

THE HIGH COURT OF SINDH, KARACHI

Present:

Mr. Justice Adnan Iqbal Chaudhry

Suit No. 1608 of 2020

[Seamax Marine Services versus The Ministry of Maritime Affairs & two [02] others]

Plaintiff : Seamax Marine Services through Mr. Omair Nisar, Advocate.

Defendants 1 & 3 : Nemo.

Defendant 2 : Karachi Port Trust through Mr. Badar Alam, Advocate.

Dates of hearing : 25-01-2021, 24-02-2021 & 16-03-2021.

Date of decision : 14-07-2021.

ORDER

Adnan Iqbal Chaudhry J.- The suit is by an aggrieved bidder who participated in a tender called by the Karachi Port Trust [KPT] (Defendant No. 2) under the Public Procurement Rules, 2004. This order decides CMA No. 7245/2020, an application by the KPT for rejection of plaint under Order VII Rule 11 CPC.

2. In June 2019, the KPT as the procuring agency, published a tender notice for *“Supply of 02 Nos. Pilot Boats on Hiring Basis for the Period of 01 year (Extendable) for Pilotage at Karachi Port Trust”*. Bids were to be submitted as per Rule 36(b) of the Public Procurement Rules, 2004 [PPR] viz. a single stage - two envelop procedure. The Plaintiff (Seamax) and one Ocean World were declared technically qualified. However, per the Plaintiff, on an inspection by the technical evaluation committee of the KPT, the pilot boats offered by Ocean World did not meet the technical specification of the minimum speed of 18 knots and also raised a higher cost of fuel, and therefore the Plaintiff objected before the KPT that Ocean World did not qualify for the opening of its financial bid. Eventually, the KPT did not open the

financial bids of both bidders, and by letter dated 15-10-2019 the KPT discharged the tender assigning the reason that there was a dispute between the bidders.

3. On 06-12-2019, the KPT again published a tender notice for "Supply of 02 Nos. Pilot Boats on Hiring Basis for a period of 02 Years for Pilotage at Karachi Port Trust". Again, bids were to be submitted as per Rule 36(b) of the PPR, viz. a single stage - two envelop procedure. This time the technical specification of the required pilot boats was stated as a minimum speed of 12 knots and the acceptable fuel consumption was prescribed. The Plaintiff objected that the speed specification had been reduced only to accommodate pilot boats offered by Ocean World under the previous tender and the KPT was confronted with its earlier letter dated 02-08-2019 whereby it had stated that due to high tide during monsoon, a pilot boat with a speed under 15 knots would not meet operational requirements. Nonetheless, the bidding process proceeded. Technical bids were opened on 27-12-2019 and both the Plaintiff and Ocean World were declared technically qualified. However, on the opening of financial bids on 22-01-2020, Ocean World was lowest bidder.

4. At the time of the subject tender, Rules 35 and 48 of the PPR provided as under:

"35. Announcement of evaluation reports.- Procuring agencies shall announce the results of bid evaluation in the form of a report giving justification for acceptance or rejection of bids at least 10 days prior to the award of procurement contract".

48. Redressal of grievances by the procuring agency.- (1) The procuring agency shall constitute a committee comprising of odd number of persons, with proper powers and authorizations, to address the complaints of bidders that may occur prior to the entry into force of the procurement contract.

(2) Any bidder feeling aggrieved by any act of the procuring agency after the submission of his bid may lodge a written complaint concerning his grievances not later than fifteen days after the announcement of the bid evaluation report under Rule 35.

(3) The committee shall investigate and decide upon the complaint within fifteen days of the receipt of the complaint.

(4) Mere fact of lodging of a complaint shall not warrant suspension of the procurement process.

(5) Any bidder not satisfied with the decision of the committee of the procuring agency may lodge an appeal in the relevant court of jurisdiction.”

(Note: The Public Procurement Rules, 2004, including Rule 48 thereof, have been substantially amended vide SRO No. 834(I)/2021 dated 28-06-2021.)

5. Though financial bids were opened by the KPT on 22-01-2020, the evaluation report required of Rule 35 PPR was issued on 03-04-2020. By letter dated 06-04-2020, the Plaintiff called upon the Chairman KPT to constitute a grievance redressal committee required under Rule 48(1) of the PPR to address the Plaintiff's complaint, with the further request not to award the contract in the meantime. However, on 07-04-2020, the Board of the KPT resolved to award the contract to Ocean World. Therefore, on 10-04-2020 the Plaintiff filed suit praying *inter alia* for declarations that the bidding process was contrary to the PPR, was biased, a case of mis-procurement, and for consequential injunctions against the award of the contract.

6. The ground taken for rejection of the plaint is essentially that the suit is barred by reason of Rule 48 of the PPR which provides a special mechanism for redressal of grievances. Mr. Badar Alam, learned counsel for the KPT submitted that the grievance redressal committee was constituted by the KPT and communicated to the Plaintiff vide letter dated 16-07-2020 (Annexure 'C' to the CMA); that the Plaintiff should be required to approach the forum provided by special law, and in the meantime, the law should be allowed to take its course as per sub-rule (4) of Rule 48, which stipulates that the mere lodging of a complaint before the grievance redressal committee shall not warrant suspension of the procurement process. Learned counsel submitted that sub-rule (5) of Rule 48 also provided an appeal against the decision of the grievance redressal committee, and thus Rule 48 was a complete code in itself; and that a civil court cannot usurp the

jurisdiction of the special *fora* provided under Rule 48 of the PPR. To support his submissions, learned counsel cited *Maqbool Associates (Pvt.) Ltd. v. Pakistan Power Park Management Company Ltd.* (2015 MLD 1790).

7. Mr. Omair Nisar, learned counsel for the Plaintiff responded by submitting that the suit is brought to challenge a non-transparent bidding process, and *malafide* and unlawful acts of the KPT as procuring agency; hence this Court as civil court has ultimate jurisdiction. He placed reliance on *Hamid Hussain v. Government of West Pakistan* (1974 SCMR 356) and *Samiullah v. Fazale Malik* (PLD 1996 SC 827). Learned counsel submitted that even though financial bids were opened by the KPT on 22-01-2020, the evaluation report was withheld by it up until 03-04-2020; that such was done by the KPT only to prevent the Plaintiff from lodging a complaint under Rule 48 of the PPR; that on 06-04-2020 the Plaintiff called upon the KPT to constitute a grievance redressal committee, but on 07-04-2020 the KPT passed a Board Resolution to award the contract to Ocean World; and that in such circumstances the remedy before the grievance redressal committee became meaningless; hence the suit. Learned counsel pointed out that the grievance redressal committee was constituted by the KPT only after the suit had been filed.

8. Heard the learned counsel. Rule 48 of the PPR does not expressly bar the jurisdiction of a civil court, let alone a High Court.¹ The parent statute, the Public Procurement Regulatory Authority Ordinance, 2002, does not infer any ouster of the jurisdiction of a civil court. Section 23 of the Ordinance is also not an ouster clause but an immunity clause from legal proceedings and that too for the Public Procurement Regulatory Authority, its Board and officers, not for the procuring agency. Therefore, the question is whether Rule 48 of the PPR (as reproduced above prior to its amendment) is an implied bar to the jurisdiction of a civil court by reason of providing a remedy

¹ That distinction being highlighted in *Searle IV Solution (Pvt.) Ltd. v. Federation of Pakistan* (2018 SCMR 1444).

before a grievance redressal committee of the procuring agency under sub-rules (1) and (2), and then by an appeal under sub-rule (5).

9. Mr. Badar Alam, learned counsel for the KPT laid great emphasis on sub-rule (5) of Rule 48 of the PPR to argue that the provision of an appeal signified a complete code for the redressal of grievances, which inferred that the jurisdiction of a civil court was ousted. Though sub-rule (5) does provide for an appeal from the decision of the grievance redressal committee, it leaves the appellate forum uncertain by describing it is simply as “the relevant court of jurisdiction”. On the query as to what would be the “relevant court of jurisdiction”, Mr. Badar Alam submitted that such question may be adverted to as and when the appeal arises. Therefore, I leave that question for a case more appropriate. For the present, suffice to say that sub-rule (5) does not advance the argument put forth.

The case of *Maqbool Associates (Pvt.) Ltd. v. Pakistan Power Park Management Company Ltd.* (2015 MLD 1790) relied upon by Mr. Badar Alam is also of no help. There, a learned Division Bench of this Court had declined to interfere in writ jurisdiction in circumstances where the evaluation report under Rule 35 of the PPR had yet to be finalized, where the procuring agency had yet to take a decision to award the contract, where the petitioner had not challenged the transparency of the bidding process, and thus the petition was dismissed as premature. That case is not for the proposition that the jurisdiction of civil courts is ousted by Rule 48 of the PPR, rather the ratio of the case is that the High Court will not exercise writ jurisdiction where the petitioner is unable to show reason to by-pass the grievance redressal committee provide under Rule 48.

10. Under section 9 CPC, civil courts have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred. It is settled law that the ouster of the jurisdiction of civil courts is not to be inferred lightly. The contours of a statutory provision that expressly or impliedly bars the jurisdiction of civil courts were laid down lucidly in *Abbasia*

Cooperative Bank v. Hakeem Hafiz Muhammad Ghaus (PLD 1997 SC 3) as follows:

“It is a well-settled principle of interpretation that the provision contained in a statute ousting the jurisdiction of Courts of general jurisdiction is to be construed very strictly and unless the case falls within the letter and spirit of the barring provision, it should not be given effect to. It is also well-settled law that where the jurisdiction of the civil court to examine the validity of an action or an order of executive authority or a special tribunal is challenged on the ground of ouster of jurisdiction of the civil court, it must be shown (a) that the authority or the tribunal was validly constituted under the Act; (b) that the order passed or the action taken by the authority or tribunal was not mala fide; (c) that the order passed or action taken was such which could be passed or taken under the law which conferred exclusive jurisdiction on the authority or tribunal; and (d) that in passing the order or taking the action, the principles of natural justice were not violated. Unless all the conditions mentioned above are satisfied, the order or action of the authority or the tribunal would not be immune from being challenged before a civil court. As a necessary corollary, it follows that where the authority or the tribunal acts in violation of the provisions of the statutes which conferred jurisdiction on it or the action or order is in excess or lack of jurisdiction or mala fide or passed in violation of the principles of natural justice, such an order could be challenged before the civil court in spite of a provision in the statute barring the jurisdiction of civil court.”

Therefore, notwithstanding Rule 48 of the PPR, it will have to be seen whether the Plaintiff has a case falling within any of the exceptions laid down in the case of *Abbasia Cooperative Bank*.

11. In the facts of the instant suit, the KPT did not constitute the grievance redressal committee despite the Plaintiff's letter dated 06-04-2020, rather the KPT proceeded to pass a Board Resolution on 07-04-2020 to award the contract to the other bidder; hence the suit on 10-04-2020. Admittedly, the grievance redressal committee was constituted by the KPT much later on 16-07-2020, after the suit was filed. In such circumstances where the remedy of a complaint under Rule 48 of the PPR before a grievance redressal committee was not made available to the Plaintiff by the KPT itself, the question of any bar to the suit by reason of Rule 48 did not arise, and the jurisdiction

of this Court as a civil court was not ousted when the suit was filed. *Prima facie*, the suit falls within the exceptions carved out in *Abbasia Cooperative Bank*. The question whether the Plaintiff can now be required to appear before the grievance redressal committee, and if so, on what terms, is different, and one which is beyond the scope of an application for rejection of plaint. With that observation, CMA No. 7245/2020 is dismissed.

JUDGE

Karachi:
Dated: 14-07-2021