

**Before the State Chief Information Commissioner,
Maharashtra Appeal u/s 19(3) of RTI Act, 2005.**

S.C.I.C./42683/Appeal no.6099/2010/02

- 1) **Shri. Surendra Dash**
M/s Rewas Port Ltd.,
Jai Towers Plot No.68,
Sector-15,CBD Belapur,
Navi Mumbai-400614.
... (Appellant)
...(Third Party)

- 2) **First Appellate Authority-cum-The Chief executive Officer,**
Maharashtra Maritime Board,
Indian Mercantile Chambers,
Ramjibhai Kamani Marg,
Ballard Estate,
Mumbai-400038.
... Respondent

- 3) **Public Information Officer-cum-The Chief Ports officer,**
Maharashtra Maritime Board,
Indian Mercantile Chambers,
Ramjibhai Kamani Marg,
Ballard Estate,
Mumbai-400038.
... Respondent

- 4) **Smt.Hema Ramani,**
Bombay Environmental Action Group,
203,Rajendra Chambers,
19,Nanabhai Lane,Fort,
Mumbai-400001.
... Respondent

Date of Interim Order : 04-12-2010
Date of Hearing : 13-12-2010
Appellant, PIO present & FAO not present.

Judgment

M/s Rewas Port Ltd.,(Third Party) has filed the Second-appeal u/s 19(3) of the Right to Information Act ,2005 against the order dated 17-04-2009 passed by the First Appellate Authority-cum-The Chief Executive Officer, Maharashtra Maritime Board.

The following are facts of :-

The Bombay Environmental Action Group(BEAG) has filed application u/s 6(1) of the Right to Information Act, 2005 on 23-04-2008 to the Chief Ports officer-cum-Public Information Officer to seek the following information in respect of M/s Rewas Port Ltd., for the period of 2000-2007 as Follows :-

- 1) A copy of the BOOST agreement signed with M/s Amma Lines Ltd.**
- 2) Have any studies been conducted on the impact of dredging and reclamation that is to be undertaken for the development of the port? if yes, a copy of the same.**
- 3) What formalities have been complied to obtain SEZ status for the port? A copy of all the related documents.**

The information is required by Registered Post.

In response to the said application the information in respect of the points no 2 &3 was provided & information regarding point no.1 i.e. the copy of '**BOOST Agreement**' denied under clause 8(1)(d) of the Right to Information Act, 2005.

Being aggrieved by the decision of the PIO dated the 03-06-2008, the BEAG has preferred the first appeal u/s19(1) of the said Act, to the First Appellate Officer-cum-Chief Executive Officer(Maharashtra Maritime Board) on the ground, that the agreement entered into by Maharashtra Maritime Board is a commercial agreement between government entity and a private enterprise and the terms of such an agreement are;

- a) First a matter of public interest and cannot be subject to confidentially, and;**
- b) Second, it is not clear how “the disclosure of a copy of the agreement would harm the competitive position of the third party,” especially when the contract has already been awarded on 19-06-2008.**
- c) “In similar circumstances as for example between the Pondicherry Port Authority and the party building the port, the agreements have been supplied.” Be supplied and it does not cover under section 8(1)(d).**

In view of above, before arriving at his decision, the FAA has observed that the Public Information Officer should have actually issued notice to third party, namely M/s. Rewas Port Ltd., and obtained their say as to how the disclosure would, if at all, harm their competitive position and remanded to Information Officer for giving a hearing to M/s. Rewas Port Ltd., and take a considered view in the matter.

In view of the letter issued to the Rewas Port Ltd., as directed by the First Appellate Authority, the Rewas Port Ltd., has requested to First Appellate Authority on 08-07-2008 to provide them the copies of the necessary documents in the matter. In response to the said request on 11th July 2008 the necessary documents are provided by Information Officer to the Rewas Port Ltd., and they have submitted their representation on 18th July 2008, with objection to provide a copy of BOOST agreement signed with their predecessor Amma Lines Ltd.

Again on 26th August, 2008 written argument was submitted by the Rewas Port Ltd. On 16th September, 2008 the Information Officer-cum-Chief port Officer has opined that, he is of the opinion that the BOOST Agreement may be provided to M/s BEAG to ensure transparency in the matter of infrastructure development of this area. However, being aggrieved by the order dated 16th September, 2008 M/s Rewas Port Ltd., has filed the first appeal, as a third party, u/s 19(2) read with section 11(4) of Right to Information Act, 2005 on the ground that the CPO cum Information Officer of Maharashtra Maritime Board (MMB) failed to appreciate the submission of the appellant (Third Party) about the possible harm or injury cause party as a result of disclosure of said commercial agreement which is confidential in nature.

However, On 17th April, 2009 First Appellate Authority after examining the points raised by the appellant has directed to provide a copy of BOOST Agreement signed between Amma Lines Ltd. & Maharashtra Maritime Board (MMB) to Bombay Environment Action Group in order to ensure transparency in the matter of infrastructure development in the area. Against this order, on 21-04-2009, M/s Rewas Port Ltd., has requested to Chief Executive Officer-cum-First Appellate Authority, that they are moving, a second appeal within period of limitation i.e. **90 days** as provided section 19(3) of the Right Information Act, 2005 to the State Information Commission & requested not to, give the copy for the BOOST Agreement i.e. Concession Agreement executed between Amma Lines Ltd. &

Maharashtra Maritime Board (MMB) for development of Rewas-Aware Port to Bombay Environmental Action Group(BEAG), otherwise their interest will be highly prejudiced & the whole purpose of appeal will be frustrated which will go against the scheme and provisions Act. In view of this, Chief Ports Officer-cum-Information Officer has intimated BEAG in respect of request of the Rewas Ports Ltd., pending their appeal before Commission and their after the Rewas Port Ltd., filed second appeal on 17th July, 2009 before the State Information Commission against the order of First Appellate Authority-cum-Chief Executive Officer.

Meanwhile, pending appeal before Commission, BEAG filed a Writ Petition no.-2093 of 2010 against MMB requesting a copy of BOOST Agreement, before the Hon'ble High Court Mumbai.

Their Lordships after hearing the submissions pleased to issue directions to the effect that M/s. Rewas Port Ltd., if it so chooses has to apply for stay of the orders passed by Chief Executive Officer-cum-Appellate Authority to State Information Commission & in the event of such stay not being obtained the Information Officer would have to furnish the copy of BOOST Agreement as sought for by the Petitioners in the present Writ Petition. Accordingly the Rewas Port Ltd., has applied to the State Information Commission for obtaining stay of the order dated 17-04-2009 passed by First Appellate Authority & the order dated 16-09-2008 passed by the Public information Officer-cum-Chief ports Officers of MMB. The State Information Commission has stayed the order of the First Appellate Authority & the Chief Officers & the Public information Commission-cum-Ports Officer. After hearing both parties i.e. M/s Rewas Port Ltd., & BEAG on dated 04-12-2010, till dated 13-12-2010.

On 13-12-2010, The Commission has heard both the parties at length. The following parties attended hearing;

Rewas Port Ltd.(RPL):

- 1) Appellant-Mr.Surendra Dash-Asst.Vice President**
- 2) Mr.S.K.Patil-Senior Adminstrative Officer**

Bombay Environmental Action Group(BEAG):

- 1) Mr.Novroz Modi-Vice President**
- 2) Ms.Hema Ramani-Activist**

For M/s Rewas Port Limited, Mr. Surendra Dash argued at length that the Bombay Environmental Action Group(BEAG) understandably spouses the cause of environmental protection in and

around Mumbai. Keeping in the view the information sought by them at Sr. no 2 & 3 pertaining to their area of activities have already been furnished to the Applicant by the Information Officer of (MMB). But BOOST Agreement contains certain vital information which are purely commercial in nature and which are not relevant and related to the activities being pursued by the Applicant(BEAG) as an environmental protection group. Besides, the agreement contains information including commercial confidence disclosure of which will harm their competitive position.

He strongly objected to furnish the information Sr. No.1 i.e. a copy of the BOOST agreement signed by Maharashtra Maritime Board(MMB) with their predecessor company(Amma Lines Ltd.). that the BOOST agreement contains information which relates to them only and they treated it as confidential. The information are of commercial confidence the disclosure of which will harm their competitive position vis-à-vis their competitors in business.

Further, information requested is not in the larger public interest but is intended to access the commercial conditions of the agreement from which our competitors can derive benefits and erode their competitive strength/position in the business being carried out by them. Moreover, it is not a standard document but is an agreement which includes commercial and legal conditions solely and exclusively meant for the use and benefit of parties to the agreement. Such information cannot be useful to public at large.

Section 8(1)(d) of the said Act makes it clear that notwithstanding contained in the Act that the public authority shall be under no obligation to give to any citizen any information including commercial confidence the disclosure of which would harm the competitive position of a third party.

Therefore, not to give a copy of the agreement to BEAG. This will greatly prejudice their right under the Right to Information Act. They treat the information as commercial confidence disclosure of which will harm their competitive position and will not be in the larger public interest.

Mr. Dash further argued that BOOST agreement signed and executed between MMB & M/s Amma Line Ltd., is a commercial agreement containing information of commercial confidence including the various clauses which are inter-related and other commercial conditions which are exclusively meant for the use and benefit of parties to the agreement. Disclosure of those information to the Applicant will harm their competitive position and therefore. M/s

Rewas Port Ltd., has treated this information as confidential information under the provision to u/s 11, as the trade or commercial secrets are protected by law for that purpose. ***Mr. Dash has relied on the decision in Reliance Industries Ltd. v/s Gujarat State Information Commission and others.(AIR2007/Guj203),(2008) 2GLR1559 special new application no.16073 and 17067 of 2007 decided On : 16-08-2007 by Hon'ble Justice Mr.D.N.Patel.*** In which the observation made in respect of the Third Party Rights under RTI under which the Third Party can treat inform him related to them as confidential. He further argued that neither any specific averment has been made by the applicant(BEAG) regarding the genuiness of the public interest to be sub-served by disclosing the BOOST Agreement, nor anything has been placed before CPIO, MMB by the applicant, to show that disclosure of the BOOST Agreement is in larger public interest being the requirement u/s 8(1)(d) of the RTI.

On the other hand, Rewas Port Ltd., have reasonably appraised CPIO & FAA regarding the gravity of injury that would be caused to it by disclosure of the said Commercial Agreement containing all clauses which are Commercial Confidence in nature, the disclosure of which would harm its competitive position viz-a-viz other competitors in business. Section 8(1)(d) of the Right to Information Act, 2005 also protect the interest of third party under the above mentioned conditions.

It is also pertinent to mention that this BOOST Agreement is not a general standard document, neither it is published in any local media/news paper/electronics media(website) nor it is saleable document from any public authority or available for public, rather this signed BOOST Agreement is a legal Agreement under which contractual obligations are of the executing parties only. Therefore, requested not to give a copy of the BOOST Agreement to the Applicant BEAG.

However, BEAG has argued that they want to know the project details and the obligations with which M/s Rewas Port Ltd., and the State Government are bound by, because they think that there will be some environments issues arising out of it and also want to know environmental impact because it is an environmentally sensitive area & therefore it involves larger public interest and should be in public domain.

BEAG Relied on the decision of the Central Information Commission in Appeal no.CIC /AT/A/2009/000964 dated 22-07-2008 u/s 19(3) in respect of Shri. Navroz Modi Appellants V/s

Mumbai Port Trust (Public Authority) & M/s Indira Container Terminal Pvt. Ltd., Mumbai(Third party), decided on 3rd September, 2009. In which,

- 1) Copy of the Detailed Project Report for construction of the Offshore Container Terminal.**
- 2) Terms and Conditions contained in the approvals of the DPR by the Ministry of Shipping and Transport.**
- 3) Copy of the Agreements signed with Gammon Infrastructure Project Limited.**
- 4) A copy of other documents signed with any other agencies executing the OCT project.**
- 5) Please indicate the number and capacities of the dredgers to be employed for dredging 14 million cum to undertaken within 14 months for the OCT project.**
- 6) Indicate the estimate of the quantum and cost of maintenance dredging required to provide an assured depth of 13.5m at the berthing area of the OCT, and bias for the assumption.**
- 7) A copy of the approval of the Maharashtra Maritime Board authorizing dredging of sand from Dharmtar creek/Amba river for filling up of the docks.**

However in the said second appeal the issue was only related to, “A copy of the License Agreement signed with Gammon Infrastructure Project Ltd.” The issue related to determination of scope of disclosure of Public Private Partnership(PPP) Agreements, therefore the issue for determination was that, “Weather Public-Private Partnership Agreements can be disclosed to the third-parties under RTI Act?”

For that purpose, the Central Information Commission had obtained the written-advice/views of the Planning Commission and the C&AG .”

Planning Commission :

- 1) “Public Private Partnership requires a framework that can enable the private investor to secure a reasonable return at manageable levels of risk, assure the user of adequate service quality at an affordable cost, and facilitate the government in procuring value for public money. These preconditions are more difficult to fulfill than is commonly realized. Because of the multiplicity of stakeholders pursuing conflict of interests, risk mitigation arrangements are usually complex. They involve

detailed legal and contractual agreements that specify the obligations of different participants, set forth clear penalties for non performance, and offer protection to investors against actions beyond their control. It is therefore vitally important to address the problems associated with risk allocation, standard setting and transparency in a way which reassures all stakeholders. All these issues are addressed in a Concession Agreement.

2) The Planning Commission has published 11 Model Concession Agreement in various sectors for adoption in PPP projects. These documents have been used for many PPP projects across different sectors. Specific provision is provided in all these documents relating to disclosure of specified documents which reads as under:-

Disclosure of Specified Documents

The Concessionaire shall make available for inspection by any person, copies of this Concession Agreement, the Maintenance Manual, the Maintenance Programme and the Maintenance Requirements (hereinafter collectively referred to as the "Specified Documents") free of charge, during normal business hours on all working days at the Site and Concessionaire's Registered Office. The Concessionaire shall make copies of the same available to any person upon payment of copying charges on a 'no profit no loss' basis.

3) On the basis of the above provision the concessionaire is required to provide copies of the concession agreement to any person who seeks to obtain the same. The Planning Commission is of the view that disclosure of the concession agreement should not be withheld."

Comptroller & Auditor General :

"The issue is whether Concession Agreement entered into between a government entity and a private entity as part of PPP is to be disclosed. PPP is generally a standard document indicating the various concessions that are admissible to the private entity while entering into a partnership with a public entity. Various clauses in a concession agreement generally do not indicate commercial interest of the parties. Under Section 8(1)(d) of the RTI Act information in the nature of commercial confidential [sic] is exempt information. As concession

agreements do not contain commercial interest there should be no objection in furnishing the same under RTI Act. In case, there are certain clauses the disclosure of which may harm the competitive position of the parties to the agreement, the provision of severability in terms of the action 10 can be applied.

During the hearing, the representatives of the planning Commission and the C&AG informed Commission that it was their considered view that no PPP Agreements should be held confidential, and should be made available in the public domain. They discounted any possibility of commercial information getting exposed due to this disclosure.”

Here the request of the applicant BEAG is that, agreement signed between Amma Lines Ltd., & MMB for development of Rewas-Aware Port i.e. BOOST Agreement be supplied to them, is a Public-Private Partnership Agreement. The development of the port in the public interest is the function of the Government that is Public Authority & this function is entrusted to a private agency, it means, the private agency is functioning for the public interest & therefore it becomes a Public-Private Partnership Agreement. Now I have to consider whether the BOOST Agreement a really commercial confidential information & it will harm & highly injurious to the interest of the Private interest that is harm to their competitive position. It is rather, as submitted by M/s Rewas Port Ltd., itself that signed BOOST Agreement is a legal agreement under which contractual obligations are of the executing parties only, that means, there are no trades secrets or intellectual properties or any details of technical projects by revealing which professional secrets are disclosed. I myself has persuaded the said BOOST Agreement. It is simply a agreement which contains terms & conditions & obligations between the two parties. Moreover, the apprehension of the M/s Rewas Port Ltd., is regarding potential misuse of the information disclose to BEAG which can't be a sufficient ground to deny information. The people of the State are entitled to know the truth about PPP agreement which is general in nature with their specific details. The Respondent has argued that PPP agreement involving the States physical resources & its infrastructure, which has critical environmental, social human aspects apart from its technical &

financial aspects, could not be a matter between the executive parties only.

In this matter also the BEAG itself has in its application u/s6(1) pointed out that, the contract has already been awarded, that means, there is no point in arguing that their competition will be benefited or their professional secrets may be copied by others., therefore it is imperative that the PPP agreement should be disclosed for the transparency rather than kept in secrecy.

Therefore, in my view, the disclosing the BOOST Agreement which is only a contractual agreement not containing any professional or trade secrets, cannot be said to be covered under the exemption from disclosure by section 8(1)(d) or RTI.

In view of the matter, the appeal is liable to be rejected & the decision of the Public Information Officer-cum-Chief Ports Officer MMB & FAA as directed by said authorities to provided a copy of the BOOST Agreement its upheld.

ORDER

The decision of the FAA and PIO is upheld and the appeal of the Third Party i.e. M/s Rewas Ports Ltd., is hereby dismissed and the SPIO-cum-Chief Ports Officer shall provide the copy of the said BOOST Agreement on payment of admissible fees within period of 15 days of the receipt of this order.

(Vilas Patil)

Chief Information Commissioner, Maharashtra

Place : Mumbai

Date : 24-12-2010

Certified copy of the original order of Hon'ble Chief Information Commissioner.

Secretary/Section Officer

State Information Commission, Mumbai.

