a show cause notice is punished that a cause of action can be said to have truly arisen as was pronounced by the Honble Supreme Court in Chanan Singh versus Registrar, CO-OP.

Societies, Punjab And Others reported in (1976) 3 SCC361 Executive Engineer, Bihar State Housing Board versus Ramesh Kumar Singh And Others reported in (1996) 1 SCC327 and Oryx Fisheries Private Limited versus Union of India And Others reported in (2010) 13 SCC427 In State of U.P. versus Brahm Dutt Sharma

reported in AIR 1987 SC943 the highest Court warned that the Court should not interfere at the show cause stage.

Look, what has happened in this case.

For supply of two mobile harbour cranes, four organizations had qualified at the Techno Commercial Stage.

These four organizations included ABG Heavy Industries Limited.

Out of these four tenderers the offer of Roadwings International PVT.Ltd was accepted by the Board of Trustees and the contract awarded to them.

ABG Heavy Industries Limited had been disqualified at the price bid stage involving these four organizations as bidders. When the Board of Trustees was awarding such an important contract, which I am told was signed by the Chairman of the Kolkata Port Trust and possibly by other members of the Board, the Board knew or was deemed to know which tenderer was disqualified and for what reason.

More particularly so when only four bidders were involved at the Techno Commercial Stage.

The Board was approached by the successful bidder Roadwings International PVT.Ltd to constitute a special purpose vehicle or a consortium with ABG Heavy Industries Limited.

The Board with the knowledge or deemed to be knowing that ABG Heavy Industries Limited had been disqualified at the price bid stage allowed the contract to be executed with the consortium and to be carried out by it.

The contract is still executory.

Now, one member of the Board who is also the disciplinary authority makes a turn around from that position and charges the legal advisor with not having informed the Board or the counsel who gave an opinion in this regard that ABG Heavy Industries Limited had not qualified at the financial bid, is on the face of it most

mala fide.

The show cause notices clearly give enough indication that they were issued with an ulterior motive.

More so when the show cause notice dated 23rd July, 2014 was issued proposing to inflict a major penalty on the writ petitioner after the disciplinary authority took an initial decision that the only charge that would be tried was the second charge and a minor penalty would be imposed.

Neither an enquiry was ordered nor was anything contained in the enquiry report to suggest any loss caused to the Kolkata Port Trust by the alleged acts of omission by the legal advisor.

If the fault of the legal advisor was that she did not place the necessary note for the perusal of counsel and did not make any comments herself regarding the induction of ABG, then some consequences of that omission were most necessary to be included in the show cause notice.

It could have been said that had the necessary inputs been available the port authorities would not have entered into the contract or that the entry of ABG was detrimental to the interests of the port or that the legal advisor was guilty of having a financial interest in doing the acts complained of and so on.

Nothing is said.

If a certain act of commission or omission does not have any consequences, it is to be taken as a trifle.

No culpability is attached to it.

The law takes no notice of trifles.

I would go to the extent of declaring that the show cause notice does not disclose a cause of action.

We are all aware of the plight of a sacrificial lamb.

From the tale that is unfolded by the two show cause notices, it would not be too adventurous for rational minded persons to come to a conclusion that the legal advisor was being made a sacrificial lamb.

We were warned against this by the decision of the Honble Supreme Court in Union of India And Another versus Kunisetty Satyanarayana pronounced by Mr.Justice Katju and reported in (2006) 12 SCC28 The Honble Supreme Court has said the following:- 16.

No doubt, in some very rare and exceptional cases the High Court can quash a charge-sheet or showcause notice if it is found to be wholly without jurisdiction or for some other reason if it is wholly illegal.

However, ordinarily the High Court should not interfere in such a matter. In Oryx Fisheries Private Limited versus Union of India And Others reported in (2010) 13 SCC427the Honble Supreme Court through Mr.Justice Ganguly remarked as follows: 31.

It is of course true that the show-cause notice cannot be read hypertechnically and it is well settled that it is to be read reasonably.

But one thing is clear that while reading a show-cause notice the person who is subject to it must get an impression that he will get an effective opportunity to rebut the allegations contained in the show-cause notice and prove his innocence.

If on a reasonable reading of a show-cause notice a person of ordinary prudence gets the feeling that his reply to the show-cause notice will be an empty ceremony and he will merely knock his head against the impenetrable wall of prejudged opinion, such a showcause notice does not commence a fair procedure especially when it is issued in a quasi-judicial proceeding under a statutory regulation which promises to give the person proceeded against a reasonable opportunity of defence.

32. Therefore, while issuing a show-cause notice, the authorities must take care to manifestly keep an open mind as they are to act fairly in adjudging the guilt or otherwise of the person proceeded against and specially when he has the power

to take a punitive step against the person after giving him a show-cause notice. In my opinion, it is plain on a reading of the show-cause notice that the mind of the disciplinary authority is closed and biased against the writ petitioner.

She is unlikely to get justice.

When mala fide is involved in the issuance of a show-cause notice, it is a case where the authority issuing the show-cause notice steps out of his jurisdiction.

It is issued without jurisdiction.

The very moment a predisposition to a decision or a closed mind or a biased mind, is indicated in the show cause notice, similar is the result.

The show-cause notice becomes illegal in terms of the ratio in Union of India versus Kunisetty Satyanarayana reported in [2006(12) SCC28].

It is amenable to challenge in the writ jurisdiction.

Show cause notices which do not disclose any cause of action are likely to be quashed and set aside on the same principles a suit or a writ petition is dismissed for not disclosing a cause of action.

The impugned show cause notices are vitiated on the ground that they were issued without jurisdiction, with mala fide intent, a closed and biased mind.

Above everything else they do not disclose a cause of action.

All observations are prima facie.

On the above prima facie case, the writ application is admitted.

In the circumstances, the entire disciplinary proceedings initiated against the writ petitioner are stayed.

The Memorandum of charges and the show cause notices dated 15th June, 2012, 16th August, 2013 and 23rd July, 2014 are stayed.

Affidavit-in-opposition by 10th November, 2014.

Affidavit-in-reply by 25th November, 2014.

List this writ application For Hearing on 26th November, 2014.

Urgent certified photocopy of this Judgment and order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(I.P.MUKERJI, J.)

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