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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 18th February, 2010
Decision on: 8th April, 2010

W.P.(C) No. 9564 of 2009 & C.M APPL No. 7567 of 2009

OTIK HOTELS & RESORTS PVT LTD
& ANR
..... Petitioners
Through: Mr. Neeraj Kishan Kaul, Senior Advocate with Mr. Sameer Nandwani, Advocate.

versus

INDIAN RAILWAY CATERING & TOURISM CORPORATION LTD. ..... Respondents
Through: Mr. Gaurab Banerjee, ASG with Mr. Sunil Malhotra, Mr. Saurabh Agarwal and Mr. Dinesh Kumar, Advocates.

AND

W.P.(C) No. 9566 OF 2009 & CM APPL No. 7579 of 2009

OTIK HOTELS & RESORTS PVT LTD
& ANR
..... Petitioners
Through: Mr. Neeraj Kishan Kaul, Senior Advocate with Mr. Sameer Nandwani, Advocate.

versus

INDIAN RAILWAY CATERING & TOURISM CORPORATION LTD. ..... Respondents
Through: Mr. Gaurab Banerjee, ASG with Mr. Sunil Malhotra, Mr. Saurabh Agarwal and Mr. Dinesh Kumar, Advocates.

CORAM: JUSTICE S. MURALIDHAR

Signature Not Verified
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Certify that the digital file and physical file have been compared and the digital data is as per the physical file and no page is missing.

1. Whether reporters of local paper may be allowed to see the judgment? ✗
2. To be referred to the report or not? ✓

3. Whether the judgment should be referred in the digest?

JUDGMENT

1. Both the petitions are filed by Otik Hotels & Resorts Pvt. Ltd., and against the Indian Railway Catering & Tourism Corporation Ltd. (IRCTC), and raise similar issues. The lead Petition would be Writ Petition No. 9566 of 2009, the outcome of which will have a bearing on the connected Writ Petition No. 9564 of 2009.

2. On 21st April 2005, IRCTC floated a tender for providing catering services in the No. 2121-22 Sampark Kranti Express. A similar tender was floated on 06th May 2005 in respect of No. 6687-88 Navyug Express. The basic condition to be fulfilled in order to be considered eligible was that the bidder should have a minimal annual turnover of Rs. 3 crores in catering and hospitality and food and beverage related business for the last one year. As proof of this, the bidder had to enclose "Balance Sheet, Profit and Loss Account of last completed year, duly audited by a Chartered Accountant/Published Annual Report."

3. The Petitioner was declared successful bidder for both the bids. The Petitioner submitted a balance sheet, which showed its sales/income for the year 2003-2004 as Rs. 3,57,34,224.76. A photocopy of the balance sheet for the year ending 31st March 2004 has been enclosed with the counter affidavit dated 1st June 2009 filed by IRCTC. The

Profit and Loss Account reveals the sum of Rs. 3,10,75,776 as the sales/income figure for the year ending 31st March 2003 and Rs.3,57,34,224.76 as the sales/income for the year ending 31st March 2004. While the balance sheet is countersigned for M/s Sunil Gupta and Associates, the Chartered Accountants, by their partner, Mr. Rishi K. Gupta on 28th August 2004, the P&L Account has been countersigned by the other partner, Mr. Rakesh K. Gupta. At the time of submission of the bids, an undertaking was given by the Petitioner in which it was stated that in the event of any information being submitted by it being subsequently found to be incorrect, the IRCTC would have the right to summarily reject the bid, cancel the licence or revoke the same at any time, without assigning any reasons.

4. It subsequently came to the notice of the IRCTC that in the Balance Sheet submitted by the Petitioner before the Income Tax Department the figure for sales/income was shown as Rs. 2,90,12,396.68 for the year ending 31st March 2004. By a show cause notice dated 16th October 2007, the Petitioner was asked to explain this discrepancy. In its reply dated 30th October 2007, while not disputing the fact that it had shown the above figure for sales before the Income Tax authorities, the Petitioner sought to explain the difference of Rs. 67,21,828.08 as corresponding to the value of the stock transfer/consignment sales which were exempted from sales tax and, therefore, excluded in the balance sheet filed with the Income Tax Department.

5. By an order dated 17th March 2008, the IRCTC terminated/cancelled the licence issued to the Petitioner for catering services in respect of the two trains, Sampark Kranti Express and Navyug Express, with effect from 9th April 2008 and 7th April 2008 respectively. The IRCTC recorded the fact that the balance sheets submitted before the Income Tax Department were the final accounts of the company as it had been audited by the statutory auditors of the Company M/s Anil Khatri & Co., and were placed in the Annual General Meeting (AGM) of the Petitioner on 24th August 2004. The said audited accounts were adopted by the AGM under Section 173 of the Companies Act, 1956 ('Act'). These figures showed that the turnover of the Petitioner was less than Rs. 3 crores for the year 2003-04. Consequently, it was concluded that the Petitioner did not fulfill the eligibility criteria and therefore its licence was cancelled. Further, since the petitioner had misrepresented the actual sales figures with a view to mislead IRCTC to obtain contracts, the petitioner was banned from all future business dealings with the IRCTC for a period of 2 years from the date of the letter.

6. The Petitioner filed Writ Petition (Civil) No. 2732 of 2008 in this Court in which an interim order was passed on 3rd April 2008 staying the operation of the said order dated 17th March 2008. On a subsequent date, IRCTC sought vacation of the said order stating that the Petitioner continued to take part in and was awarded tenders. However, a statement was made on behalf of the Petitioner, which was recorded in the order dated 21st July 2008, that "the Petitioner will not take part

in future tenders till the next date of hearing." The tenders referred to hereinabove were in respect of three trains, viz., No. 2721-22 (Dakshin Express), No. 2669-70 (Ganga Kaveri) and No. 8101-02 (Muri Express), which were awarded to the Petitioner in the month of May 2008. However, these were made contingent upon the final outcome of the pending writ petition.

7. On 23rd September 2008 a detailed order was passed by this Court disposing of W.P(C) No. 2732 of 2008 by issuing, *inter alia,* the following directions:

> "(a) Petitioner will give a reply to the show cause notice dated 16.10.2007 along with necessary documents, on which the petitioner wishes to rely upon, within a period of two weeks from today.
>
> (b) Respondent will consider the material on record and thereafter give a personal hearing to the petitioner and thereafter pass a speaking order within a period of three weeks from today.
>
> (c) It is agreed that till the matter is finally disposed of, the operation of the impugned order dated 17.03.2008 shall remain partially stayed to the extent that the catering licence with respect to train nos. 6687-6688, Navyug Express and 2121-2122, MP – Sampark Kranti Express shall not be cancelled."

8. Thereafter, a further hearing was given to the Petitioner by IRCTC and the fresh impugned order was passed on 22nd April 2009. The said order referred to the letters written on 14th March 2009 and 31st March 2009 by the IRCTC to the Petitioner requiring the Petitioner to produce the annual report along with the balance sheet filed by it before the Registrar of Companies (ROC). However, the Petitioner did not supply the said documents. After considering all the material produced before it, the IRCTC found that the annual report as filed by the Petitioner with the ROC in the year 2004-05 showed that for the year ending 31st March 2004, the figures for the sales/income was Rs. 2,90,12,396.88. This matched with the figures in the balance sheet and P&L Account submitted by the Petitioner before the Income Tax authorities. It was also noticed that this excluded the consignment transfers. The IRCTC also referred to the figures disclosed by the Petitioner in the Sales Tax returns, which also did not indicate the sales to be in excess of Rs. 3 crores.

9. It is pointed out by the IRCTC that debarment of the Petitioner for a period of two years from the date of the letter dated 17th March 2008, came to an end on 16th March 2010. Although the maximum period of debarment, in terms of clauses 9.1 and 9.2 of the agreement, was one year, no such period was specified under clause 8.1, which concerned the breach of the terms and conditions of the licencee.

10. The learned counsel for the Petitioners submitted that the requirement of the tender condition was only that the copies of the balance sheet as certified by the Chartered Accountant, and not by an Auditor, had to be submitted. Referring to the provisions of Sections 226 and 233(A) of the Act, it is submitted that it is only that Chartered Accountant who is appointed at an AGM who is competent to sign the balance sheet. However, where the requirement is that a report signed by a Chartered Accountant has to be filed than then any Chartered Accountant, even other then the auditor of the company, is competent to sign such report/certificate/balance sheet. It is submitted that now the IRCTC is trying to amend its own tender document and is trying to read the word "Auditor" in place of "Chartered Accountant".

11. The above argument does not impress this court. It is not possible to accept the submission that the Petitioner can give different figures of sales turnover to different statutory authority for the same accounting period. Obviously, when in order to ascertain if the Petitioner was doing sufficient business in the area or not, the IRCTC asked it to produce the Balance Sheet and Profit & Loss Account for the past one year, it means that audited balance sheets and accounts duly certified by the company's auditors be produced.

12. The IRCTC is not concerned with the Petitioner's tax planning. However, it is concerned that the statement made to it in an application for award of a contract be truthful. The IRCTC cannot be expected to

examine if the submission of two different balance sheets, containing different sales figures for the same accounting period, to two different statutory authorities is justified or not. The IRCTC also cannot be expected to form an opinion on whether the explanation offered that the difference constituted the consignment sales figures was a plausible one. As far as the IRCTC is concerned it was able to ascertain that the balance sheet filed by the petitioner for the year 2003-04 showed the figures of sales for the year ending 31st March 2004 as to Rs. 2,90,12,396.88, which was identical to the sales figure submitted for the same period by the petitioner with the Income Tax authority. Therefore, on the Petitioner's own showing it furnished a different balance sheet to the ROC and the IT authorities from the one submitted by it to the IRCTC for the same period.

13. The above documents clearly establish that the Petitioner's turnover was not Rs. 3 crores and above as claimed. The Respondent IRCTC was justified in cancelling the petitioner's bid as it was based on misrepresentation of the facts.

14. As regard the contention that debarment could not be for a period beyond one year, this Court finds that Respondent IRCTC is relying upon Clause 8.1 and not Clauses 9.1 and 9.2. Therefore, there is no restraint on the IRCTC imposing a ban on a person found to be in breach of the conditions of the licence for a period exceeding one year. It was up to the IRCTC to decide for which period such debarment would remain.

15. In the above circumstances, this Court finds no reasonable ground having been made out by the Petitioner to persuade the Court to interfere with the order dated 22nd April 2009 passed by IRCTC. Writ Petition (Civil) No. 9566 of 2009 is accordingly dismissed and the application also stands dismissed. Interim order stands vacated.

16. In Writ Petition (Civil) No. 9564 of 2009, it is not in dispute that the award of catering services for the three trains was made even while Writ Petition (Civil) No. 9566 of 2009 remained to be decided. If, during the said time, three more contracts were awarded to the Petitioner when the validity of the earlier order was still in question, then clearly the Petitioner could not be permitted to participate in a future tender till such time that issue which was in the courts was resolved. Consequently, this Court finds no illegality committed by the IRCTC in cancelling the three contracts awarded to the Petitioners during May 2008. It is clearly understood that such award of contracts would be subject to the outcome of the Writ Petition (Civil) No. 9566 of 2009, since the Petitioners could not otherwise have participated in the bidding while being debarred by the IRCTC.

17. For the aforementioned reasons, this Court does not find merit in Writ Petition (Civil) No. 9564 of 2009 as well.

18. The said Petition is also dismissed. Interim order stands vacated and the application also stands dismissed.

S. MURALIDHAR, J.

8th April, 2010
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