
(2000) 10 KL CK 0033
In the High Court Of Kerala
Case No : O.P. No. 3098 of 2000

Hotel Presidency	Vs	APPELLANT
Cochin International Airport Ltd.		RESPONDENT

Date of Decision : 12-10-2000

Acts Referred:

Citation : (2000) 2 KLJ 988

Hon'ble Judges : M. Ramachandran, J

Bench : Single Bench

Advocate : C.C.Thomas, for the Appellant; N.N. Sugunapalan and Antony Domenic, for the Respondent

Judgement

M. Ramachandran

1. The Cochin International Airport Ltd.,(Ist respondent herein) had invited tenders for establishing and operating a restaurant in the International Terminal of the Airport by Ext.P2 notice from reputed For/Five Star Hotel operators. General conditions of the tender indicated that the bid was for royalty, on percentage of gross turnover, the minimum being specified as 10%. Tender was to remain open for ninety days from the date of opening, evidently for negotiations. The licence was stated to be for five years, and royalty payable quarterly. The petitioner had submitted tender on 22.11.1999. Two other participants also had submitted tenders. It has come out that they had offered 31% of the gross turnover. They were thereafter asked to furnish additional details, however, by Ext.P4 mainly the expected turnover and the expenditure for facilitating the working out of the royalty percentage. The relevant text of the letter is as follows:

The offers received from the agencies for the operation of a restaurant in the international terminal by paying a royalty as a percentage of the gross turnover is under scrutiny. In this connection we would like to have information on the gross turnover estimated and the expenditure under the various heads

considered, by you to work out the royalty percentage, information may be furnished to the extent possible in the format annexed hereto, for year-1, year-2, year-3. Also kindly arrange to furnish the breakup of your investment for setting up the restaurant.

In the format supplied, petitioner had given the projected details for three years, by Ext.P5. However, by Ext.P6 letter dated 14.1.2000, petitioner and two others were required to quote the percentage of turnover, and an offer of minimum royalty, irrespective of the turnover. The letter, to the extent relevant is extracted as follows:

1. The agency will quote the percentage of royalty of annual gross turnover (excluding all government taxes payable) to be paid to CIAL, every quarter. The gross sales would include restaurant sales and value of food served at the security/departure lounge, and other areas inside the terminal for passengers of delayed /disrupted flights.
2. The agency will also offer a minimum royalty amount which will have to be paid to CIAL every quarter, irrespective of the turnover.

Petitioner submitted their offer of 25% annual gross turnover, excluding taxes and minimum royalty of Rs. 61,000/- per month, whichever may be higher. It has, in due course, come out that there was only one more offer and that was from the second respondent. They offered 20% royalty and a sum of Rs. 7,20,000/- for the first year and a gradual increase whereby during the 5th year, annual payment was to be Rs. 12,00,000/- (Ext.P8). Finding that the competitor had quoted figures for five years, the petitioner on the same day, according to them, had quoted a slightly higher figure, as seen from Ext.P8, and for five years.

2. The petitioner had been running the restaurant during the above period, as required by the first respondent, but submits that during the pendency of the petition, they had been directed to discontinue, and the operations are now remaining suspended. The petitioner submits that their willingness to work the restaurant at short notice at the initial stages has been ignored: that they had an excellent back record, that the second respondent had been non-cooperative in the ventures of the first respondent, and the proposal to reject the offer can be understood as a mala fide action.

3. In the first counter-affidavit filed by the first respondent, it was submitted that the Board had decided to issue Ext.P6 taking into account that a minimum amount was to be ensured as royalty, and rental element had been initially overlooked. Of the offers subsequently received, as there was assured income of Rs. 49.20 lakhs from the second respondent as against Rs. 36.60 lakhs from the petitioner, they were sought to be preferred. But it was conceded however that the escalating rate offered by the petitioner was not considered, as it was received after opening the tenders. The relevant portion of the affidavit filed by the Managing Director reads as follows:

It was noted that the offer of M/S.Oberoi Airport Services was better than that of M/s. Presidency, as during the tenure of licence period, CIAL would receive assured minimum royalty of Rs. 49.20 lakhs during the period of contract against an assured royalty of Rs. 36.60 lakhs by M/s. Presidency who offered an yearly escalating rate after the tenders were opened and hence this was not considered.

It was also pointed out that the experience of the second respondent was vast in the area, when compared with that of the petitioner and the latter had intentions of making a higher investment on capital items.

4. An additional counter affidavit had been tiled, supplying a comparative study of the original offers and making available the other documents referred in the earlier affidavit. The second respondent has not filed any affidavits".

5. Mr. C.C. Thomas, counsel for the petitioner, highlighted the contentions in the Original Petition and pointedly referred to the arbitrariness which according to him was visible. He submits that even by the two affidavits it has not been able to substantiate as to why the claims of his client were overlooked. He said that the projected figures had no relevance, and when Ext.P4 was issued information for three years alone were asked to be supplied at all. Ext.P5 had been given in the above context, in the format supplied, and therefore felt aggrieved that they were attempted to be overlooked for the reason that figures for five years were not quoted. He also submitted that the first respondent will be beneficiary ultimately, if offer of the petitioner was accepted; since when the petitioner quoted 25% of the gross earnings as minimum, the figure 65,000/- per month really had no significance, as it would have really worked out to a better price than his competitor.

6. He also referred to the condition in the tender that after opening it, it will be kept open for ninety days. Therefore, when on the date of opening of the tender itself, the petitioner had made an offer, evidenced by Ext.RI(c), which in figures as well as percentage was higher than the quoted price of the second respondent, the rejection on the plea that it cannot be accepted as it was received only after the opening of the tender, left one to guessing as to what was the yardstick of commercial approach of such a public sector enterprise. As to the contentions in the additional counter-affidavit that the second respondent had intention to invest Rs. 40.50 lakhs for the project, Mr. Thomas submitted that it was not only irrelevant, but also unreliable. There was no commitment thereby made, and as already a Star Hotel standard had been expected, the quality of furnishing and the infrastructure was implied, and only because of a gilt edged letter, the first respondent should not have permitted itself to be misled.

7. The first respondent justified their stand that the paramount interest of the institution was always attempted to be adhered to. It was stated that a change had been brought about after floating the original tender, as it was considered that whomsoever was the tenderer, it had to be ensured, that a minimum

amount was receivable. As regards the offer in Ext.RI(c), it was stated that after the respective rates quoted were disclosed, fairness demanded that for the only reason that they had come with an offer so as to gain a march on its competitor they could not change sides. If the offer was accepted, the credibility of the institution would have been at stake.

8. Mr. Antony Dominic, appearing for the second respondent, adopted the contentions raised by Sri. Sugunapalan. He stated that on comparison of merit the petitioner was no where near the second respondent. He pointed out that the petitioner was obliged to quote rates for all the years, and the belated wisdom was suspicious. This affected the root of the matter, and attempt was to corner the contract with sinister motive. He also urged that the possibility of a higher income that may arise out of the higher percentage, remained only a possibility, whereas the offer made by them was irrevocable and the first respondent by accepting the offer was at least sure as to where they really stood.

9. In the face of the claims and counter claims, it is also relevant to note that the CIAL was for the first time giving a contract of the restaurant after inauguration. Therefore, it was only natural that a leeward approach had been taken. One cannot also blame them for inviting a fresh tender as evidenced by Ext.P6, requiring a minimum guaranteed payment. The business proposition come It had gone far from the initial stage of the tender as the expectation originally was very modest and was to get a minimum 10% of the gross income. Also it is understandable that the rental element had been not given due importance earlier. It is safe to presume that as days passed, the first respondent got a better and clear idea of the potential. Therefore, there was nothing illegal about Ext.P6, or the negotiations which had been attempted to.

10. As pointed out by the counsel for the first respondent, in the matter of contracts issued by the Government and other authorities, the objective for tender/negotiations is to find the best talents at the best price. It is a" settled position that a contract need not be awarded only for the reason that the quoted price is attractive. A mature assessment of the competing talents is to be attempted, bearing in mind the capacity of the contractor, his ability to deliver goods, credibility and also the ultimate financial advantage from the deal. Even though a dead line was prescribed by the tender, it was not given undue importance. A fresh tender had been required to be submitted by the petitioner. Simultaneously the tender was to be kept open for three months. These indicated that there was no liability for the respondent to accept the highest offer, and such offer did not at all bind its hands. Therefore, when a very good offer came from the petitioner on the date of the opening of the tender, viz., 22.01.2000, doors need not have been closed to such offer, as it was better than the tender proposed to be accepted. Fairness demanded however that the second respondent also was to be given an opportunity to better their offers. As there was response from only two bidders, nothing stood in the way of negotiations, and it is difficult to understand why a ludewarm attitude was adopted, adopting a

position that as the offer of the petitioner was late by a few hours, their chances were for ever foreclosed. As suggested by the petitioner, as the Managing Director, who was the Chief Executive Officer during the relevant time is not available to give an, explanation, one is left guessing.

11. Nothing adverse has come against the petitioner excepting to state that on a comparison of experience and resources, the second respondent is ahead of them. But that may not be the only relevant factor, as it is not disputed that the petitioner has the requisite qualifications and was in fact running the restaurant for quite some time, though on an adhoc basis. It is the fact that the full potential of the project was not in the comprehension of the first respondent, at the initial stage when the tenders were invited. Now that clear projections have forth come, it is only proper that a more professional approach is made.

12. Therefore, the petitioner, according to me, is on good footing when he submits that the CIAL was not justified in rejecting the highest offer on technical reasons. The petitioner referred to the decision in M/s. Monarch Infrastructure (P) Ltd. Vs. Commissioner, Ulhasnagar Municipal Corporation and Others, , especially paragraphs 10 and It, wherein the principle was laid down as follows:

10. There have been several decisions rendered by this Court on the question of tender process, the award of contract and have evolved several principles in regard to the same. Ultimately what prevails with the courts in these matters is that while public interest is paramount there should be no arbitrariness in the matter of award of contract and all participants in the tender process should be treated alike. We may sum up the legal position thus:

(i) The Government is free to enter into any contract with citizens but the court may interfere where it acts arbitrarily or contrary to public interest.

(ii) The Government cannot arbitrarily choose any person it likes for entering into, such a relationship or to discriminate between persons similarly situate.

(iii) It is open to the Government to reject even the highest bid at a tender where such rejection is not arbitrary or unreasonable or such rejection is in public interest for valid and good reasons.

11. Broadly stated, the courts would not interfere with the matter of administrative action or changes made therein, unless the Government's action is arbitrary or discriminatory or the policy adopted has no nexus with the object it seeks to achieve or is mala fide.

13. As the principles of earlier decisions have been crystalised, I do not think it is relevant for me to refer to the other earlier decisions on the subject. Following the above, a Division Bench of this Court in Salim Associates v. State (W.A. No. 1677/2000) had occasion to hold that even if the contract was awarded in favour of a person, who had not submitted a tender, at the time of invitation, but who came on invitation at a subsequent stage, if the dealings were transparent and intended for the ultimate benefit of the State, for technical reasons, the decision

could not have been faulted.

14. In the above view, I am of the opinion that the rejection of the petitioner's offer could not have been upheld as in the best interests of the institution. Even at the initial stage, they had offered a better package, considering the percentage offered. If the Airport did a good business, the returns were attractive. The first respondent need not have adopted a sceptic approach and satisfied with income assured. Further, in view of Exts. P4 and P5, the petitioner had in fact been misled to submit figures for three years, and their failure to give figures for five years also was therefore not a circumstance to discard their application. The wisdom of awarding contract for five years, at the first instance, also had been an issue of discussion at the bar, but being a matter of policy, at any time the petitioner may be able to bring in appropriate modifications, before the contract finally awarded. Likewise, the first respondent was without any proper basis relying on Ext.RI(c) letter, as regards the proposal for substantial investments, as this was a matter not strictly within the contract conditions. In the aforesaid view, I hold that the decision to award the contract in favour of the second respondent by Ext.P13 is to be subjected to a review. I direct that from the point of Ext.RI(b), laying down the figures as the basis, negotiated contract would be restarted, both in the matter of minimum royalty, and the percentage on the gross income, as has already been decided. Parties on both sides expressed their anxiety in the delay in finalisation of arrangements. Such steps as above ordered may be taken up by the first respondent as early as is possible. The Original Petition is disposed of with the above directions.