
(2015) 07 KL CK 0141

In the High Court Of Kerala

Case No : Writ Petition (C) No. 15447 of 2015 (E)

P.A. Musthafa

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 21-07-2015

Acts Referred:

Citation : (2015) 07 KL CK 0141

Hon'ble Judges : K. Vinod Chandran, J

Bench : Single Bench

Advocate : Abraham Vakkanal, Senior Advocate, Paul Abraham Vakkanal, Dijo Sebastian, Vineetha Susan Thomas, for the Appellant; N. Nagaresh, Assist. S.G. of India and Maheswary G., C.G.C., Advocates for the Respondent

Final Decision : Dismissed

Judgement

K. Vinod Chandran, J—The petitioner who claims to be a licensee with respect to various commercial contracts under the Airports Authority of India [for brevity "AAI"] challenges the decision of the 2nd respondent to cancel the contract notified as per Exhibit P1 tender, in which the petitioner turned out to be the successful bidder. The learned Senior Counsel appearing for the petitioner would contend that, this is the second time the tender in which the petitioner had come out successful has been cancelled, which clearly indicates the mala fides involved in the matter. The petitioner is purposefully kept out of the work which is sought to be awarded by Exhibit P1, is the contention raised and even if no mala fides could be found, the learned Senior Counsel would urge that the same is a fit case in which legal mala fides could be imputed on the respondents. The learned Senior Counsel relies on the following decisions of the Hon'ble Supreme Court - Har minder Singh Arora Vs. Union of India (UOI) and Others, AIR 1986 SC 1527 : (1986) 1 SCALE 1242 : (1986) 3 SCC 247 : (1986) 3 SCR 63 : (1986) 2 UJ 159 , Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others, AIR 2000 SC 801 : (2000) 1 CTC 594 : (2000) 1 JT 481 : (2000) 1 SCALE 346 : (1999) 4 SCALE 477(1) : (2000) 2 SCC 617 : (2000) 1 SCR 505 : (2000) AIRSCW 351 : (2000) 1

Supreme 351 , Jagdish Mandal Vs. State of Orissa and Others, (2008) 2 CTLJ 538 : (2007) 14 SCC 517 : (2006) 10 SCR 606 Supp , Noida Entrepreneurs Association Vs. NOIDA and Others, AIR 2011 SC 2112 : (2011) 6 JT 223 : (2011) 5 SCALE 505 : (2011) 6 SCC 508 : (2011) 8 SCR 25 : (2011) AIRSCW 5014 : (2011) AIRSCW 3154 and Ratnagiri Gas and Power Pvt. Ltd. Vs. RDS Projects Ltd. and Others, AIR 2013 SC 200 : (2013) 115 CLT 562 : (2012) 10 JT 629 : (2012) 10 SCALE 410 : (2013) 1 SCC 524 .

2. The learned counsel appearing for the AAI, however, would contend that there could be no allegation of mala fides and the fact that twice the petitioner came out successful could not be a ground to award tender and the cancellation in both instances, was only an unfortunate circumstance necessitated only by reason of the change in policy. Even at the earlier point of time, this Court has specifically found that there was no mala fides in the decision to cancel the award of the tender. The cancellation which had been effected twice, were on valid grounds. The respondent also relies on Jagdish Mandal (supra).

3. Exhibit P1 is the notification which has been brought out by the AAI for awarding the work of operating Baggage Wrapping Machine in the Departure Terminal of the International Airport. The award, as per Exhibit P1, was to be for a period of three years and carried a license fee of Rs. 4,37,000/- per month. The maximum rate a tendered could quote, was Rs. 200/-, viz., the amount collected for each baggage from the customer. Exhibit P1 notification also provided for 10% escalation after three years. Admittedly three persons applied pursuant to Exhibit P1 notification, which tenders were opened on 11.08.2014. Only two tenderness were qualified in the technical bid. The financial bid of the two successful pre-qualified tenderness, one of whom was the petitioner, was opened ten days hence. The petitioner was found to have bid lower, at the rate of Rs. 97/-. On 01.09.2014, the Committee decided to award the tender to the petitioner, as is evident at Exhibit R3(d) dated 02.09.2014. However, after 43 days on 14.11.2014 a letter is said to have been received by the petitioner, by which the CHQ (Central Headquarters) directed the award of the tender to be kept in hold for reason of there being some change in the guidelines. So much is evident from the communication at Exhibit P3, dated 07.11.2014.

4. The learned Senior Counsel for the petitioner would take me through the Commercial Manual, AAI, Department of Commercial Services. The tender opening process, as is found in Chapter 5 Clause 11 was relied upon to contend that if the tenders have been opened by the station/airport/region and the same is within the acceptance power conferred on the CHQ, then the recommendations in the tender forwarding note along with the Comparative Statement (CS) of technical and financial bids should be sent to CHQ for acceptance by the fastest means of communications. Chapter 6 relating to award of contract also mandates that the decision of the competent authority, herein the CHQ, shall be conveyed immediately with all details. On such communication being made, the commercial department of the concerned airport is mandated to issue letter of

award of the contract immediately on receipt of the approval. The expediency in the matter of sanction of award and the award itself is projected to contend that when tenders were opened and financial bid accepted on 02.09.2014, no deviation could be made on the basis of new guidelines brought out subsequently. If at all new guidelines have been brought in, then that could apply only prospectively and a tender which has culminated in the bid being accepted by a committee, if interfered with, would lead to legal mala fides, is the contention.

5. Admittedly at the earlier point of time also there was a tender notification, pursuant to which the petitioner applied. The two point bid system, being the technical bid and the financial bid, also was followed thereon. There the petitioner was technically qualified; but, however, after that there was a change in policy. A learned Single Judge, considering the writ petition filed by the petitioner in the earlier instance, by Exhibit P10 rejected the ground of mala fides. It was found that no tendered had a legal right to demand the award of work as long as the process of tender has been properly complied with. Considering the fact that a decision has been taken by the AAI in public interest to proceed for re-tender, this court refused to interfere with the same. A Writ Appeal filed by the petitioner against the said judgment also concluded with Exhibit P11, wherein the Division Bench also agreed with the learned Single Judge; both on the question of the grounds of cancellation as also on there being no mala fides, either factual or legal, established in the case. In such circumstance, the petitioner cannot rely on the earlier instance and the rejection made there at to contend that there is a concerted effort to keep the petitioner away from the award of the work.

6. Even when the earlier Writ Appeal was pending, by Exhibit R3(c) amendment to the Eligibility Criteria and Special Conditions for inviting tenders for Baggage Wrapping facilities with Value Added Services for passenger facilitation was brought in, as is indicated in Annexure-I. It is pursuant to Exhibit R3(c) that the present notification at Exhibit P1 was issued. The tender conditions and the date stipulations were as afore noticed. The petitioner had also been the successful tendered whose bid was accepted by the committee as per Exhibit R3(d). There can be no laxity found on the part of the Airport Director, since Exhibit R3(d) dated 02.09.2014 was immediately transmitted to the RHQ (Regional Headquarters).

7. However, in the meanwhile a further review of the policy was initiated at the CHQ level and as per the communication dated 14.10.2014, the acceptance of the tenders and award of the work were directed to be kept in hold. On the question of discrimination alleged by the petitioner on the basis of Exhibit P12, the learned counsel for the AAI would submit that the said tender at the Bangalore Airport was awarded on 23.09.2014 pursuant to the earlier amendment made as per Exhibit R3(c). In Thiruvananthapuram, the notification was delayed only since Writ Appeal was pending before this Court and before the

CHQ took up the matter for consideration, the review in policy was intimated by letter dated 14.10.2014.

8. The review in policy is also said to be necessitated to augment revenue to the AAI. The earlier notification under which the petitioner applied and was found successful mandated only a bid with respect to the amounts to be charged from a passenger and the licence fee was fixed. Hence, whatever be the bid, the revenue of the AAI would be stable without the licence fee having any nexus with the revenue earned by the successful awarded. This was sought to be changed by virtue of the new policy, as has been indicated in Exhibit R3(f). Exhibit R3(f) brought out the following amendments:

"i. The periodicity of the contract to be increased to five years in place of 3 years to recover the cost of the investment of new machines without any exclusivity rights.

ii. The party will be asked to quote highest %age of revenue to be shared with AA1 (the minimum percentage will be 13% of GTO) subject to minimum Annual Guarantee Amount in place of fixed license fee at present. However, minimum guaranteed amount to be fixed by Airport, will have 10% annual escalation and the party will be paying higher of the revenue share or the minimum guaranteed amount.

iii. The machine EPOS should be integrated with AAI intricacy system and should transmit transaction information in real time to coordinate revenue share to AAI".

9. Hence, the licence fee to be quoted as per the new policy had a direct nexus with the revenue earned by the successful awarded. There was also a minimum percentage of license fee fixed with reference to the Gross Turn Over (GTO). The amounts to be collected per baggage by the awarded was specified as fixed, categorized in the various groups to which the Airports belong. The bid was with respect to the licence fee offered by the tenderness, which also provided for a minimum percentage of 13% of the gross turnover, subject to a minimum annual guarantee amount in place of fixed licence fee at present. The petitioner's contention that the same is not passenger friendly and is against public interest cannot be countenanced. The said contention is raised only on the ground that the passengers would have to pay more for availing the baggage wrapping facilities provided by the successful awarded. Public interest does not depend upon the passenger friendliness of the facility, that too definitely not on the expenses that would be incurred by a passenger.

10. Public interest would have to be looked at on balancing considerations of the facilities provided by an Airport and the services offered therein, which involves considerable expenditure. The AAI is a public authority which offers the facilities of air services to passengers at large from its airports as also facilitates various other services. The policy as indicated at Exhibit R3(f) definitely has a direct nexus to the revenue, a successful awarded earns with respect to the commercial transaction it is permitted to carry out in the Airport, for which charges are levied

from the passengers. There cannot be any mala fides, either factual or legal, found in the action of the AAI and the new policy only augments its revenue.

11. True, the petitioner's tender had been twice scuttled and in the present instance after he was found to be successful. The petitioner cannot insist, in the teeth of the change in policy, that the same could be applied only prospectively. The award was never made. The petitioner definitely turned out successful as per the earlier bid conditions and his bid was accepted by the committee which opened the tenders. However, the confirmation/approval from the CHQ was absolutely necessary and before that was made, the award was kept in hold and the policy change was intimated, necessitating a fresh tender notification. The petitioner definitely could apply for such tender; but cannot insist that what has been accepted already by the committee should be accepted by the CHQ also.

12. Harminder Singh Arora (*supra*) was a case in which pursuant to a tender notification for milk supply, a Government Undertaking was given 10% price preference and work awarded despite another tendered having quoted lower. No policy of such price preference to Government Undertaking was in existence at the time of notification and the Government supplier's tender indicated supply of milk of a different specification from that in the notification. On such varied terms not notified having been accepted, the award was set aside. Air India Ltd. (*supra*) restated that State instrumentalities in the matter of award of contracts should not depart arbitrarily from the terms and norms notified; but also emphasized that the financial implication is not the only criteria and there could be further negotiations with the tenderness however in a fair and impartial manner. There the appellant was invited for further negotiations and the contract awarded to them despite their offer being financially detrimental to the awardee. Even then the Hon'ble Supreme Court refused to interfere with the award, since the lowest tendered at no time had agreed to better its offer in which circumstance a negotiation was found to be a futile exercise. Both the decisions on facts were related to the conflicting considerations of one tendered being preferred over another. No such situation exists herein. Noida Entrepreneurs Association (*supra*) also on facts have no similarity. The proposition emphasized again was of the public trust doctrine, vitiating any action of the State or its instrumentalities; if it lacks bona fides or is arbitrary or proved to be a colourable exercise of power.

13. Ratnagiri Gas & Power (P) Ltd. (*supra*) is urged to drive home the ground of mala fides, specifically legal mala fides. On facts it dealt with the rejection of the lowest tendered, by the principal, after the project subsidiary recommendation on the final bid opening, for not satisfying the Basic Qualification Criteria. The contention was repelled. "Legal mala fides" was held to be an action, totally impermissible in law, though the action was one without any malice and taken quite innocently. Here the contention urged is only based on the fact that twice the petitioner was excluded. As was noticed, this Court at the earlier instance found no basis for the allegation of factual mala fides and the cancellation in the

teeth of the policy revision also was upheld. This time over, the policy revision is again found to further the public interest and is also in the best interest of the public authority. The expediency mandated as per the "Commercial Manual" cannot be the sole reason to find a malice in law. Admittedly the award was not made and it could have been made only by the CHQ. The recommendation to the CHQ was made promptly and the CHQ kept it on hold for reason of the impending revision in policy. As for the policy change, Air India Ltd. (supra) is an authority; for the awarder having "carte blanche" in the matter of deciding the parameters in entering into a commercial transaction and the method chosen, to arrive at a decision.

14. The decision which assumes significance in the facts of the case, on which the learned counsel on both sides placed reliance, is Jagdish Mandal (supra), wherein the following questions were indicated to be posed, before; a Court interferes in tender or contractual matters in exercise of power of judicial review:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;

OR

Whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached";

(ii) Whether public interest is affected".

Having posed such questions, this Court is not convinced that any interference could be caused in the instant decision of the AAI.

The writ petition, hence, would stand dismissed, leaving the parties to suffer their respective costs.