

IN THE HIGH COURT OF SINDH AT KARACHI

PRESENT:

Mr. Justice Aqeel Ahmed Abbasi
Mr. Justice Mahmood A. Khan.

High Court Appeal No. 162 of 2023

Appellant: Pakistan International Container Terminal Limited
through Mr. Khalid Jawed Khan, advocate.

Respondent No.1: Federation of Pakistan
through Mr. Muhammad Qasim,
Deputy Attorney General.

Respondent No.2: Trustees of the Port of Karachi
through Mr. Asim Mansoor Khan, advocate
a/w Mr. Zeeshan Bashir Khan, advocate.

Syed Saydian Raza Zaidi, Chairman
a/w. Rajibul Khair, G.M.(P&D),
Karachi Port Trust.

Faisal Ahmed Uqaili,
Secretary to Government of Sindh,
Planning & Development Department.

Date of Hearing: 02.06.2023

Date of Short Order: 02.06.2023

ORDER

AQEEL AHMED ABBASI, J ; - Through instant High Court Appeal, the appellant (*Pakistan International Container Terminal Limited*) has impugned order dated 23.02.2023 passed by learned Single Judge in Suit No. 2933/2021, whereby, according to learned counsel for the appellant, while dismissing the injunction application filed under Order XXXIX Rules 1&2 CPC (CMA No.713/2022), seeking a restraining order against respondent/KPT from terminating the implementation agreement and inviting bids for Award of contract for terminal operations on Berth Nos.6 to 9 at East Wharf, Karachi, however, the learned Single Judge has been pleased to record an adverse finding in

Para12 of the impugned order to the effect that “the 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.”

2. Learned counsel for the appellant after having read out the impugned order passed by the learned Single Judge of this Court in Suit No.2933/2021 on CMA No.713/2022 and the relevant clauses of **Implementation Agreement dated 18.06.2002** executed between “the Trustees of the Port of Karachi” and “Premier Mercantile Services (Private) Limited, and **Novation Agreement dated 15.10.2002** executed between (i) the Trustees of the Port of Karachi; (ii) Premier Mercantile Services (Pvt.) Limited (PMS); & (iii) Pakistan International Container Terminal Limited (PICT), particularly, clauses 21.3, 22.1.1., 22.2.1 & clause 22.2.3, has argued that the adverse finding of the learned Single Judge as recorded in Para 12 of the impugned order, is based on misinterpretation of the terms of the agreement, as referred to hereinabove, whereas, the respondents have failed to commence the process of competitive bidding well before the expiry of the agreement i.e. 17.06.2023, and also did not take any steps for the appointment of an independent Consultant to evaluate the assets etc. and also to examine the aspect for transferring such assets after expiry of Implementation Agreement on 17.06.2023, however, according to learned counsel, respondents intend to dispossess the appellant forcibly on the date of termination of the agreement, as referred to hereinabove, without completing the exercise of awarding contract for operating the subject terminal through process of competitive bidding, which will not only cause financial losses to the appellant, who have invested Billions of Rupees in establishing the terminal operations, but on account of halt of port operations on the terminal, huge losses will

also be incurred to the public revenue as well as to the public at large during the intervening period of the expiry of the implementation agreement on 17.06.2023.

3. However, learned counsel for the appellant, after arguing the matter at some length on 23.05.2023, has candidly submitted that prima facie, there seems no scope of extending the period of the Implementation Agreement after its expiry on 17.06.2023, in terms of the Novation Agreement, however, in view of the Board Resolutions (B.R. No. 56 dated 25.06.2021 and B.R. No. 130 dated 21.09.2021), according to which, the respondents were required to initiate the bidding process by hiring consultant for preparation of bidding documents and agreement for award of terminal operation at Berths 6 to 9 at East Wharf, Karachi and also to intimate the appellant (PICT) before 01.01.2022 their intention either contract is to be awarded through open competitive bidding, or the continue its operations itself, respondents have, therefore, failed to implement the terms of implementation agreement in its letter and spirit, whereas, only recently, respondents have started the bidding process, which is likely to consume several months altogether, and there is serious apprehension that the respondents on expiry of the Implementation Agreement on 17.06.2023 will forcibly seek ejectment of the appellant from subject terminal, which will bring all the port operations and activities at the terminal to a halt. According to learned counsel for the appellant, such action on the part of the respondents will not only effect the financial interest of the appellant, who has invested a huge amount towards establishing a terminal on "BOT" basis, on the one hand but will also cause loss of revenue to public exchequer as well as to the public at large, as there will be no activity at the terminal until the process of fresh bidding is complete and the contract is awarded to the successful

party and the appellant and if the appellant in terms of the Implementation Agreement and the relevant law applies thereto, exercises the right of first refusal by matching the highest bid as may be received during the process of Award.

4. In support of his above submissions, learned counsel for the appellant has also referred to some recent letter exchanged between the appellant and the respondent (KPT), copies of which, have been placed on record through Statement dated 26.05.2023 during course of arguments, whereby, according to learned counsel for the appellant, respondents have invited the team of the appellant to present proposal on the operational continuity of PICT during the transition period of the fresh bidding process, therefore, submits that in order to avoid financial losses to the appellant and public at large, as well as revenue loss to the public exchequer, respondents may be directed to expedite the process of bidding, and until such process is complete, the appellant may be allowed to continue to operate at previous rates, however, the respondent/KPT will have a right to charge the rates to continue port operations at current market price with effect from the date of expiry of Implementation Agreement till the contract is awarded for terminal operations. It has been further urged that impugned order may be modified in the above terms, as it will not only prevent the finance losses to the appellant, who have made huge investment, at one hand but will also prevent loss of revenue to public exchequer also, which may occur if the terminal remains inoperative in the intervening period, which will be consumed in the bidding process by the respondent/KPT. While concluding his arguments, learned counsel for the appellant has submitted that the aforesaid arrangement will not be construed in any manner as extension of implementation agreement by the appellant (PICT), whereas, request for modification of the impugned order in the

above terms has been made in the interest of public revenue and benefit to the public at large.

5. Notice of instant High Court Appeal was issued to the respondents vide order dated 23.05.2023, however, with the following observations:-

“Prima facie, period of implementation agreement is expiring on 17.06.2023, whereas, it appears that right of appellant of first refusal as per implementation agreement has been recognized in the impugned orders, however, since the appellant has expressed its apprehension of ejection by the respondents on expiry of 17.06.2023 and expected halt of all activities of the terminal, and loss of revenue to public exchequer also, we would, therefore, issue pre-admission notice to the respondents as well as DAG, to be served through first three modes, for 26.05.2023 as appellant seeks urgency, when reply / objections, if any, shall be filed with advance copy to learned counsel for the appellant.”

6. Pursuant to aforesaid Notice, comments have been filed on behalf of respondent No.2/KPT, wherein, while raising preliminary objections as to maintainability of instant High Court Appeal, the factual background of the case has been given, whereas, while denying the allegations of default towards contractual obligations or forceful ejection of the appellant on expiry of contractual period on 17.06.2023, reference has been made to the relevant clauses of the Implementation Agreement, according to which, there is no clause available in the aforesaid agreement, whereby, the implementation agreement could be extended in favour of the appellant after expiry of such period on 17.06.2023. Learned counsel for the respondent No.2 has argued that in view of the clear and unambiguous terms of implementation agreement executed between the appellant and respondents, the appellant has no right whatsoever to keep possession of the terminal or to continue its operation at Berths No. 6 to 9,

whereas, the appellant is bound by contract and under legal obligations to give peaceful possession of the terminal alongwith all the assets in terms of relevant clauses of Implementation Agreement. Learned counsel for the respondent No.2 after having referred to various clauses of the Implementation Agreement, has read out the relevant findings of the learned Single Judge giving reasons for dismissing the injunction application filed by the appellant, and has submitted that there is no factual error or legal infirmity in the impugned order as all the three ingredients required to be considered while deciding an injunction i.e. (i) prima facie case; (ii) balance of inconvenience; & (iii) irreparable loss and injury, have been taken into consideration, therefore, the impugned order does not require any interference by this Court in the instant High Court Appeal. According to learned counsel, the appellant has miserably failed to make out a prima facie case for grant of any injunctive relief having the effect of restraining the respondents from completing the process of competitive bidding for awarding contract of terminal operation afresh, after expiry of the implementation agreement on 17.06.2023, in accordance with law. It has been further submitted that the arguments of the learned counsel for the appellant with regard to the delay on the part of the respondents to initiate the process of competitive bidding, well before the expiry of the Implementation Agreement, is factually incorrect, as the respondent No.2 has already communicated the intention to start the process of competitive bidding as per the terms of implementation agreement well in advance to the appellant, however, the appellant with malafide intention filed subject suit i.e. Suit No.2933/2021 on 14.12.2021 for declaration and injunction with the prayer that it may be declared that appellant is legally entitled to continue operating container terminal at Berth Nos.6 to 9, East Wharf, Karachi and also for extension of the implementation agreement, whereas, it has been further prayed

that respondents may be restrained from terminating the implementation agreement and inviting bids for the Award of contract in respect of the subject terminal, and also obtained an *ex parte* ad-interim order on 14.12.2021 through misrepresentation of facts, however, parties were directed to maintain status quo. According to learned counsel for the respondent No.2, in view of restraining order operating in the subject suit the competitive bidding process has been delayed for a couple of months, however, respondents immediately filed reply to the injunction application, and after having brought all the facts and the relevant provisions of implementation agreement to the notice of the learned Single Judge, sought recalling/modification of ad-interim order, to the extent that *the defendants/KPT may commence such tender process and may issue Award as required under the law, however, such Award, as conceded by plaintiff's counsel, shall be subject to the outcome of the trial of the suit.*” as recorded in the order dated 16.01.2023 and, thereafter, the process of competitive bidding has already commenced. While concluding the arguments, learned counsel for the respondent No.2 submits that instant High Court Appeal having no merits is liable to be dismissed.

7. Heard the learned counsel for the parties, perused the record and the impugned order passed by the learned Single Judge, with their assistance. Since the facts of the case and the documents produced by the parties, including implementation agreement dated 18.06.2002 executed between “(i) the Trustees of the Port of Karachi” and “(ii) Premier Mercantile Services (Private) Limited, and Novation Agreement dated 15.10.2002 executed between (i) the Trustees of the Port of Karachi; (ii) Premier Mercantile Services (Pvt.) Limited (PMS); and (iii) Pakistan International Container Terminal Limited (PICT) as well as Board Resolutions (B.R. No.56 dated 25.06.2021 and BR No.130 dated 21.09.2021) are not disputed, whereas, the finding of the learned Single

Judge is based on the interpretation of the terms of the aforesaid agreement(s), therefore, we may examine, as to whether the learned Single Judge, while passing the impugned order has rightly interpreted the relevant provisions of the implementation / novation agreement(s), and as to whether, the three ingredients to be considered, while deciding injunction application (i) prima facie case; (ii) balance of convenience; & (iii) irreparable loss and injury, have been taken into consideration, while dismissing the injunction application. The learned counsel for the appellant, during the course of hearing instant High Court Appeal, could not point out any factual error or legal infirmity in the impugned order passed by the learned Single Judge on the injunction application (CMA No.713/2022), nor could refer to any provision, either in law, or any clause in the Implementation / Novation Agreement(s), according to which, the period of Implementation Agreement, after its expiry on 17.06.2023 could be extended, without adopting the fresh competitive bidding process. Whereas, the only ground pressed was that since, there has been delay on the part of respondents to initiate the process of competitive bidding for awarding contract afresh, therefore, it has been argued that during such intervening period i.e. expiry of agreement on 17.06.2023 till the date contract is awarded to successful bidder, while recognizing the right of the appellant of first refusal and to match the highest bid, appellant may be allowed to continue port operations on the subject terminal, to avoid financial losses. For the above reason, after recording the contention of the learned counsel for the appellant, notice of instant High Court Appeal was issued to the respondents on 23.05.2023 in the following terms: -

“Mr. Khalid Jawed Khan, Advocate for the appellant.

1. *Urgency granted.*
2. *Deferred.*

3. *Exemption is granted subject to all just exceptions.*

4-5. *Through instant High Court Appeal, appellant has impugned order dated 23.02.2023 passed by learned Single Judge in Suit No. 2933/2021, whereby, according to learned counsel for the appellant, while deciding injunction application (CMA No.713/2022) though the right of first refusal to the appellant has been recognized in terms of implementation agreement executed between the appellant and respondent No.2, however, while misinterpreting the terms of agreement, an observation has been made in Para 12(iv) of the impugned order with regard to the right of the appellant to occupy the terminal beyond 17th June, 2023, inspite of the fact that as per the Implementation Agreement, respondent No.2 was required to commence the process of competitive bidding well before expiry of the agreement i.e. 17th June, 2023, which process has recently been started, which will take considerable time and during such process, cut-off date of 17th June, 2023 will expire and there is an apprehension that in view of above adverse observations, the respondents will seek ejectment of the appellant from the subject terminal, which will seriously affect the financial interest of the appellant and other bidders on the one hand, but will also affect the interest of respondents, the terminal will become un-operational and respondents will shut down the operation of terminal. Per learned counsel, appellant intends to bring foreign investment to improve the functioning of the terminal if there is extension of the agreement by the respondents in favour of appellant as per terms of implementation agreement, therefore, requests that operation of impugned order may be suspended.*

Prima facie, period of implementation agreement is expiring on 17.06.2023, whereas, it appears that right of appellant of first refusal as per implementation agreement has been recognized in the impugned orders, however, since the appellant has expressed its apprehension of ejectment by the respondents on expiry of 17.06.2023 and expected halt

of all activities of the terminal, and loss of revenue to public exchequer also, we would, therefore, issue pre-admission notice to the respondents as well as DAG, to be served through first three modes, for 26.05.2023 as appellant seeks urgency, when reply / objections, if any, shall be filed with advance copy to learned counsel for the appellant.

Mr. Muhammad Qasim, Asst. Attorney General, present in Court in some other cases, waives notice, claims copy of instant HCA alongwith annexures and requests for time to seek instructions and to file reply / objections on the next date of hearing.”

8. In order to verify the allegation of forcible ejection of the appellant from the subject terminal by the respondents after expiry of implementation agreement on 17.06.2023, expected halt of all the port activities at the terminal, and loss of revenue to public exchequer on this account, as argued by the learned counsel for the appellant, the Chairman KPT was called in person to assist the Court in the instant matter with regard to future decision relating to interim period *i.e.* 17.06.2023, till the date when the process of competitive bidding an Award of contract afresh is completed. Pursuant to Court's Notice, Syed Saydian Raza Zaidi, Chairman, Mr. Rajibul Khair, G.M. (P&D), Karachi Port Trust as well as Faisal Ahmed Uqaili, Secretary to Government of Sindh, Planning & Development Department, have shown appearance alongwith their respective counsel and the learned Deputy Attorney General, whereas, the Chairman (KPT) has submitted that there is no malafide on the part of the respondents, nor any action or decision has been taken against the appellant in violation of law, or the terms of Implementation / Novation Agreement(s), which is expiring on 17.06.2023 and, therefore, the appellants are required to vacate the terminal and transfer the assets as per terms of the aforesaid agreement(s).

9. Learned counsel for the respondent and the learned DAG have vehemently argued that the process of competitive bidding could not be completed within stipulated period on account of pendency of the Suit No.2933/2021 filed by the appellant, wherein, an ex-parte ad-interim order requiring the parties to maintain status-quo was obtained through misrepresentation of facts. It has been submitted that delay occurred in this account is not on the part of respondents, rather, it can be attributed to the appellant, who obtained status-quo order without disclosing the entire facts and relevant provisions of the Implementation Agreement relating to expiry/termination period, and thereafter, awarding of the contract afresh through competitive bidding process. The officers present in Court were enquired, as to whether the competitive bidding process to Award the contract afresh can be concluded in a short period of time, in response to which, it has been candidly stated that such process may require couple of month as per terms of the agreement and the requirement of law. However, it has been further submitted that the KPT has an option to operate the terminal itself in case of expiry of the agreement, during the intervening period, whereas, in view of recent enactment of Act NO.XXX of 2022 dated 04.11.2022 titled as "Inter-Government Commercial Transactions Act, 2022", which has an overriding effect in terms of Section 9 of the Ordinance over other laws, the Federal Government also has the right to enter into "inter-governmental framework agreement" with the government of foreign state, therefore, the Federal Government can also exercise such option in the instant case, to secure foreign investment and also to avoid loss of revenue to the public exchequer. According to learned counsel for the respondents and the learned DAG, the appellant has no right to perpetuate its possession and to continue port operation on the subject terminal after expiry/termination of the

Implementation Agreement on 17.06.2023 on the basis of ill-founded allegations, whereas, the apprehension of losses to public exchequer on account of appellant's ejection after expiry of the Implementation Agreement on 17.06.2023 is also equally misconceived and contrary to the pleadings and the interim relief sought. It is, however, submitted that it will be ensured that the entire process of competitive bidding for the purpose of awarding contract afresh shall be transparent and strictly in accordance with law, and the right of first refusal of the appellant and to match the highest bid as per terms of the agreement, will be given to the appellant accordingly. It has been further assured that in case the respondents opt to continue the terminal operations itself during the intervening period, and/or invokes the provisions of Inter-Government Commercial Transactions Act, 2022 for the purposes of awarding contract, while entering into Government to Government agreement with foreign Government(s) the said decision will be taken strictly in accordance with law and also in the interest of public at large.

10. Perusal of the impugned order reflects that the learned Single Judge, after having examined all the relevant facts and the relevant clauses of the Implementation Agreement dated 18.06.2002 i.e. 21.3, 22.1.1., as well as the Board Resolutions (B.R. No. 56 dated 25.06.2021 and B.R. No. 130 dated 21.09.2021), has interpreted the terms of the Implementation Agreement, which otherwise, are clear and unambiguous, and has been pleased to conclude his finding in the following terms:-

“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.”*

11. We have already observed that the appellant could not point out any factual error or legal infirmity in the aforesaid findings of the learned Single Judge, whereas, the allegation of their forceful ejection from the subject terminal after expiry of the agreement as on 17.06.2023 by the respondents, in violation of law and/or the terms of Implementation / Novation agreement(s) appears to be misconceived in view of admitted

facts and the terms of the Implementation Agreement relating to termination at expiry date (21.3). From perusal of the aforesaid clause of the Implementation/Novation Agreement(s), there seems no ambiguity relating to termination/expiry of the agreement period as on 17.06.2023 and consequently handing over of the possession of terminal and transferring the assets by the appellant to the respondent (KPT) as per agreed terms of the agreement, therefore, the finding of the learned Single Judge as recorded in the impugned order to this effect reflects correct interpretation of Implementation/Novation Agreement(s) by the learned Single Judge through impugned order, which does not require any interfere by this Court. Moreover, unless an aggrieved party points out some factual error or legal infirmity in the impugned order passed by the learned Single Judge, while deciding an application for grant of injunctive relief during pendency of lis between the parties, the Court while hearing High Court Appeal, does not disturb such finding of the learned Single Judge, if it is based on proper appreciation of facts and application of law. In the instant case, discretion as vested in Court for such purpose has been properly exercised under the facts and circumstance of the case.

11. Accordingly, we are of the opinion that the appellant has not been able to make out a prima facie case requiring this Court to interfere with the impugned order passed by the learned Single Judge on the injunction application of the appellant. As regards, the apprehension of the appellant to the effect that during intervening period i.e. after expiry/termination of the implementation / novation agreement(s) on 17.06.2023, and till the date when competitive bidding process for awarding of contract afresh, is likely to consume considerable time, and in case the appellants are not allowed to continue with port operations at previous rates during such period, it will

cause loss of revenue to public exchequer, besides being beyond the scope of the pleadings in the suit nor it was part of the injunction application as well as the impugned order passed thereon, is also misconceived, whereas, in view of the assurance given by the respondents to the effect that entire process of competitive bidding for the Awarding the contract afresh shall be completed within shortest possible time in a transparent manner while recognizing the right of the appellant of first refusal, and/or to undertake terminal operations themselves during the intervening period, and/or to resort to the provisions of Inter-Government Commercial Transactions Act, 2022 by the Federal Government, it will be ensured that such decision will be made as per law, in the interest of public at large and the revenue. We are not inclined to draw any adverse inference or to discard such undertaking given on behalf of the respondents. Accordingly, vide our short order dated 02.06.2023, instant High Court Appeal was dismissed alongwith listed application, above are the reasons of short order. Before parting with this order, we may, however, observe that in case the respondents are inclined to make some arrangement with the appellant for the intervening period i.e. after expiry/termination of implementation / novation agreement(s) on 17.06.2023 till the date when competitive bidding process for the Award of contract afresh, is completed, respondents will be at liberty to enter into such arrangement as per the terms as may be agreed between the appellant and respondents, however, strictly in accordance with law and the terms of the Implementation Agreement as well as the policy decision, if taken in the public interest for such intervening period. It is, however, observed that such arrangement will not in any manner, be construed to give extension of the Implementation/Novation Agreement(s), nor the appellant will claim any right or entitlement to continue the port operation at the terminal after the expiry/termination of the agreement

on 17.06.2023. It is, however, without prejudice to the right of the Federal Government to invoke the provisions of the Inter-Governmental Commercial Transaction Act, 2022 as referred to hereinabove. Above High Court Appeal stands dismissed in the above terms alongwith listed application.

JUDGE

JUDGE

A.S./Farhan