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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ W.P.(C) 1049/2008

% Date of Decision : 04.11.2009

FLEMINGO DUTY FREE SHOP P.LTD. & ANR. Petitioners
Through Mr. Arunabh Chowdhury, Mr. Anupam
Lal Das & Mr. Raktim Gogoi, Advocates.

versus

UOI & ORS. Respondents
Through Ms. Anjana Gosain, Advocate for the
respondent Nos. 1 and 2.
Dr. A.M. Singhvi, Sr. Advocate with Mr. Milanka
Chaudhary, Mr. Abhishek Sharma & Mr.
Sarojanand Jha, Advocates for respondent No.3.
Mr. Amit Sibal & Ms. Divya Jain, Advocates for
respondent No. 4.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA

ORDER

1. The petitioner, M/s Flemingo Duty Free Shop Private Limited, had participated in the tenders floated by the respondent No. 3-Delhi International Airport Private Limited (DIAL, for short) in the year 2006 for operating, managing and developing duty free shops at Indira Gandhi International Airport, New Delhi for a period of three years. The petitioner had given a minimum guarantee licence fee of US\$ 22 million per annum.
2. The respondent No. 4, M/s Alpha Future Airport Retail Private Limited, the successful tenderer had given a minimum guarantee licence

fee of US\$ 93 million per annum. Accordingly, an agreement dated 9th November, 2006 was executed between the DIAL and the respondent No.

4. It may be noted that the second highest bidder had offered a minimum guarantee licence fee of US\$ 23 million.

3. The petitioner contends that the respondent No. 3, DIAL subsequently re-negotiated the minimum guarantee licence fee and the same was reduced first to US\$ 54 million per annum and then US\$ 50 million per annum. It is submitted that the said renegotiations are arbitrary and discriminatory and violate Article 14 of the Constitution of India. It is pointed out that the licence fee to be received under the said contract has to be distributed between respondent No. 3, DIAL and the respondent No. 2, Airports Authority of India under revenue sharing arrangement in the ratio of 54.01%, and 45.99% respectively. Learned counsel for the petitioners in this regard has drawn my attention to the minutes of Board of Directors dated 11th September, 2007 in which the failure of the respondent No. 4 to pay the minimum guarantee fee was examined and it was resolved that in spite of implications in terminating the contract, the same was preferred the course of action and the DIAL should not enter into re-negotiations.

4. The writ petition is opposed by International Airport Authority of India and DIAL as well as the respondent No. 4.

5. In the additional affidavit filed by the DIAL, it has been explained

that the matter was referred to the Conciliator in terms of Clause 14.1.1 of the contract. My attention is drawn to the invocation letter dated 22nd November, 2007 and the Statement of Facts and Disputes filed by the respondent No. 4 before the Conciliator.

6. The respondent No. 4 had raised the number of contentions before the Conciliator including failure of the DIAL to provide the area proposed under the contract in breach of Clause 10.1 of the agreement. There were allegations that the petitioner herein was given a preferential location and was not removed, thereby causing loss and serious disadvantage to the respondent No. 4. No doubt, DIAL had opposed and had filed reply to the said Statement of Facts and Disputes but the matter was ultimately resolved with the Conciliator intervening and a settlement agreement dated 7th February, 2008 was signed. Under this settlement agreement, the minimum guarantee licence fee was reduced to US\$ 54 million. Thereafter, there was another conciliation proceedings and the amount was reduced to US\$ 50 million vide settlement agreement dated 8th August, 2008.

7. Reduction in the licence fee nodoubt raises concern and suspicion but there is no evidence or material to suggest that the conciliation proceedings were sham or mere cover up. In the absence of any material it is difficult to hold that the action of the respondent was actuated by extraneous considerations and was malafide.

8. As noticed above, the minimum guarantee licence fee proposed and mentioned by the petitioner in their bid was only US\$ 22 million per annum, which is substantially lower than the minimum guarantee licence fee, which the respondent No. 4 is today paying US\$ 50 million per annum. The second highest licence fee was US\$ 23 million per annum.

9. In these circumstances and also keeping in view the factual background of the case as explained by the respondent No. 3 in their additional affidavit, I do not think the petitioners are entitled to any relief in the present writ petition.

10. The writ petition is accordingly dismissed. There will be no order as to costs.

11. It is clarified that the contention raised by the respondent No. 3 that they are not a State under Article 14 of the Constitution of India, is not decided in the present writ petition.

SANJIV KHANNA, J.

**NOVEMBER 04, 2009
VKR/P**