

(2000) 01 MAD CK 0032

In the Madras High Court

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

Air India Ltd.

APPELLANT

Vs

Cochin International Airport Ltd.

RESPONDENT

Date of Decision : 31-01-2000

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Citation : (2000) 01 MAD CK 0032

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

Bench : Division Bench

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

Judgement

Judgment Pronounced by G.T. Nanavati, J.—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 "C1AL",) of awarding contract for ground handling services at the new Cochin Airport at

Nedumbassery to Air India Ltd. The learned single Judge held that the impugned action of C1AL 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 alternative 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. Cambata 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 organisations, 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 Mascaren has, 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 liberalisation.

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 Bidding 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 a airline operator like

Air India and its interest and expertise was limited to ground handling work alone. Air India has 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 regard the allegation of actual mala fide the learned single Judge held that the pleadings 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 regards 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 tenders 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 finalising 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 of 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 *R.D. Shetty v. International Airport Authority*, 1979 (3) SCC 488; *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 a 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, its 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, its 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 hanger 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 reported 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 C1AL 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 C1AL that it would accept the highest offer or accept the offer on a particular basis. AH 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 C1AL 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 C1AL to have permitted Air India to make a fresh presentation and revise its terms. Even while conceding that

C1AL 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 C1AL 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. C1AL 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 ground handling services without giving any reason for its

preference for Cambatta, while making 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 C1AL. Cambatta had protested against giving of an opportunity of 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 C1AL was improper and in violation of global competitive bidding norms. In spite of the protest of Cambatta the Board of Directors of C1AL 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 C1AL. In that letter it was also indicated that it would try to enhance Air India and other Airlines"-domestic and international operations through C1AL 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 C1AL) and that it would be unfair to accept the revised bid of Air India. In spite of the protests of Cambatta, C1AL, 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 C1AL 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 All 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 sub-contract, 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.