

(2000) 01 SC CK 0188

In the Supreme Court Of India

Case No : C.A. No. 3641 of 1998 with C.A. No. 3642 of 1998

Air India Ltd.

APPELLANT

Vs

Cochin Int., Airport Ltd. and Others

RESPONDENT

Date of Decision : 31-01-2000

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : AIR 2000 SC 801 : (2000) AIRSCW 351 : (2001) 1 CALLT 41 : (2000) 1 CTC 594 : (2000) 1 JT 481 : (2000) 2 MLJ 72 : (2000) 1 SCALE 346 : (1999) 4 SCALE 477(1) : (2000) 2 SCC 617 : (2000) 1 SCR 505 : (2000) 1 Supreme 351

Hon'ble Judges : S. N. Phukan, J;G. T. Nanavati, J

Bench : Division Bench

Advocate : Soli J. Sorabjee, Attorney General, F.S. Nariman, R.F. Nariman, K.K. Venugopal, Mukul Rohatgi, T.L.V. Iyer, A.H. Desai, T.R. Andharujina, I.M. Chagla, A. N. Haksar, H.N. Salve, Gulam Navati and Arun Jaitley and H.D. Nanavati, A.K. Singh, Joseph Kodianthara, Jatinder K. Sethi, Puneet D. Tyagi, Rustam B. Hathikhanawala, Romy Chacko, Rajiv Shekhedhar, Sakesh Kumar, K.L. Hathi, for Hathi and Co. and Ramesh Babu, M.R.P.S. Shroff, M.P. Bharucha, Sunil Dogra, Monica Sharma, Subrat Birla, shaneen Dastur, P.H. Parekh, Sameer Parekh, Indoo Verma, G. Prakash, Satish Sah and S. Sagar, for the Appellant;

Final Decision : Allowed

Judgement

G T. Nanavati. J.

1. Both these appeals arise out of the judgment of Kerala High Court in Writ Appeal No. 462 of 1999. Cambatta Aviation Ltd. (hereinafter referred to as 'Cambatta') had filed that appeal against the decision of a learned single Judge of that High Court in O.P.No. 25560 of 1998 whereby its said petition was dismissed. Cambatta had challenged the action of the Cochin International Airport Ltd. (for brevity sake referred to as the 'CIAL') of awarding contract for ground handling service at the new Cochin Airport at Nedumbassery to Air India Ltd. The learned single Judge held that the impugned action of CIAL was neither arbitrary nor Illegal. On appeal Division bench of that Court held that the said

action was violative of principles of natural justice, arbitrary and illegal.

2. CIAL is a public sector undertaking. Some other public sector undertakings and the State of Kerala are its shareholders. It has been established for setting up and maintaining a new International Airport at Cochin. For awarding a contract for ground handling facilities at the new Airport it invited offers by writing letters to some companies having experience of that type. The letters were written on 12-11-1997 to Cambatta; Air India and six others. Proposals were to be submitted by 31-12-1997. Kambatta, Air India, M/s. Dnata of Dubai, M/s. Ogden Aviation Services of Hong Kong and M/s. P.S.M. Aviation Pvt. Ltd. responded. Proposals of some of them contained alter native proposals also. On 13-7-1998 CIAL again wrote to them to make their best offers on or before 28-7-1998. Air India submitted its proposal on 20-7-1998. Cambatta did so on 28-7-1998.

3. The Committee constituted by CIAL for evaluation of the offers met on 28-9-1998. It found that Cambatta, Air India, DNATA and Ogden Aviation were on par as regards technical competence, organisational capacity and past experience. It took note of the fact that Cambatta and Air India are Indian organisation, operate mainly in India and have better proven adaptability for operating in, Indian conditions. Out of those two it recommended Cambatta for awarding the work. On 11-8-1998 the Government of India wrote a letter to the Government of Kerala recommending Air India for awarding the contract on the ground that Air India is the national carrier and has better experience. Thereafter a meeting took place between the Managing Director of Air India and the Chief Minister of Kerala. That was followed by a letter dated 29-10-1998 by Mr. P. Mascarenhas, Managing Director of Air India to the Chief Minister of Kerala seeking an opportunity to make a more detailed presentation to the Board of CIAL on the advantages CIAL would derive of Air India was appointed its exclusive handling agent. The Board of Directors met on 7-11-1998 and decided to have a detailed discussion with Air India before taking a final decision and informed it to give a presentation before the Board on 27-11-1998. Having come to know about this development Cambatta wrote a letter on 10-11-1998 to the Chief Minister of Kerala pointing out that their company is also an Indian company and they also have experience of over 30 years in ground handling work. It also took exception to the effort made by Air India to revise its offer on the ground that it was unethical and deserved to be condemned by the Board. It again wrote to the Chief Minister on 12-11 -1998 against giving preference to a national carrier in view of the policy of liberlisation. On 23-11 -1998 Cambatta wrote to CIAL that it was extremely perturbed over the fact that Air India was given a further opportunity to make a presentation to the Board and requested it not to go back upon its earlier decision to give the contract to Cambatta. It also warned that not adhering to its earlier decision would be a retrograde step and shake the confidence of the people in fairness and impartiality of CIAL. Air India gave the presentation and by its letter dated 1-12-1998, reaffirmed its proposal with some changes as discussed and requested CIAL to accept it as it was better

than the offer made by any other party. Cambatta again protested by its letter dated 7-12-1998 and informed CIAL that to accept the revised offer of Air India and not to accept its offer would be unfair and unethical and violative of Limited Global Competitive Building Norms. On 12-12-1998 the first respondent awarded the contract to Air India.

4. Cambatta filed a writ petition in the Kerala High Court challenging that action of CIAL. Its contention was that its offer was the highest and it had fulfilled all the conditions. The offer given by Air India did not come anywhere near their offer, yet the contract was given to Air India because of influence exerted by Air India and the Secretary of Ministry of Civil Aviation. It was also challenged on the ground that CIAL had not acted fairly and impartially as it had carried on negotiations with Air India behind the back of Cambatta and no opportunity was given to Cambatta to give a better offer. In the counter-affidavit filed on behalf of CIAL it was stated that this was not a case where tenders were invited. It was a project to be implemented by raising finances from various sources and, therefore, it was decided to invite offers from reputed agencies in order to decide best terms and conditions and then to award the contract to the best suited party in order to make the project viable and successful. It was further stated that individual offers were assessed considering the background and infrastructure of the companies, their financial capacity, expertise and future benefits likely accrue to CIAL. While awarding the contract to Air India what had weighed with it was, apart from its selection by the evaluating Committee, that it is a public sector unit, the national carrier under the Government of India and that it had offered to support CIAL in a big way by showing its willingness in equity participation. It had also taken into consideration the fact that Cambatta was not an airline operator like Air India and its interest and expertise was limited to ground handling work alone. Air India had also offered to help in improving the revenue of CIAL by increasing Air Traffic through the Cochin Airport. Thus, on a comparative analysis of the offers made by Cambatta and Air India it was found that the offer made by Air India was better and more beneficial to CIAL. The petition was heard by a learned single Judge of the High Court who held that there was no illegality, arbitrariness or unreasonableness in the decision making process of CIAL and the decision was taken bona fide after evaluating both the offers and on being satisfied that in the matter of experience, expertise, infrastructure and financial capacity the offer of Air India was superior and more beneficial. As regards the allegation of actual mala fides the learned single Judge held that the pleading in that behalf was very vague and scanty.

5. The matter was then carried by Cambatta in appeal before the same High Court. The Division Bench held that it was a case of public tender. It also held that though the decision of evaluation committee was only recommendatory and not binding on the Board of Directors of CIAL, the fact that the evaluation committee had considered all the relevant aspects and found Cambatta as the most competent party and yet no reasons were disclosed for explaining what prompted the Board of Directors to take a different view was clearly indicative of

the fact that CIAL was influenced in its decision making process by Air India and the Secretary of the Ministry of Civil Aviation. As regard the justification disclosed by CIAL in its counter-affidavit the Division Bench held that it was "not impressed with the reasons given in the counter-affidavit as it was well known that the reasons given in the counter-affidavit cannot be accepted for what has happened at the time of acceptance of the offer". It was also of the view that if the other tenderers had also been invited for negotiations by CIAL then possibly they would have given better offers and pointed out demerits of the offers made by the rival tenderers. It held that the Board of Directors was Influenced by the threat to the effect that if Air India was not given the contract the International Airport will be bereft of flights as Air India will not allow other flights to land there. It then held that the action of CIAL in awarding contract to Air India was arbitrary, illegal and opposed to the principles of natural justice. It allowed the appeal, cancelled the contract in favour of Air India and directed CIAL to re-consider the valid tenders once again and, if necessary, to call all those tenderers for negotiations before finalizing the contract.

6. Challenging this decision of the High Court, Air India has filed Civil Appeal No. 3641 of 1999 and CIAL has filed Civil Appeal No. 3642 of 1999. Mr. Nariman, learned senior counsel appearing for Air India and Mr. Venugopal, learned senior counsel appearing for CIAL contended that the Division Bench has gone wrong in its conclusion as it adopted a wrong approach in a matter of this type. They submitted that the Division Bench committed a grave error in considering this to be a case public tender. They also submitted that the decision of CIAL to award the contract to Air India was taken bona fide in the financial and overall interest of CIAL and, therefore, the High Court while exercising its power under Article 226 ought not to have interfered as no substantial amount of public interest was involved.

7. The law relating to award of a contract by the State, its corporations and bodies acting as instrumentalities and agencies of the Government has been settled by the decision of this Court in *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, ; *Fertilizer Corporation Kamgar Union (Regd.), Sindri and Others Vs. Union of India (UOI) and Others*, ; *Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others*, ; *Tata Cellular Vs. Union of India*, ; *Ramniklal N. Bhutta and another Vs. State of Maharashtra and others*, and *Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others*, . The award of contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are of paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even

though it happens to be the highest or the lowest. But the State, is corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the Court can examine the decision making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, is corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision making process the Court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should intervene.

8. In view of this settled legal position, Mr. Andhyarujina learned senior counsel appearing for Cambatta rightly and fairly did not dispute that CIAL was not bound to accept the highest offer or that it was entitled to enter into negotiations with Air India. What he contended was that CIAL ought to have treated all the tenderers fairly. As Air India was given an opportunity to give a presentation and revise its offer it ought to have given a chance to Cambatta also to have its say with respect to the offer made by Air India and to match its offer with the offer of Air India. He submitted that the evaluation committee had recommended Cambatta for awarding the contract after considering all the relevant factors and, therefore, it was Incumbent upon the Board of Directors to disclose why they differed from the said recommendation and decided to accept the offer of Air India. He also submitted that the decision of CIAL was vitiated because of the influence exercised by Air India and the Ministry of Civil Aviation and also because it took into consideration an irrelevant consideration that Air India is a public sector undertaking and a national carrier.

9. What was emphasised by Mr. Nariman and Mr. Venugopal is that CIAL was incorporated to set up a new private International Airport. At all airports, permissions for operating aircraft, maintenance, licensing of crew and flying schedules of airlines is controlled by the Directorate General of Civil Aviation. Applications for hangar space, landing and parking facilities and ground handling are made to and granted by the Airport Authority of India. This was the first attempt to privatise. Therefore, CIAL, in order to make its project viable and successful, after taking into consideration various factors, decided to entrust the task of providing ground handling services for all airlines operating from the airport to one single agency. For achieving this purpose it invited offers by writing letters to eight reputed agencies to enable it to decide the best terms and conditions for awarding the contract and to select the best agency. They submitted that, for these reasons, it did not choose to adopt the public tender mode. In its counter-affidavit filed in the High Court this position was made clear. What was stated in the counter-affidavit was as under:

The object of inviting their offers was only to get the terms and conditions of the respective companies for consideration by the Board of Directors of this respondent and to select the best suited to the interest of the respondent. Being a new project implemented by raising finance from various sources all efforts were made to make the project viable. Hence when Ext. R1 (a) letter was sent inviting offers the paramount consideration was to get the best offer for the benefit of the 1st respondent. There was no minimum estimated amount or other conditions for acceptance and rejection like the usual tender procedure.

The High Court was also of the view that if the offers were made only pursuant to the letter dated 12-11-1997 the respondents would have a good case. But in view of Board of Directors' decision to be fair and the CIAL's letter dated 13-7-1998 calling upon the tenderers to give the best offer before it took a final decision and informing them that the contract period would be 10 years and the subsequent letter dated 5-8-1998 requiring the tenderers to give a bank guarantee, CIAL was bound to treat this case as a case of public tender and for that reason it was not open to it to say that it was free to accept that offer which was best suited to it. It is, however, not necessary to deal with this aspect more elaborately and point out how. the High Court's view is wrong as it was not disputed by the learned Counsel appearing for Cambatta that it was open to CIAL not to accept the highest offer of Cambatta if it had good reasons to do so. It was at no point of time declared by CIAL that it would accept the highest offer or accept the offer on a particular basis. All along it had made clear that it would accept that offer which was found to be the best in their interest.

10. The only point that really falls for consideration is whether CIAL had acted fairly after it had invited fresh offers by its letter dated 13-7-1998. It was forcefully submitted by Mr. Andhyarujina that after the High Level Committee had evaluated the proposals and recommended Air India for the job it was unfair on the part of CIAL to have permitted Air India to make a fresh presentation and revise its terms. Even while conceding that CIAL had a right to enter into negotiations even at that stage, it was submitted that Cambatta also should have been invited for negotiations and informed about the revised terms of Air India. It was submitted that like Air India, Cambatta should have been given an opportunity to match the offer made by Air India, From the letter written by CIAL to Cambatta on 13-7-1998 and similar letters written to others also, it appears that the Board of Directors had, in its meeting held on 29-6-1998, taken certain decisions and felt that in fairness all eligible agencies should be requested to give their best offers. Air India had submitted its offer on 20-7-1998 and stated therein that its offer was open for negotiations, Cambatta had submitted its offer on 28-7-1998. It was made on the basis of certain assumptions. CIAL had in all received five offers. The High Level Committee constituted for evaluation of offers did not consider the offer of M/s. P.S.M. Aviation Pvt. Ltd. as it had not submitted the required bank guarantee. The other four agencies, namely, Cambatta, DNATA., Air India and Ogden, were found on par as far as technical competence, organisational capacity and past experience was concerned. It,

however, short listed Cambatta and Air India on the ground that they are Indian organisations, operate mainly in India and has better proven adaptability for operating in Indian conditions. It then recommended Cambatta for undertaking the around handling services without giving any reason for its preference for Cambatta. While 'king the decision the Committee observed that it would be for the Board of Directors to consider whether any negotiation should be held with the qualified agencies. The Board of Directors had then met on 7-11 -1998 and after taking note of the minutes of the high level committee and taking note of the fact that Air India is a public sector undertaking and a national carrier, decided to have a detailed discussion with Air India before taking a final decision. It, therefore, invited the Managing Director of Air India for giving a presentation before the Board on 27-11-1998. It was also felt necessary to take a final decision in its next meeting to be held on 27-11-1998 as the matter was pending since long and it was necessary to solve the financial crunch of CIAL. Cambatta had protested against giving of an opportunity to Air India to make a presentation by its letters dated 12-11-1998 and 23-11-1998 on the ground that what was being done by CIAL was improper and in violation of global competitive bidding norms. In spite of the protest of Cambatta and Board of Directors of CIAL permitted Air India to make a presentation for outlining in detail its ground handling capabilities, packages of services which it wished to offer and other relevant advantages including financial. Air India by its letter dated 1-12 1998 recapitulated the details of the offer which it had already made, and the subsequent presentation and discussion on 27 11-1998. The said letter discloses that some changes were made by Air India in its original offer to make it more acceptable to CIAL. In that letter it was also indicated that it would try to enhance Air India and other Airlines' - domestic and international operations through CIAL and pointed out that only through maximisation of operations this new venture can be a profitable one at an early date. Cambatta again by its letter dated 7-12-1998 reiterated that its offer was the highest (most favourable to CIAL) and that it would be unfair to accept the revised bid of Air India. In spite of the protests of Cambatta, CIAL, by its letter dated 12-12-1998, informed Air India that the Board of Directors had decided to accept the revised offer of Air India.

11. This narration of facts makes it clear that all along, after the High Level Committee had recommended Cambatta for awarding the contract, what Cambatta was contending was that CIAL having accepted the limited global competitive bidding norms and having decided 28-7-1998 as the last date for inviting final offer, it was not open to it thereafter to negotiate with Air India behind the back of Cambatta and permit Air India to revise its offer. Even though Cambatta had written protest letters, it had not requested CIAL to give it any opportunity to negotiate or to improve upon its offer. The decision of the high Level Committee was obviously not the final decision and certainly it was not binding on the Board of Directors who were the final authority to take the decision. The Board of Directors, at the meeting held on 7-11-1998, considered

the proposals of Air India and Cambatta and appears to have taken a tentative decision to award the contract to Air India and, therefore, called it for negotiations with a view to have better terms and take the final decision. The Board of Directors did take the final decision on 27-11-1998 as Air India agreed to make Its offer more beneficial to CIAL. That becomes apparent from Air India's letter dated 1-12-1998. The Board of Directors having taken tentative decision on 7-11-1998 there was no point in calling Cambatta thereafter for any negotiation. It may be recalled that Cambatta was recommended over Air India by the High Level Committee only because Cambatta's financial rating was found higher. What is significant to note is that even the High Level Committee had in its minutes noted that financial rating cannot be the sole criterion for taking the final decision. Moreover, in a commercial transaction of such a complex nature a lot of balancing work has to be done while weighing all the relevant factors and the final decision has to be taken after taking an overall view of the transaction. It is true that even though Cambatta had called upon CIAL to produce the minutes of the meeting of the Board of Directors held on 27-11-1998 the same was not made available to Cambatta. But that did not entitle the High Court to draw any adverse inference. The High Court had not called upon CIAL to produce those minutes.

12. As regards the merits of Cambatta's proposal, it was contended by Mr. Andhyarujina that all the three offers of Cambatta were superior in terms of parameters laid down by CIAL than Air India's offer. He submitted that even after CIAL unilaterally raised the license fee of Air India from 17 per cent to 20 per cent in the 10th year to match Cambatta's offer and imposed a condition that Air India would not subcontract, it did not become comparable with the offer of Cambatta as Air India did not offer to pay 2 per cent bonus in license fee. It was also submitted that Air India's representation that it would be able to bring more traffic was illusory and for that reason also Air India's proposal cannot be regarded as superior or even comparable with the proposal of Cambatta. We do not think that CIAL did any wrong in taking into consideration the fact that Air India is an Airline and being a national carrier would be in a position to bring more traffic of Air India and other domestic lines if it was awarded the contract. As regards the merits of the rival offers, we do not think it proper to look at only the financial aspect and hold that CIAL did not accept Cambatta's offer, even though it was better, because it wanted to favour Air India or that it had acted under the influence of Air India and the Ministry of Civil Aviation. In a commercial transaction of a complex nature what may appear to be better, on the face of it, may not be considered so when an overall view is taken. In such matters the Court cannot substitute its decision for the decision of the party awarding the contract. On the basis of the material placed on record we find that CIAL bona fide believed that involving a public sector undertaking and a national carrier would, in the long run, prove to be more beneficial to CIAL. For all these reasons, it is not possible to agree with the finding of the High Court that, CIAL had acted arbitrarily and unreasonably and was also influenced by extraneous

considerations during its decision making process.

13. We, therefore, allow these two appeals, set aside the judgment of the Division Bench of the Kerala High Court in Writ Appeal No. 462 of 1999 and confirm the decision of the learned single Judge in O.P. No. 25560 of 1998.