

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

TUESDAY, THE 21ST DAY OF JULY 2015/30TH ASHADHA, 1937

WP(C).No. 15447 of 2015 (E)

PETITIONER(S):

**P.A. MUSTHAFA, AGED 44 YEARS,
PALASSERI HOUSE, KUMMINIPARAMBA P.O.,
MALAPPURAM DISTRICT, KERALA - 673 638.**

**BY SRI.ABRAHAM VAKKANAL, SENIOR ADVOCATE.
ADVS. SRI.PAUL ABRAHAM VAKKANAL,
SRI.DIJO SEBASTIAN,
SMT.VINEETHA SUSAN THOMAS.**

RESPONDENT(S):

- 1. UNION OF INDIA,
REPRESENTED BY ITS SECRETARY,
CIVIL AVIATION DEPARTMENT, NEW DELHI- 110 001.**
- 2. AIRPORT AUTHORITY OF INDIA,
REPRESENTED BY EXECUTIVE DIRECTOR (COMMERCIAL),
CORPORATE OFFICE, RAJIV GANDHI BHAVAN,
SAFDARJUNG AIRPORT, NEW DELHI - 110 003.**
- 3. AIRPORT DIRECTOR,
TRIVANDRUM INTERNATIONAL AIRPORT,
THIRUVANANTHAPURAM -695 008.**
- 4. THE SENIOR MANAGER (COMMERCIAL),
ADMIN ANNEX 1ST FLOOR, DOMESTIC TERMINAL BUILDING,
TRIVANDRUM INTERNATIONAL AIRPORT,
THIRUVANANTHAPURAM - 695 008.**
- 5. REGIONAL EXECUTIVE DIRECTOR,
AIRPORT AUTHORITY OF INDIA, SOUTHERN REGION,
CHENNAI INTERNATIONAL AIRPORT, CHENNAI - 600 027.**

**R1 BY ADV. SRI.N.NAGARESH, ASSIST. S.G OF INDIA.
ADV. SMT.MAHESWARY.G., CGC.
R2 TO R5 BY ADV. SRI.V.SANTHARAM.**

**THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD
ON 14-07-2015, THE COURT ON 21/07/2015 DELIVERED THE
FOLLOWING:**

rs.

APPENDIX

PETITIONER'S EXHIBITS:-

- EXHIBIT-P1- TRUE COPY OF THE NOTICE INVITING TENDER (E-BID NO. 1000004342) ISSUED BY THE 3RD RESPONDENT DATED NIL.
- EXHIBIT-P2- TRUE COPY OF THE QUESTION ASKED BY A FRIEND OF THE PETITIONER UNDER THE RIGHT TO INFORMATION (RTI) ACT DATED NIL.
- EXHIBIT-P3- TRUE COPY OF THE ANSWERS PROVIDED BY THE 3RD RESPONDENT DATED 25/03/2015.
- EXHIBIT-P4- TRUE COPY OF THE QUESTION ASKED BY THE PETITIONER'S MANAGER UNDER THE RIGHT TO INFORMATION ACT DATED NIL.
- EXHIBIT-P5- TRUE COPY OF THE ANSWERS PROVIDED BY THE 3RD RESPONDENT DATED 17/04/2015.
- EXHIBIT-P6- TRUE COPY OF THE COMPARISON CHART OF BID INVITATION NO. 1000004342 DATED NIL.
- EXHIBIT-P7- TRUE COPY OF THE LETTER ISSUED TO THE 3RD RESPONDENT FROM THE OFFICE OF THE 5TH RESPONDENT DATED 16/03/2015.
- EXHIBIT-P8- TRUE COPY OF THE REVISED GUIDELINES ISSUED BY THE AAI, HEADQUARTERS, NEW DELHI DATED 19/02/2015.
- EXHIBIT-P9- TRUE COPY OF THE LETTER ISSUED ON BEHALF OF THE 3RD RESPONDENT TO THE PETITIONER DATED 23/03/2015.
- EXHIBIT-P10- TRUE COPY OF THE JUDGMENT IN WP(C).NO.12613/2013 (B) DATED 19/02/2014.
- EXHIBIT-P11- TRUE COPY OF THE JUDGMENT IN W.A. NO.439/2014 DATED 30/05/2014.
- EXHIBIT-P12- TRUE COPY OF THE E-TENDER ISSUED BY THE MANGALORE INTERNATIONAL AIRPORT DATED 22/05/2014.
- EXHIBIT-P13- TRUE COPY OF THE ANSWERS PROVIDED BY THE AIRPORT DIRECTOR, MANGALORE INTERNATIONAL AIRPORT TO THE QUESTION ASKED OF HIM BY THE PETITIONER'S FRIEND DATED 21/04/2015.

RESPONDENT'S EXHIBITS:-

- EXT.R3A COPY OF THE COMMUNICATION DATED 16/10/2014 ALONG WITH A COPY OF THE LETTER DATED 14/10/2014 ISSUED TO AIRPORT DIRECTORS OF ALL AIRPORTS IN THE SOUTHERN REGION.

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- EXT.R3B COPY OF THE LETTER NO.AAI/SR/M/BWM/TVM/COMML
DATED 16/03/2015.**
- EXT.R3C COPY OF THE COVERING LETTER DATED 07/03/2014
ALONG WITH THE MODIFIED CRITERIA.**
- EXT.R3D COPY OF THE COVERING LETTER NO.AAT/COM/3(32)/2014/630
DATED 02/09/2014 ALONG WITH THE MINUTES OF 508TH LCAC
MEETING HELD ON 01/09/2014.**
- EXT.R3E COPY OF THE LETTER NO.AAT/COM/3(32)/223 DATED 23/03/2015.**
- EXT.R3F COPY OF THE COMMUNICATION NO.COM/COMMERCIAL
INSTRUCTIONS/2015 DATED 24/04/2015 ISSUED BY THE
CENTRAL HEAD QUARTERS OF AAI TO THE 5TH RESPONDENT
AND AIRPORT DIRECTORS INTIMATING THE REVISED ELIGIBILITY
AND SELECTION CRITERIA FOR BAGGAGE WRAPPING FACILITY.**

//TRUE COPY//

P.S. TO JUDGE

rs.

K. Vinod Chandran, J

W.P.(C).No.15447 of 2015-E

Dated this the 21st day of July, 2015

JUDGMENT

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 *malafides* 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 *malafides* could be found, the learned Senior Counsel would urge that the same is a fit case in which legal *malafides* could be imputed on the respondents. The learned Senior Counsel relies on the following decisions of the Hon'ble Supreme Court - ***Harminder Singh Arora v.***

Union of India [(1986) 3 SCC 247], Air India Ltd. v. Cochin International Airport Ltd. [(2000) 2 SCC 617], Jagdish Mandal v. State of Orissa [(2007) 14 SCC 517], Noida Entrepreneurs Association v. Noida [(2011) 6 SCC 508] and Ratnagiri Gas & Power (P) Ltd. v. RDS Projects Ltd. [(2013) 1 SCC 524].

2. The learned counsel appearing for the AAI, however, would contend that there could be no allegation of *malafides* 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 *malafides* 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 tenderer 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 tenderers were qualified in the technical bid. The financial bid of the two successful pre-qualified tenderers, 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 *malafides*, 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 *malafides*. It was found that no tenderer 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 *malafides*, 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 tenderer 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 awardee. 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 awardee. 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 awardee 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 tenderers, 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 awardee. 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 awardee 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 *malafides*, 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 tenderer 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 emphasised that the financial implication is not the only criteria and there could be further negotiations with the tenderers 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 awarder. Even then the Hon'ble Supreme Court refused to interfere with the award, since the lowest tenderer 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 tenderer being preferred over another. No such situation exists herein. ***Noida Entrepreneurs Association*** (*supra*) also on facts have no similarity. The

proposition emphasised again was of the public trust doctrine, vitiating any action of the State or its instrumentalities; if it lacks *bonafides* 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 *malafides*, specifically legal *malafides*. On facts it dealt with the rejection of the lowest tenderer, 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 *malafides*' 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 *malafides* 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.

Sd/-
K.Vinod Chandran
Judge.

vkul/-

[true copy]