

*** HIGH COURT OF DELHI : NEW DELHI**

+ LPA No. 296 of 2010

% Decided on: April 28, 2010

1. M/s Otil Hotels & Resorts Pvt. Ltd.
33, J-Block, Community Centre
Rajouri Garden
New Delhi-110 027.

2. Sh. Harjeet Singh Bedi
Director
M/s Otil Hotels & Resorts Pvt. Ltd.
33, J-Block, Community Centre
Rajouri Garden
New Delhi-110 027.

..... Appellants

Through: Mr. M.S. Syali, Sr. Adv. with
Mr. Manjeet Singh Ahluwalia,
Ms.Mahua Kalra, Mr.Pratyush
Jain, Advocates

versus

Indian Railway Catering & Tourism
Corporation Ltd.
9th Floor,
Bank of Baroda Building
16, Parliament Street
New Delhi.

..... Respondent

Through: Mr. Parag P. Tripathi, ASG with
Mr.Saurav Agrawal, Mr. Dinesh
Kumar, Advocates

Coram:

**HON'BLE THE ACTING CHIEF JUSTICE
HON'BLE MS. JUSTICE MUKTA GUPTA**

1. Whether the Reporters of local papers may be allowed to see the judgment? Yes
2. To be referred to Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

MADAN B. LOKUR, ACJ (ORAL)

The Appellants are aggrieved by an order dated 8th April, 2010 passed by a learned Single Judge in WP(C) No. 9566/2009.

2. The Appellants had bid for a contract for catering services with the Indian Railway Catering and Tourism Corporation Ltd. (IRCTC). One of the terms of the tender documents required the Appellants to disclose the following:

“8. Minimum annual turnover, of Rs.3.00 crore, in catering/hospitality and F&B services related business**. Enclose Balance Sheet, and Profit & Loss, of last completed financial year, duly audited by a Chartered Accountant/Published Annual Report.”

**** Existing licensee will be eligible to participate in a tender against the respective units held by them even if they do not fulfill the prescribed turnover criteria for the said catering unit. But the concerned licensee should have rendered satisfactory catering services in the Railways for atleast five years.**

3. It is common ground that the last completed financial year referred to in paragraph 8 above is the financial year 2003-2004.

4. In support of their eligibility, the Appellants submitted their profit and loss account for the purposes of sales tax duly audited by a chartered accountant in which the turnover was shown as about Rs.3.57 crores. This amount included an amount of about Rs.67 lakhs towards stock transfer. On the basis of this document, the Appellants were held to be eligible and being the highest bidder, the Appellants were awarded the contract.

5. Later on, it came to the notice of the Respondent that in the profit and loss account for the purposes of income tax, the Appellants had shown their turn over as about Rs.2.90 crores and, therefore, they were ineligible to make a bid in terms of paragraph 8 quoted above.

6. Consequently, the Appellants were given a show cause notice for cancellation of the contract by the Respondent which was adjudicated on 17th March, 2008. As a result of the adjudication order, the Appellants were debarred from carrying on further business in respect of the contract awarded to them (subject matter of the present appeal) and they were also debarred from making bids in future for a period of two years.

7. Feeling aggrieved by the adverse order passed against them, the Appellants preferred a writ petition being W.P.(C) No. 2732/2008 which was heard and disposed of by a learned Single Judge by an order dated 23rd September, 2008.

8. In that writ petition, it appears that during the course of arguments, it was submitted by learned counsel for the Appellants that the stock transfer of about Rs.67 lakhs was in fact a consignment sale made by the Appellants in Noida and Gurgaon. The documents in support of this submission were annexed along with the rejoinder affidavit filed by the Appellants in that writ petition. It was contended that since those documents had not been taken into consideration, the adverse order passed against the Appellants was vitiated.

9. The learned Solicitor General, who appeared on behalf of the Respondent, seems to have accepted the fact that the documents were not considered by the Respondent and on this basis, the matter was remanded back to the Respondent for reconsideration on merits.

10. On remand, the matter was heard afresh by the Respondent who passed an order dated 6th May, 2009. As a result of that order, it was held that the Appellants were ineligible to participate in the bidding process since their annual turnover was less than the minimum requirement of Rs.3 crores. Accordingly the licence granted to the Appellants in respect of the catering services in respect of two trains was cancelled. Some other consequences also followed but we are not concerned with them for the time being.

11. Feeling aggrieved by the order dated 6th May, 2009 the Appellants preferred a fresh writ petition in this Court which was disposed of by the impugned order dated 8th April, 2010.

12. It may be mentioned that the Appellants seem to have given up the contention before the Respondent that the stock transfers were in fact

consignment sales. This is evident from paragraph 20 of the order dated 6th May, 2009. The new case put up by the Appellants was that although its gross turnover was about Rs.2.90 crores, it had paid sales tax of about Rs.16 lakhs. If this amount is included in the gross turn over, then the turnover of the Appellants for the financial year 2003-2004 would cross Rs.3 crores and, therefore, the Appellants would become eligible for participating in the bidding process.

13. The learned Single Judge did not accept the contention urged by the Appellants and concluded that they could not be permitted to file two different returns before two different statutory authorities and seek to rely upon only one of them to its advantage. The learned Single Judge dismissed the writ petition filed by the Appellants holding that they had misrepresented the facts to the Respondent inasmuch as their turnover was less than Rs.3 crores and therefore the Appellants were ineligible to bid for the catering services in terms of paragraph 8 of the tender documents reproduced above.

14. Feeling aggrieved, the Appellants are now before us under Clause 10 of the Letters Patent.

15. It is submitted by learned counsel for the Appellants that in fact the Appellants had a choice of either filing the audited profit and loss account for the purposes of sales tax or for income tax purposes for showing that they had a turnover in excess of Rs.3 crores. In this case, the Appellants had filed the sales tax documents which show a turnover of Rs.2.90 crores and if Rs.16 lacs paid towards sales tax is added to that, then the turnover would be in excess of Rs.3 crores.

16. Learned counsel for the Appellants relied upon *M/s George Oakes (Pvt.) Ltd. v. State of Madras, AIR 1962 SC 1352* particularly paragraph 6 thereof wherein the Supreme Court accepted that both in England and in America the tax paid must be included in the turnover. According to the Appellants they had rightly included the sales tax paid by them to arrive at a figure in excess of Rs.3 crores as their turnover.

17. We have seen the audited profit and loss account of the Appellants for the financial year 2003-2004 both in respect of sales tax and in respect of income tax. Both the audited profit and loss accounts show the turnover of the Appellants to be about Rs.2.90 crores. However, if Rs.16 lakhs paid as sales tax is added to the profit and loss account

relevant for sales tax purposes, then the gross turnover exceeds Rs. 3 crores. The Appellants, in our opinion, did not have an option of deciding which document to produce before the Respondent to establish their eligibility in the bidding process.

18. In the bidding process, we would have expected the Appellants to come clean and to be fair to the Respondent and disclose that in fact they have filed two separate returns, one for sales tax purposes and one for income tax purposes both based on the audited profit and loss account for the financial year 2003-2004. The Appellants should have, in our opinion, clearly stated before the Respondent that they were relying upon the audited profit and loss account for the purposes of sales tax rather than for income tax purposes. The Appellants should then have left it to the Respondent to take a decision which audited profit and loss account to accept and which to reject. Instead, what the Appellants did was to produce only one of the two profit and loss accounts. In our opinion, the Appellants have not come to the Respondent with clean hands and have in that sense misrepresented the facts of the case and misled the Respondent into believing that the Appellants are in fact eligible to participate in the bidding process.

19. We may also mention that in its order dated 6th May, 2009 the Respondent took into consideration the fact that the Appellants had claimed that stock transfers of about Rs.67 lacs were made. This has been considered by the Respondent in paragraph 16 of the order dated 6th May, 2009 and it shows that the amount of about Rs.67 lacs claimed by the Appellants as consignment sales have been included for arriving at a total of Rs.2.90 crores towards the turnover. The order dated 6th May, 2009 shows that the so-called consignment sales were not so. In fact, the turnover of the Appellants was about Rs.2.90 crores as disclosed by the Appellants in the audited profit and loss account for income tax purposes as well as for sales tax purposes.

20. Under the circumstances, we find that there is no error committed by the learned Single Judge in coming to the conclusion that the Appellants had not disclosed the correct and full facts to the Respondent at the time of the bidding process and had, in a sense, misrepresented the true and correct picture so as to claim eligibility to participate in the bidding process.

21. We do not find any merit in this appeal. It is accordingly dismissed.

ACTING CHIEF JUSTICE

APRIL 28, 2010
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MUKTA GUPTA, J