

**ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI**

Suit No.2933 of 2021

Pakistan International Container Terminal Limited
Versus
Federation of Pakistan & others

Date	Order with signature of Judge
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For hearing of CMA 713/2022.

Date of hearing: 23.02.2023

M/s Arshad Tayebaly, Omer Memon and Aitzaz Manzoor Memon, Advocates for the plaintiff.

Mr. Ayan Mustafa Memon, Advocate for defendant No.2.

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Muhammad Shafi Siddiqui, J.- Plaintiff is a listed container terminal of Pakistan and is operating as a terminal operator in pursuance of an Implementation Agreement since 18.06.2002, whereas, defendant No.1 is a regulator of the licensed ports, marine services and facilities and the management of vessels traffic at ports, whereas, defendant No.2 is the statutory trust established under the Karachi Port Trust (KPT), Act, 1886.

2. Defendant No.2 invited proposals for the design, finance, construction and development operation and transfer of container terminal Karachi Port on the existing berths No.6 to 9 at East Wharf on Build, Operate and Transfer (BOT) basis. Defendants No.2 entered into negotiations with Premiere Mercantile Services Private Limited and the negotiations ended up in the Implementation Agreement dated 18.06.2002 referred above. In pursuance of such terms, the terminals were set up by the sponsor company, however, the record reflects that in 2012 majority stakes in plaintiff was secured by the International Container Terminal

Services, Incorporated (ICTSI), which is a Philippines based operator.

3. The scope of this suit, as framed by the plaintiff, is that the defendant No.2 intends to terminate the Implementation Agreement with the plaintiff vide resolution dated 25.06.2021 and the board resolution No.130 dated 21.09.2021 in this regard be declared as being illegal and that the plaintiff is legally entitled to continue operating the container terminal at berths No.6 to 9 at East Wharf, Karachi and also entitled for the extension of the implementation agreement.

4. Mr. Arshad Tayebaly and Mr. Ayan Memon have argued the subject at length and have taken me to various covenants of the implementation agreement as well as pleadings and I have heard them and perused the record.

5. Implementation Agreement as referred above was executed on 18.06.2002 and contains an expiry date as agreed. The expiry date in the agreement is define as under:-

“Expiry Date”- means the date falling twenty one (21) years from the Date of Signing.”

The Implementation Agreement also contains a clause as terminal expiry date as 21.3 which is reproduced as under:-

21.3. Termination at Expiry Date

(a) This Agreement shall terminate on the Expiry Date.

(b) Prior to the Expiry Date, KPT will invite competitive bids for the operation of the Terminal from pre-qualified parties with terminal operating experience unless KPT intends to operate the Terminal itself after the Expiry Date. No later than twelve (12) Months before the Expiry Date, KPT shall advise TOC of its decision regarding the operation of the Terminal following the Expiry Date.

In the Event KPT does not intend to operate the Terminal after the Expiry Date, it shall give TOC the first right of refusal to match the financial and other terms and conditions of the most successful bidder and stipulate a period of not less than Thirty (30) Days within which TOC would have the right to exercise said option.

Clause 22.1.1 of the Implementation Agreement provides transfer of the assets of certain events which is as under:-

22.1.1 Transfer of Assets

(a) Except as otherwise provided in this Agreement, the scope of transfer covers the transfer of the Terminal together with all plant, equipment, machinery, vehicles, spares, infrastructure, installations, buildings, structures, civil works and facilities on the Site of the Project, including all other movable and immovable assets, complete as per the Project Scope with all replacements thereto made by TOC but excluding receivables until the Transfer Date (“the Transfer Assets”).

Additional equipment acquired by TOC shall at the option of KPT be offered to KPT at mutually agreed price.

(b) Such transfer will take place on the Expiry Date or upon earlier termination of this Agreement in accordance with the terms hereof (“the Transfer Date”) from TOC to KPT.

6. Plaintiff insisted that they would continue to operate the terminal notwithstanding the fact that they have initiated the process of inviting bids since the agreement would expire on 17.06.2023 and the process to invite fresh bids at the twilight of this agreement would commence a year before, they cease to continue to operate from the terminal.

7. It is plaintiff's case that since KPT has not opted to operate on their own and invited the bids, therefore, they are clear that the defendant (KPT) itself would not operate the terminal, rather license out to an individual/entity in the process, at the conclusion of invitation for the competitive bids, therefore, till such process is concluded, they would not be dispossessed from the terminal. In

this regard the plaintiff's counsel has relied upon resolutions dated 25.06.2021 and 21.09.2021. Both resolutions No.56 and board resolution No.130 are respectively reproduced below:-

"B.R No.56 Dated 25.06.2021

1. *Presentation- Expiry of Implementation Agreement between KPT and Pakistan International Container Terminal (PICT) in June 2023 Request of PICT for Expansion and Extension).*

56 *Resolution:- The Board considered Agenda Item No.1. A detailed presentation was given by General Manager (P&D) and the Board during consideration of matter discussed different options on Expiry of Implementation Agreement between KPT and Pakistan International Container Terminal (PICT) and supported the open tendering option before reaching conclusion of new contract agreement so as to ensure transparency and competitiveness. In this regard a draft tender document to be prepared by P&D Division and presented before the next Board Meeting."*

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B.R No.130 Dated 21.09.2021

1. *Hiring of Consultant for Preparation of Bidding Documents & Concession Agreement for Award of Terminal Operations at Berths 06-09 at East Wharf after Expiry of PICT Concession Tenure in June 2023.*

130 *Resolution:- The Board considered Agenda Item No.1 regarding Hiring of Consultant for Preparation of Bidding Documents & Concession Agreement for Award of Terminal Operations at Berths 06-09 at East Wharf after Expiry of PICT Concession Tenure in June 2023. The Board after examining the matter, approved hiring of consultant for evaluation of assets, preparation of bidding documents & concession agreement for award of Terminal Operations at Berths 06-09 at East Wharf. The Board also directed KPT Management to inform/intimate PICT before 1st January, 2022 that the concession/contract is to be awarded through open tender competitive bidding."*

Secretary
KARACHI PORT TRUST

8. As of now the terms of the Implementation Agreement are such that plaintiff is in no position to interfere in the invitation of the fresh bids to be awarded to new terminal operator at the

respective berths and the plaintiff only enjoys the first right of refusal to match the bid and other terms and conditions of the most successful bidder and stipulated of period, out of which the operator may exercise its right, however, that is one of the events that is covered and presently applied.

9. At this point of time the resolutions thus suggest that KPT is not inclined to operate terminal on their own but a situation might come when after invitation of the bids, as has been undertaken in the instant case, the KPT may refuse offer/offers that they receive in response to invitation and may then decide to operate on their own. In the first instance that is at the time when the bids are being considered, the plaintiff will be well within their right to match it and may re-commence its operation, however, they cannot insist to continue occupy the terminal without any valid reason which it doesn't have. In any of the two events above, plaintiff has no legal justification to continue to operate after Agreement expiry date.

10. Assets discussed above are to be transferred to KPT and plaintiff cannot rely on such assets as defense. So on the expiry of Agreement, no right for plaintiff survives to occupy, except that it can match the bid to re-commence the operation and on this defense, possession cannot be retained. KPT still has a right to decide now or any time after the invitation of the bids and during the process of conclusion of the bids, that it will operate the terminal itself. No justification exists for plaintiff to compel the defendants to offer the plaintiff to operate the terminal till new assignment is executed or decision is made. They have no legal justification to continue its operation after the conclusion of the agreed period under the Implementation Agreement.

11. Plaintiff is in no position to succeed on the strength of investment made by him as it was on Build Operate and Transfer (BOT) basis. Plaintiff build and operated it for 21 years and now it stands transferred at the conclusion of Agreement.

12. The defendants claimed to have issued a notice to them for the inspection of the entire terminal which include the property and equipment etc., which in any case may not be objected by the plaintiff and with this understanding of law, the listed application (CMA No.713/2022) is dismissed with the following observations:-

- (i) The plaintiff has a right to exercise their right of first refusal to match the bid of a successful bidder, if so declared by KPT to the satisfaction of the defendant; KPT may exercise their right to reject any bid before offering right of refusal to plaintiff if deemed fit and proper, subject to law.
- (ii) In case the defendants desire to operate the terminal on its own, the plaintiff cannot compel the defendant for the extension or renewal of the instant or any agreement for operating the terminal.
- (iii) The plaintiff being licensee would complete its period as stipulated in the agreement however cannot succeed for renewal/extension on the strength of the investments made.
- (iv) Plaintiff has no legal justification to continue occupying the terminal beyond 17th June, 2023. In case right of refusal is exercised by plaintiff, it would be re-occupation and re-commencement of such fresh terms as agreed.

J U D G E

Dated: 02.03.2023

Ayaz Gul