

IN THE HIGH COURT OF KARNATAKA, BENGALURU

DATED THIS THE 23<sup>RD</sup> DAY OF FEBRUARY, 2022

BEFORE

THE HON'BLE MR. JUSTICE KRISHNA S.DIXIT

**WRIT PETITION NO.11165 OF 2021(GM-TEN)**

BETWEEN:

M/S SAPL-GCC JV,  
FLAT NO.302, MAHARAJA HEIGHTS,  
ATTAVARA, FALNIR ROAD,  
MANGALORE - 575 001.  
REPRESENTED BY ITS PA HOLDER,  
SRI. D V RAMAN.

... PETITIONER

(BY SRI. S S NAGANAND, SENIOR COUNSEL AND  
SRI. BASAVARAJ V SABARAD, SENIOR COUNSEL A/W  
SRI. H L PRADEEP KUMAR, ADVOCATE)

AND:

1. GOVERNMENT OF INDIA,  
MINISTRY OF PORTS,  
SHIPPING AND WATERWAYS TRANSPORT,  
BHAWAN1 PARLIAMENT STREET,  
NEW DELHI - 110 001.  
REPRESENTED BY ITS SECRETARY.
2. NEW MANGALORE PORT TRUST,  
GOVERNMENT OF INDIA,  
MINISTRY OF PORTS,  
SHIPPING AND RAILWAYS PANAMBURU,  
MANGALURU - 575 010.  
REPRESENTED BY ITS CHAIRMAN.
3. NEW MANGALORE PORT TRUST,  
THE CHIEF ENGINEER (CIVIL)  
GOVERNMENT OF INDIA,  
MINISTRY OF PORTS,  
SHIPPING AND RAILWAYS PANAMBURU,  
MANGALURU - 575 010.

4. NEW MANGALORE PORT TRUST,  
TENDER COMMITTEE  
GOVERNMENT OF INDIA,  
MINISTRY OF PORTS,  
SHIPPING AND RAILWAYS  
PANAMBURU MANGALURU – 575 010
5. M/S YOJAKA INDIA PRIVATE LIMITED,  
A PRIVATE LIMITED COMPANY  
INCORPORATED UNDER INDIAN  
COMPANIES ACT,  
HAVING ITS REGISTERED OFFICE AT  
D.NO.3-28/43, 2<sup>ND</sup> FLOOR,  
ABCO TRADE CENTRE, NH17,  
KOTTARA CHOWKI, MANGALCRE.  
DAKSHINA KANNADA – 575 006.  
REPRESENTED BY ITS MANAGING DIRECTOR  
SRI. JAGADISH BOLOORU.

... RESPONDENTS

(BY SRI. R YATEESH KUMAR, CGC FOR R1;  
SRI. R SUBRAMANYA, ADVOCATE FOR R2 TO R4;  
SRI. ANAND R KALLI, FOR  
SRI. M S VENUGOPAL, ADVOCATE FOR R5)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA PRAYING TO REVIEW AND RECALL THE ORDER PASSED ON 19.04.2021 IN W.P.NO.6892/2021(GM-TEN) HEAR THE PETITIONER AND DISMISS THE WRIT PETITION NO.6892/2021(GM-TEN) FILED BY R5 M/S YOJAKA INDIA PRIVATE LIMITED ANNEXURE-M AND ETC.,

THIS PETITION HAVING BEEN HEARD AND RESERVED FOR ORDER, THIS DAY, THE COURT PRONOUNCED THE FOLLOWING:

### **ORDER**

Petitioner-Company who was in the fray of public tender in question is knocking at the doors of Writ Court seeking review of the judgment rendered by a Co-ordinate Bench of this court in fifth respondent's W.P.No.6892/2021 disposed off on 19.4.2021 *inter alia* on the grounds that it was not arrayed as a party to the case

and the said judgment has prejudiced its interest; in support of the claim for review, the decision of the Apex Court in **SHIVDEO SINGH VS STATE OF PUNJAB** AIR 1963 SC 365, is pressed into service.

2. **FACTS IN BRIEF:**

(a) The NMPT had called for a re-tender for the construction of breakwater, marine structure, dredging & reclamation for fishing harbour at Kulai on EPC basis pursuant to the NMPT Board Resolution No.113/2019-20 dated 25.11.2019. This tender was in e-procurement mode through CPP Portal in two cover system. Four persons including the petitioner were in the fray. The bids were opened on 23.02.2020 and petitioner & another bidder were found to be technically qualified whereas the bid of other two was rejected. However, the tender was cancelled since the rate quoted by L-1 bidder was 40% above the estimated cost of the project.

(b) The NMPT vide Board Resolution No.141/2021 dated 10.12.2020 again called for e-tender again adding some more works to the project. The last date for submission of e-tender was 01.02.2021 and the date for opening of the tender was 20.02.2021. Four persons were

in the tender fray, including the petitioner & the 5<sup>th</sup> respondent. Petitioner ultimately was found to be the lowest bidder. However the bid of 5<sup>th</sup> respondent came to be rejected. This was pursuant to Board Resolution which accepted Tender Committee Recommendations dated 30.03.2021 to open the price bids of qualified bidders and to disqualify the 5<sup>th</sup> respondent & another.

(c) The 5<sup>th</sup> respondent had filed a complaint dated 02.04.2021 with the Central Government and others alleging some irregularities perpetrated in the subject tender process by the officials of the NMPT hand in glove with petitioner. A day before, he had also filed W.P. 6892/2021 essentially laying a challenge to TCE recommendation and the award of tender work; however, petitioner was not made a party thereto. The Central Government vide order dated 15.04.2021 had constituted a Committee to conduct a detail investigation in the matter and to report. In view of this development, the said Writ Petition came to be disposed off by a Co-ordinate Bench of this Court on 19.04.2021 on the submission of the NMPT that further action with regard to tender in question would

be taken only “after the Central Government would pass the order on the basis of report of the enquiry committee”.

(d) Petitioner, who as already mentioned above, was not a party to the said Writ Petition has filed this petition seeking review of the said judgment relying on the decision of the Apex Court in **SHIVDEO SINGH**, *supra*. In substance, petitioner submits that the tender process having already been accomplished, the Central Govt. could not have directed enquiry at the instance of respondent no.5 and could not have asked the NMPT to go for a fresh tender, there being absolutely no justification therefor. Even otherwise, Central Govt. does not have jurisdiction in the matter and that the fifth respondent neither had *locus standi* nor had he made out any case for the intervention of Central Govt.

3. After service of notice, the first respondent Central Government has entered appearance through the learned CGC. The respondent nos. 2, 3 & 4 being the New Mangalore Port Trust [hereinafter ‘NMPT’], are represented by their Senior Panel Counsel. A private advocate appears for the 5<sup>th</sup> respondent who was the petitioner in the aforesaid W.P.No.6892/2021. The Port Trust and the 5<sup>th</sup>

respondent have filed their Statements of Objections separately. The respondent nos.1 & 5 resist the Writ Petition making submission in justification of the judgment in review. However, the NMPT broadly sails with the petitioner.

4. Having heard the learned counsel for the parties and having perused the Petition Papers, this Court is inclined to grant indulgence in the matter as under and for the following reasons:

(a) The tender in question was called on 21.12.2020. Pre-bid meeting was held on 11.1.2021. Last date for submission of bids was extended up to 22.2.2021. Petitioner had made the bid on the last day. The fifth respondent & two other contractors were also in the fray. Technical bids were opened on 23.2.2021 and the Project Management Consultant ('PMC' for short) i.e., M/s L & T Infrastructure Engineering Limited had submitted the report recommending the bid of the petitioner and for the rejection of fifth respondent's bid. The Tender Evaluation Committee ('TEC' for short) in its meetings held on 25.3.2021 & 30.3.2021 found technical bid of the fifth respondent as non-responsive and that of the petitioner as responsive and therefore recommended to the Board of the

NMPT for consideration accordingly. The Board accepted the said recommendation.

(b) Fifth respondent had filed W.P.No.6892/2021 on 1.4.2021 challenging TEC recommendation dated 25.3.2021 and decision thereon. Strangely, petitioner was not arrayed as one of the respondents and that no explanation is offered in the Statement of Objections as to why it was not so arrayed. True it is that complaint was filed on 2.4.2021 i.e., a day after instituting the Writ Petition. Nothing prevented the said respondent from impleading the petitioner herein as a respondent in all fairness at least after the complaint was made. This petitioner had filed a caveat on 3.4.2021 after sending RPAD notice to him. Apparently, petitioner happened to be a proper party if not a necessary party to the said Writ Petition vide **RAZIA BEGUM VS. SAHEBZADI ANWAR BEGUM**, AIR 1958 SC 886. The very nature and scope of the works comprised in the tender in question apparently show the urgency & importance. Thus, there was a kind of sharp & unscrupulous practice adopted by the fifth respondent in obtaining the judgment now in review, keeping both the Co-ordinate Bench and the petitioner in darkness. Such a person who had approached the court

with soiled hands cannot be permitted to resist this Writ Petition on merits. An argument to the contrary would amount to placing premium on the culpable conduct of a litigant who happened to be a rival business competitor and who had caused interdiction of implementation of the public project resulting into heavy cost escalation and enormous public inconvenience.

(c) As already mentioned above, the PMC in its report dated 25.3.2021 had recommended to qualify the bid of petitioner & another, and not to technically qualify that of the fifth respondent & another. The TEC met on 25.3.2021 and held detailed deliberation which culminated into the decision to accept the recommendation of PMC and to open their bids. Since the project was time bound, the recommendations of TEC were placed before the NMPT Board on fast track basis on 29.3.2021 itself, for approval. The Board in its resolution dated 31.3.2021 accorded approval to the recommendation and authorized the NMPT Chairman to accept the tender of petitioner (L1 bid). The fifth respondent had lodged the complaint with the Minister of State (I/C), Ministry of Ports, Shipping and Waterways, New Delhi on 2.4.2021. The Central Govt. could not have constituted a Committee to look into the said complaint



after the L1 bid of the petitioner was accepted especially when the allegations in the complaint were more in the nature of procedural irregularities not going to the root of the matter; that was the stand of NMPT before the Central Govt. too, as here.

(d) There is no justification for the Central Govt. to constitute a Committee to enquire into alleged irregularities in the tender process on the baseless allegations of a loosing bidder whose offer after scrutiny was found to be substantively defective *inter alia* on the grounds that: the consortium members ought to have collectively authorized their lead member whereas only JV member was authorized to be the lead member of the consortium. The role of lead member was indicated as 'technical support' only and that of JV member indicated 'financial support and full execution of work'; thus there was noticeable variance; there was ongoing NCLT case against the fifth respondent. Petitioner points out that there was a huge loan recovery proceedings against this respondent and a **Division Bench** of this Court in **W.A.No.328/2020** disposed off on 6.4.2021 reserved liberty to the appellant Corporation Bank to proceed against the said respondent under the SARFAESI Act,

2002 for the recovery of loan approximately quantified at Rs.275 crore. Several other defects also have been pointed out in the bid of this respondent by the PMC and by the TEC. It hardly needs to be stated that in awarding tenders of gigantic value, several factors enter the fray of decision making and such decisions cannot be readily upset by the Central Govt. on some baseless allegations of an unsuccessful business competitor leveled against a successful bidder; be that as it may.

(e) Learned Senior Advocate, Mr.Naganand appearing for the petitioner is more than justified in arguing that the text of Section 111 of Major Port Trusts Act, 1963 which empowers the Central Govt. to issue direction does not come to the rescue of respondent – Central Government inasmuch as such directions can be issued only on questions of policy and not in specific cases. Section 111 of the Act reads as under:

**“111. Power of Central Government to issue directions to Board** ((1) *Without prejudice to the foregoing provisions of this Chapter, the Authority and every Board shall, in the discharge of its functions under this Act be bound by such directions on questions of policy as the Central Government may give in writing from time to time:*

*Provided that the Authority or the Board, as the case may be, shall be given opportunity to*

*express its views before any direction is given under this sub-section.*

*(2) The decision of the Central Government whether a question is one of policy or not shall be final.”*

He is right in submitting that policy as contemplated under the above provision means general directions for future guidance or regulation on repetitive basis, as of norm applicable to all matters like Dredging Policy, Tariff Policy, etc. and thus they are normative in character which do not get exhausted on their application to a given fact matrix.

(f) What **The Oxford Handbook of Public Policy** (2008) authored by Robert E. Goodin, Martin Rein & Michael Moran states at page 17 about ‘policy’ is instructive:

*“To do something ‘as a matter of policy’ is to do it as a general rule. That is the distinction between ‘policy’ and ‘administration’ (Wilson 1887), between ‘legislating’ policy and ‘executing’ it (Locke 1690). Policy makers of the most ambitious sort aspire to ‘make policy’ in that general rule - setting way, envisioning administrators applying those general rules to particular cases in a minimally discretionary fashion (Calvert, McCubbins, and Weingast 1989)”.*

The directions/decisions of an authority that are individual centric and case specific are not considered as matters of policy. It is so even when the authority issuing the direction has power to evolve the policy. There is difference between what is policy and what is administration/operation of policy. True policy decisions ordinarily are dictated by the pragmatic considerations such as financial, technical & social factors or constraints. The operational area is concerned with the practical implementation of or carrying out policies that are already formulated. Operational decisions are usually made on the basis of administrative discretion, expert opinion, technical standards and other general standards of reasonableness. This view is supported by the decision of Canadian Supreme Court in **BROWN VS. BRITISH COLUMBIA (MINISTER OF TRANSPORTATION AND HIGHWAYS)** (1994) 3 LRC 581. This apart, under the text of this provision, evolving of policy cannot be done without hearing the Port Trust concerned. An exercise of a statutory power in breach of express or implied conditions will be illegal, the condition of hearing being mandatory vide **HARIDWAR SINGH vs. BEGUM SUMBRUI**, (1973) 3 SCC 889. Obviously, the matter did not involve any

question of policy and therefore, the provision of section 111 of the Act could not have been invoked.

In the above circumstances, this Writ Petition succeeds. The order in fifth respondent's W.P.No.6892/2021 (GM-TEN) has been reviewed and recalled and the said Writ Petition is dismissed. A Writ of Certiorari issues quashing the order dated 15.4.2021 and 7.10.2021 issued by the first respondent-Central Govt. at Annexures-L & Q respectively. A Writ of Mandamus issues directing respondent nos.2 to 4 to consider awarding of the contract in question to the petitioner, in accordance with law and without brooking any delay.

Costs made easy.

This court places on record its deep appreciation for the able assistance rendered by the Law Clerk cum Research Assistant, Mr.Faiz Afsar Sait.

**Sd/-  
JUDGE**

Snb/