

(2022) 01 DEL CK 0042

In the Delhi High Court

Case No : Civil Writ Petition No. 15240 Of 2021, Civil Miscellaneous Application No. 47969 Of 2021

Dr. Subramanian Swamy

APPELLANT

Vs

Union Of India & Ors

RESPONDENT

Date of Decision : 06-01-2022

Acts Referred:

Constitution Of India, 1950 — Article 226
Code Of Civil Procedure, 1908 — Order 39 Rule 1, Order 39 Rule 2

Citation : (2022) 01 DEL CK 0042

Hon'ble Judges : Dhirubhai Naranbhai Patel, CJ; Jyoti Singh, J

Bench : Division Bench

Advocate : Dr. Subramanian Swamy, Ramni Taneja, Satya Sabharwal, Vishesh Kanodia, Tushar Mehta, Chetan Sharma, Amit Mahajan, Dhruv Pande, Amita Gupta Katragadda, Kaustubh Rai, Preksha Malik, Isha Chaudhary, Nikhil Goel, Harish Salve, Anuradha Dutt, Lynn Pereira, Feresthe Sethna, Kunal Dutt

Final Decision : Dismissed

Judgement

D. N. Patel, CJ

1. This Public Interest Litigation has been filed seeking the following reliefs:-

â??a. Issue a writ, order or direction in the nature of a writ of mandamus or any other appropriate writ, order, or direction directing the Respondents

Nos. 1 to 4 to quash the present Air India Disinvestment process,

b. issue a writ of Certiorari or any other writ or direction of similar nature to set aside and revoke any action or decision or grant of any further

approvals/ permissions/ permits, etc. by the Respondent authorities with respect to the present Air India Disinvestment process,

c. Issue a writ, order or direction in the nature of a writ of mandamus or any other appropriate writ, order, or direction directing the Respondent No. 5

to investigate into the role and functioning of the Respondents authorities and submit a detail report in the present Air India Disinvestment process

exclusively to this Honâ??ble Court,

d. Issue any other appropriate writ, order or direction as this Honâ??ble Court may deem fit and proper in the facts and circumstances of the case.â??

2. Arguments were heard on behalf of the respective parties on 04.01.2022. During the course of arguments, learned Solicitor General of India,

appearing on behalf of Respondents No.1 to 4 sought liberty to place on record a short Note on the arguments canvassed by him. Liberty was granted

to do the needful. Similarly, Petitioner and Respondent No.6 were also permitted to file their respective short Notes. All the parties filed their

respective Notes of arguments, which have been taken on record and perused.

3. The factual matrix is in a narrow compass. Process of disinvestment of Air India and its subsidiaries commenced in June, 2017, with the in-principle

approval of Cabinet Committee on Economic Affairs (CCEA). The first round did not elicit any Expression of Interest. A policy decision to disinvest

was taken after following the transparent procedure through multi-layered decision making, involving Inter-Ministerial Group (IMG), Core Group of

Secretaries on Disinvestment (CGD) and the empowered Air India Specific Alternative Mechanism (AISAM) at the apex Ministerial level, with

support for the entire process from reputed Transaction Adviser, Legal Adviser and Asset Valuer.

4. Advertisements inviting bids mentioned that the Government would cease to be responsible for loss after the date of disinvestment, as brought out in

the documents annexed as Annexure A-1 and Annexure A-3 with the writ petition. In the light of excessive debt and other liabilities of Air India,

arising out of huge accumulated losses, the bidding construct was revised in October, 2020 to allow the prospective bidders an opportunity to resize the

balance sheet and increase chances of receiving bids and competition. The bids were invited on the basis of the revised construct for total

consideration for equity and debt with minimum cash consideration of 15% for equity (â??Enterprise Valueâ?). Further, it was clearly advertised and

made known that the sum of certain identified current and non-current liabilities (other than debt) would be retained in Air India and AIXL and would

be equal to the sum of certain identified current and non-current assets of Air

India and AIXL. The balance debt, over the debt quoted in Enterprise Value bid and excess liabilities, over and above the value of identified current and non-current assets, for the pre-disinvestment period, would be transferred to an identified Government Company.

5. First and foremost contention of Dr. Subramanian Swamy, Petitioner in person was that the Air India Disinvestment process is arbitrary, unconstitutional, unfair, discriminatory and unreasonable and the same cannot be sustained in law. Process is also violative of Article 14 of the Constitution of India as well as against the interest of National integrity and security, primarily for the reason that there is an on-going investigation against Air Asia (India) Private Limited, wherein one of the shareholders is Air Asia Investment Limited, Malaysia and they exercise direct and indirect control over Respondent No.6.

6. It was next submitted that the Consortium led by Mr. Ajay Singh, the Principal shareholder, Chairman and Managing Director of SpiceJet Limited has pending litigation against him, filed by a decree holder under Order 39 Rules 1 and 2 CPC, seeking injunction to restrain SpiceJet from transferring/ alienating any of its assets to SpiceXpress and Logistics Pvt. Ltd. and seeking recovery of the amounts under a Foreign decree. The High Court of Madras vide its order dated 06.12.2021 in Co. Pet. No. 363/2015 has issued winding up orders against SpiceJet. Mr. Ajay Singh, the lead member of the Consortium, which was one of the two bidders, is disqualified under Clause 13.2 of the Preliminary Information Memorandum (hereinafter referred to as "PIM"), with respect to Air India disinvestment, issued by Ministry of Civil Aviation on 27.01.2020. It was urged that since there were only two financial bids, out of which one bidder was the Consortium led by Mr. Ajay Singh, effectively the bidding process was a mere sham only to fulfil the technical requirement of there being more than one bidder. It is obvious that the whole process was collusive and tailor made to facilitate Respondent No.6 acquiring Air India.

7. It was contended that the successful bidder ought to have been disqualified on account of the allegations made by the Petitioner in an earlier writ petition being W.P.(C) 5909/2013, claiming breach of the extant FDI Policy as per Press Note 6 of 2012 read with DGCA Guidelines. Petitioner has prayed for a CBI investigation in the said petition to investigate the role and

functioning of the concerned Respondents and the Court has directed CBI to file a Status Report, which has since been filed and the writ petition is pending.

8. The next contention of Dr. Subramanian Swamy was that Air India was a profitable enterprise until 2004 and should not have been privatized.

Although Dr. Swamy repeatedly urged in the oral submissions that he is not against privatization, but submitted that he is aggrieved by the methodology of valuation, which according to him was arbitrary, corrupt, illegal and against public interest, as allegedly evident from the statement in one of the news articles, that Government was seeking Rs. 62,000/- crores for debt and other liabilities of Air India, whereas at an earlier press conference in October, 2021, Department of Investment and Public Asset Management had stated that the net liability on the Government after Air India's privatisation, amounted to Rs. 28,000/- crores approximately.

9. On the aforesaid grounds, Petitioner seeks a direction for quashing the Air India disinvestment process as also directing Central Bureau of Investigation (CBI)/Respondent No.5 to investigate into the role and functioning of the official Respondents, involved in the disinvestment process.

10. Learned Solicitor General of India appearing on behalf of Respondents No.1 to 4 submitted that the apprehensions expressed and the allegations levelled by the Petitioner, relating to the disinvestment process of Air India, are absolutely baseless, apart from the fact that there are several factual inaccuracies in the averments made by the Petitioner. It was submitted that the fundamental premise on which the Petition is predicated is that there is an on-going investigation against AirAsia (India) Private Limited, wherein one of the shareholders is AirAsia Investment Limited, Malaysia and they have direct and indirect control over Respondent No.6. This according to the learned Solicitor General, is an incorrect assumption as factually neither AirAsia (India) Private Limited nor Air Asia Investment Limited, Malaysia has a direct or indirect control over Respondent No.6. AirAsia (India) Private Limited has no interest in Respondent No.6/ M/s Talace Private Limited, the highest bidder. As a matter of fact and record, Respondent No.6 is a wholly owned subsidiary of M/s Tata Sons Ltd. It is pointed out that the Petitioner in paragraph 16, ground VI and ground VIII, of the writ Petition, has himself averred that Respondent No.6 is a wholly owned subsidiary of M/s Tata Sons Pvt. Ltd. and thus despite being aware of the said

position, has chosen to level false allegations, for reasons best known to the Petitioner. It was also submitted that even as per the Petitioner there is no charge sheet filed by any Government Agency against AirAsia (India) Pvt. Ltd. or Respondent No.6 or Tata Sons Ltd and thus no ground for disqualification is made out against Respondent No.6, as per the criteria set out in the PIM.

11. It was further submitted by learned Solicitor General that the second ground, which is very vaguely pleaded in Ground X of the writ petition, concerns some legal proceedings against SpiceJet Limited. It was pointed out that the disinvestment process saw keen competition with seven EOIs, being received in December, 2020 and two bidders submitted the financial bids in September, 2021. One of the bidders who submitted the financial bid was a Consortium, where the lead member was Sh. Ajay Singh, in his individual capacity. SpiceJet Limited was neither a member of the Consortium nor an "Affiliate", on whose net worth any of the members of the Consortium had relied, to meet the financial capability criteria, prescribed under the PIM. It was submitted that the criteria for disqualification had been specifically prescribed in the PIM and was strictly applied in the bidding process. The relevant criteria is set out in Para 13.2(j) of the PIM and the relevant clause, as relied upon, is as follows :-

"(j) If at any time it is discovered that an IB (sole bidder or any member of Consortium, as applicable) and/or Affiliate (only in case IB is taking benefit of financial strength of such Affiliate) is/are subjected to winding up/insolvency proceedings or other proceedings of a similar nature."

(emphasis supplied)

Under the said Clause, it was urged, only where winding up/insolvency proceedings or other proceedings of a similar nature are pending, against the member of the Consortium (i.e. IB) and/or Affiliate (only in a case where a member of the Consortium takes benefit of financial strength of such Affiliate), would such a Consortium be disqualified in terms of the PIM. Thus, the proceedings against SpiceJet Limited are of no consequence and would not result in disqualification of the Consortium, with Sh. Ajay Singh as the lead member.

12. It was next submitted by learned Solicitor General that the decision to disinvest Air India Limited, while retaining part of the pre-disinvestment debt

and liability with the Government, is essentially a matter of policy and in the absence of any illegality or arbitrariness being pointed out in the decision

making process, a policy decision is not be amenable to judicial review. It was further submitted that the Government has been working towards

closing of disinvestment at the earliest, as the Government is paying Rs. 20 crores a day to run the Airline. It is expected that apart from providing job

protection to the employees, the new owner will infuse huge capital to refurbish the aircrafts and possibly purchase new aircrafts for the obsolete

ones, so that the Airline can be revived. Any further delay, it was submitted, in closure of the disinvestment, shall cause loss to public exchequer,

create uncertainty amongst the employees and will be against the public interest and thus the petition be dismissed.

13. We have heard Mr. Harish Salve, learned Senior Counsel appearing on behalf of Respondent No.6, who urged that a policy decision for

disinvestment of Air India and its subsidiaries was taken in June, 2017, with the in-principle approval of Cabinet Committee on Economic Affairs. Thus

in essence, this petition is a challenge to a policy decision taken almost five years ago and is highly belated. It was submitted that the successful bidder

in the present case is Respondent No.6, who is not facing any criminal proceedings, in relation to the subject matter of W.P.(C) No.5909/2013, as

sought to be alleged by the Petitioner. Respondent No.6 is admittedly a wholly owned subsidiary of M/s Tata Sons Private Limited, who is also not

facing any criminal proceedings. Both the companies are Indian entities and hence, no question of Foreign Direct Investment Policy violations could

arise. It was pointed out that Mr. Venkataramanan Ramchandran, referred to in the FIR dated 28.05.2018, is no longer a trustee of Tata Trusts, nor

does he hold any office in Respondent No.6 or its parent M/s Tata Sons. It was submitted that Tata has increased its shareholding in AirAsia (India)

Limited from 49% to over 83%. No interim relief was granted to the Petitioner in W.P.(C) No.5909/2013 and in fact, the same was categorically

declined vide order dated 11.02.2014 as also by a subsequent order dated 11.07.2019.

14. Mr. Harish Salve submitted that AirAsia (India) Limited was not a bidder in the present process of disinvestment of Air India. One of the bidders

of the financial bid was a Consortium, whose lead member was Mr. Ajay Singh, in his individual capacity. SpiceJet Limited was neither a member of

the Consortium nor an "Affiliate", on whose net worth, any of the members of the Consortium had relied on, to meet the financial capability

criteria, prescribed under the PIM. It was also submitted that there is not even an iota of evidence or material in the writ petition, which would even

remotely suggest that Respondent No.6 colluded with Mr. Ajay Singh's Consortium or was aware of the Consortium's bidding strategy, as

alleged by the Petitioner.

15. It was argued by Mr. Harish Salve that Petitioner has merely relied upon a news report published in one of the newspapers, wherein it was stated

that the Government has sought Parliament's nod to infuse over Rs. 62,000/- crores to its Company that holds Air India's debts liabilities and

some non-core assets, to contend that the methodology of valuation was illegal. It was submitted that the said article itself explains that the balance

amount includes interest liabilities towards working capital etc. and that of the approximately Rs. 62,000/- crores total debt, Respondent No.6 will take

over Rs. 15,300/- crores and that the Government has already budgeted Rs. 8,351/- crores since 2018, to fund the liabilities that will remain with the

Government SPV, set up to clean the Air India's balance sheet. In any event, none of these assertions establish any arbitrariness, much less

illegality or corruption. Parliamentary control over executive action is a primary form of control in a democracy. Where Parliamentary sanction is

sought for infusion of such a large amount into an Airline, it is obvious that the wisdom of the decision, apart from its different dimensions would be

discussed in the Parliament. The wisdom of the decision and the exact mathematics of how the Government plans to deal with the large mountain of

losses piled up on account of Air India, are matters for Parliamentary control and not for judicial review.

16. It was further submitted that the Letter of Intent was issued to Respondent No.6 on 11.10.2021 and the SPA was signed on 25.10.2021. Tata

Sons (which is the parent company of Respondent No.6) has given Parent Guarantee as part of the transaction. Petitioner has knowledge of

Respondent No.6's participation in the bidding process as far back as in December, 2020, which is clearly evident from Annexure P-2 to the writ

Petition. It is thus prayed that the Petition be dismissed, as the same is totally devoid of merits.

17. Having heard Dr. Subramanian Swamy, Mr. Tushar Mehta, learned Solicitor General appearing for Respondents No.1 to 4 and Mr. Harish Salve,

learned Senior Advocate appearing for Respondent No.6, we see no reason to entertain this Public Interest Litigation, for the following facts and

reasons:-

(I) By way of this Public Interest Litigation, Petitioner seeks directions to quash the present Air India disinvestment process, which has reached its

final stage. The bidding process is complete, in which Respondent No.6 has emerged as the highest bidder. Respondent No.6/ M/s Talace Private

Limited is a wholly owned subsidiary of M/s Tata Sons Private Limited. Cabinet Committee of Economic Affairs has approved the highest price bid of

Respondent No.6 on 08.10.2021, for sale of 100% equity shareholding of Government of India in Air India, along with equity shareholding of Air India,

Air India Express Limited (AIXL) and Air India Transport Services Limited (AISATS).

(II) In the present petition, mainly four grounds have been agitated by the Petitioner which are:-

(a) There is on-going investigation against AirAsia Ltd., where one of the shareholders is AirAsia Investment Ltd., Malaysia, and they have direct and

indirect control over Respondent No.6 and thus Respondent No.6 was disqualified from bidding. The successful bidder/ Respondent No.6, ought to

have been disqualified even on account of the allegations made by the Petitioner in W.P.(C) 5909/2013, claiming breach of Foreign Direct Investment

Policy.

(b) The bidding process was tailor made to facilitate Respondent No.6 in acquiring Air India, by entertaining a bid on behalf of SpiceJet, which was a

planned and collusive strategy. There are various pending litigations against SpiceJet Ltd. as also a winding up order by the Madras High Court.

(c) The methodology of valuation was arbitrary, corrupt, illegal and against public interest, and

(d) Air India which was a profitable enterprise until 2004 and should not have been privatized.

(III) So far as the first challenge is concerned, it is an admitted case of the Petitioner that Respondent No.6 is a wholly owned subsidiary of M/s Tata

Sons Limited. Neither Tata Sons Private Limited nor Respondent No.6 are facing

any criminal proceedings in relation to the subject matter of W.P.

(C) 5909/2013 or in any other matter. Both Respondent No.6 as well as Tata Sons Limited are Indian entities and therefore, no question arises of

violation of Foreign Direct Investment Policy, in any event. Moreover, AirAsia (India) Private Limited has no interest in M/s Talace Private Limited,

who is the highest bidder. For ready reference, the shareholding pattern of Respondent No.6 and AirAsia (India) Private Limited is set out below:-

(IV) No charge sheet has been filed in any criminal proceedings against AirAsia (India) Private Limited or M/s Talace Private Limited or Tata Sons

Limited, as on date, in the matter pertaining to AirAsia and accordingly, no ground for disqualification of Respondent No.6, as per the criteria set out in

the PIM, is made out. Similarly, no ground for disqualification of Respondent No.6 on the basis of the allegations made in writ petition being W.P.(C)

5909/2013, is made out. In fact, in our view, the said petition is wholly irrelevant and unconnected to the present controversy.

(V) So far as second ground, on which this petition has been preferred, that the bidding process was tailor made to facilitate Respondent No.6

acquiring Air India by entertaining a bid on behalf of SpiceJet, is concerned, the same is equally devoid of merit, mainly for the reason that

disinvestment process saw keen competition with seven (7) Expression of Interests, received in December, 2020 and two (2) bidders submitted the

financial bid in September, 2021. One of the bidders, who submitted the financial bid, was a Consortium in which the lead member was Mr. Ajay

Singh but in his individual capacity. SpiceJet Limited was neither a member of the Consortium nor an "Affiliate", on whose net worth, any of the

members of the Consortium had relied on, to meet the financial capability criteria, prescribed under PIM. The criteria for disqualification, as noted

above, has been specifically prescribed in the PIM. The relevant criteria as set out in para 13.2(j) of the PIM has been extracted in the earlier part of

the judgement.

As per the said criteria, only where winding up or insolvency proceedings or other proceedings of similar nature are pending against a member of

Consortium (i.e. IB) and/or Affiliate (only in case a member of Consortium was taking benefit of financial strength of such Affiliate), would such

Consortium be disqualified in terms of PIM. However, in the present case, as

brought out by the Respondents, SpiceJet Limited was not a member of the Consortium and thus any proceedings pending against SpiceJet Limited will be of no consequence and would not result in disqualification of the Consortium, having Mr. Ajay Singh, as the lead member. There is no material on record which would support the allegations of the Petitioner that Respondent No.6 colluded with Mr. Ajay Singh's Consortium or was aware of the Consortium's bidding strategy.

(VI) So far as methodology of valuation is concerned, a reserve price was fixed after receipt of sealed financial bids for the transaction, based on valuation using methodologies, as per established process. The policy decision to disinvest was taken after following transparent procedure through multi-layered decision making, involving Inter-Ministerial Group (IMG), Core Group of Secretaries on Disinvestment (CGD) and the empowered Air India Specific Alternative Mechanism (AISAM) at the apex Ministerial level, with support for the entire process from reputed Transaction Adviser, Legal Adviser and Asset Valuer. The advertisements inviting bids mentioned that the Government would cease to be responsible for loss after the date of disinvestment. In the light of the excessive debt and other liabilities of Air India, arising out of huge accumulated losses, the bidding construct was revised in October, 2020, to allow the prospective bidders an opportunity to resize the balance sheet and increase chances of receiving bids and competition. The bids were invited on the basis of revised construct for total consideration for equity and debt, with minimum cash consideration of 15% for equity (Enterprise Value). It was made clear that the sum of certain identified current and non-current liabilities (other than debt) to be retained in Air India and AIXL would be equal to the sum of certain identified current and non-current assets of Air India and AIXL. The balance debt, over the debt quoted in Enterprise Value bid and excess liabilities, over and above the value of identified current and non-current assets for the pre-disinvestment period would be transferred to an identified Government Company.

(VII) The apprehension of the Petitioner is based upon a news report in one of the newspapers that the Government has sought Parliament's nod to infuse over Rs. 62,000 crores to its Company that holds Air India's debt, liabilities and some non-core assets, whereas in October, 2021,

Department of Investment and Public Asset Management (DIPAM) Secretary had stated that net liability on Government after Air India's

privatization amounted to Rs. 28,844 crores. Mr. Harish Salve, learned Senior Counsel has clearly brought out the exact import of the said article

which is annexed as Annexure P-5 to the memo of the writ petition. The article is self-explanatory and indicates the balance amounts due,

including interest liabilities towards working capital and aircraft loans, lease rentals, owing to the oil companies and to the Airports Authority of India

and does not read in the manner sought to be read by the Petitioner. Thus, there is no substance in these allegations.

(VIII) So far as the last argument is concerned, i.e. Air India which was a profitable enterprise until 2004 should not have been privatized, the same

does not appeal to this Court and is not even germane to the issue in question. As brought out by the Respondents, way back in June, 2017, in-principle

approval was accorded by the Cabinet Committee on Economic Affairs for the process of disinvestment of Air India and its subsidiaries. This was a

policy decision by the Central Government, taken after due deliberations, at various levels and is not open to interference in judicial review by this

Court, exercising jurisdiction under Article 226 of the Constitution of India, more particularly in the absence of any illegality or arbitrariness being

established by the Petitioner, in the decision making process and as rightly contended by Respondent No.6 is a highly belated challenge.

(IX) We also find merit in the stand of the Respondents No. 1 to 4 that each day, approximately Rs. 20 crores are being invested to run the Airline by

the Government. The successful bidder needs to invest huge capital to infuse new life into the concerned Airline. We also find merit in the stand of

Respondents No.1 to 4 that they have been working towards closing of the disinvestment process, at the earliest and any further delay shall cause loss

to the public exchequer, besides creating uncertainty amongst the existing employees, with regard to their future prospects and it needs no gainsaying

that public interest shall be adversely affected.

18. The writ petition is wholly devoid of merit and is accordingly dismissed along with the pending application.