

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 02.03.2017

Pronounced on : 23-03-2017

CORAM :

THE HONOURABLE MR. JUSTICE B. RAJENDRAN

Writ Petition No. 15777 of 2016
and

W.M.P. Nos. 13689, 17205, 33437 and 33590 of 2016

M/s. Fleming Duty Free Shop Pvt Ltd
rep. by its Senior Manager C. Ramesh
D73, ITTC Industrial Area
Navi, Mumbai - 400 705
having office at
No.38, First Floor, K.V. Apartments
Poes Garden
Chennai - 600 086

.. Petitioner

Versus

1. Airports Authority of India (Southern Region)
represented by its Regional Executive Director
Office of Regional Executive Director
Operational Offices, Southern Region
Chennai - 600 027

2. AGM Duty Free Selatan Sdn BH
16th Floor, Menara Safaun
50450, Kulalampur, Malaysia
With present office (local) at
Door No.86/A, Royal Complex
Sankari Road, Seetharampalayam
Tiruchengode, Namakkal District
Tamilnadu - 637 209

3. Airports Authority of India
represented by its Chairman
Rajiv Gandhi Bhawan
Safdarjung Airport
New Delhi - 110 003

.. Respondents

Petition filed under Article 226 of The Constitution of India praying for a Writ of Certiorarified Mandamus to call for

the records of the first respondent in Request for Proposal dt.Sept 2015 (E-Bid No.100013196 dated 15.12.2015) culminating in proceedings dated 24.03.2016 and quash the proceedings dated 24.03.2016 and consequently direct the first respondent to declare that the bid submitted by the second respondent pursuant to the Request for Proposal dated Sept.2015 (E-Bid No.100013196 dated 15.12.2015) stands disqualified being contrary to the Threshold Eligibility Criteria 2.2.2 of the Request for proposal dt. Sept. 2015 (E.Bid No.100013196 dated 15.12.2015).

Amended Prayer:- Petition filed under Article 226 of The Constitution of India praying for a Writ of Certiorarified Mandamus to call for the records of the first respondent in Request for Proposal dt.Sept 2015 (E-Bid No.100013196 dated 15.12.2015) culminating in proceedings dated 24.03.2016 and quash the proceedings dated 24.03.2016 and the letter of intent to Award dated 29.03.2016 issued by the first respondent to second respondent and quash the consequential proceedings dated 24.03.2016 and 29.03.2016 and further direct the first respondent to declare the bid submitted by the second respondent pursuant to the Request for the proposal stands disqualified being contrary to the Threshold Eligibility Criteria 2.2.2 of the Request for Proposal dt. Sept 2015 (E-Bid No.100013196 dated 15.12.2015).

(Prayer amended as per the Order dated .03.2017 made in WMP No. 33437 of 2016 in WP No. 15777 of 2016)

For Petitioner : Mr. P.S. Raman, Senior Advocate
for Mr. L. Murali Krishnan

For Respondents : Mr. Vijaynarayan, Senior Advocate
for Mr. Parthiban for R1

Mr. Ar.L. Sundaresan, Senior Advocate
for Mr. R. Nalliappan for R2

ORDER

In this writ petition, the petitioner calls in question the legality and/or validity of the order dated 24th March 2016 passed by the first respondent in and by which the first respondent rejected the objections raised by the petitioner with regard to the documents submitted by the second respondent pursuant to the tender floated by the first respondent for awarding duty free outlets at Madurai Airport.

2. The petitioner company claims to be the first private entity in India to be engaged in the business of operation and

management of Duty Free Shops which sell duty free goods at Airports and Seaports in India. According to the petitioner, they are operating such Duty Free Shops in International Airports at Chennai, Calicut, Mangalore, Goa, Kolkatta, Trichy and Ahamedabad. The petitioner also claims to be operating 28 such duty free shops at various Airports and Seaports in India. While so, during August 2015, the first respondent floated the Request for Proposal (RFP) for Madurai International Airport to design, built, operate and maintain duty free outlets. The petitioner as well as the second respondent participated in the RFP. Subsequent to the tender notification issued during August 2015, the first respondent has also issued various corrigendum. Thereafter, during September 2015, the first respondent cancelled the tender itself which was floated during August 2015 with an intention to float a fresh tender. Accordingly, on 23.09.2015, a paper publication was effected by the first respondent inviting tender applications for running duty free shops in 14 Airports, including Madurai Airport. On the next day namely 24.09.2015, the first respondent issued a second tender notification and it was followed by atleast two corrigendums issued by the first respondent.

3. As far as the petitioner company is concerned, they have participated in the pre-bid meeting, As per the tender conditions and the corrigendums issued thereof, the petitioner made on-line submission of the bids (technical as well as financial) in the e-tender portal before 18th January 2016, the last date indicated by the first respondent for submission of the bids. On 18.02.2016, the petitioner was informed that the financial proposal will be opened on 19.02.2016 at the office of the first respondent.

4. In the meantime, the first respondent issued a similar Request for Proposal (RFP) during September 2015 to design, build, operate and maintain duty free shops at Trivandrum International Airport and after evaluating the bids of the tenderers, the first respondent awarded the tender in favour of the second respondent herein. Challenging the same, the petitioner has filed WP (C) No. 861 of 2016 before the Kerala High Court and obtained an interim stay. The writ petition was filed before the Kerala High Court by specifically contending that the second respondent does not fulfil the threshold eligibility criteria indicated in RFP. On the basis of such pleading, the Kerala High Court directed the first respondent to produce the documentary records of the second respondent to examine the claim of the petitioner. Ultimately, the Kerala High Court dismissed the writ petition on 12.02.2016 against which the petitioner has filed W.A. No. 354 of 2016 before the Division Bench of the Kerala High Court and the appeal is

pending.

5. As far as the present tender notification is concerned, after the financial bids were opened, the first respondent, by an order dated 29.02.2016, selected the second respondent as the highest bidder for running duty free shops at Madurai Airport. The petitioner objected to the selection of the second respondent on the ground that in the website of TEWA, which is the world's biggest duty free and travel retail association, the name of the second respondent is mentioned only as an "Agent/Distributor" and not as a duty free retail operator. On the other hand, the petitioner regularly participates in the Summits held during 2013, 2014 and 2015 and the name of the petitioner is prominently mentioned as a Duty Free and Travel Retail Operator in the relevant visitor list. Further, the second respondent is operating only a duty free retail business at one Seaport namely the Pasir Gudang Ferry Terminal in Malaysia and in the other locations, the second respondent operates only as a distributor, wholesaler and ship-chandler but not as a duty free retailer as required in the RFP. Further, based on the outcome of enquiry conducted by the petitioner, they have submitted an internal analysis report which would clearly reveal that the second respondent has not fulfilled any of the conditions laid down in RFP. Therefore, the petitioner has raised objections objecting to the entertaining of the bid submitted by the second respondent inasmuch as the second respondent is ineligible for awarding the contract. However, the objections raised by the petitioner have been rejected by the first respondent by the communication dated 24.03.2016. Challenging the order of rejection dated 24.03.2016 of the first respondent, the present writ petition has been filed by the petitioner.

6. Mr. P.S. Raman, learned Senior counsel appearing for the petitioner would vehemently contend that as per the RFP issued by the first respondent, the second respondent is not eligible for being considered for award of the tender in their favour. While so, the first respondent, with an oblique motive, has accepted and considered the tender of the second respondent as valid instead of invoking the threshold eligibility criteria to reject the tender of the second respondent. According to the learned Senior counsel for the petitioner, the second respondent has misrepresented the facts and submitted documents which were clearly in contradiction of the conditions laid down in RFP, however, such application of the second respondent has been accepted by the first respondent which would expose the bias attitude on the part of the first respondent. Thus, according to the learned Senior counsel for the petitioner, the first respondent, without examining the documents submitted by the

second respondent properly as to it's authenticity has erroneously awarded the tender in their favour. Such action on the part of the first respondent is nothing but a malafide and arbitrary action intended to favour the second respondent, while depriving the legitimate claim of the petitioner for getting the contract awarded in their favour.

7. The learned Senior counsel for the petitioner has invited the attention of this Court to the documents submitted by the second respondent to contend that the term annual turnover indicated in RFP would mean the total turnover from sale of duty free items to ultimate consumers less applicable sales tax or value added tax. In other words, "turnover from duty free business" means the turnover for the last three financial years. The first respondent ought to have gone into the fact that the second respondent could not have fulfilled the financial annual turnover criteria of US dollar 80,500 from duty free retail business. On the contrary, the second respondent does not have the requisite annual turnover from duty free retail business and what was indicated therein is inclusive of the distribution and sale of retail items. Therefore, the turnover indicated by the second respondent is not the one generated from duty free business alone. It is further contended that the second respondent, while submitting the bid, had altered the format prescribed in respect of annual turnover and that by itself is a sufficient ground to reject the tender of the second respondent. Further, the documents submitted by the second respondent relating to their experience is not on par with requisite standards as specified in RFP. The learned Senior counsel would further vehemently contend that the mere license issued to the second respondent to operate duty free shops cannot be taken into consideration by the first respondent especially when they relate to only one shop claimed to be situated at Pasir Gudant. Even though the second respondent claimed that they are operating 8 duty free shops at various ports, they have not produced any certificate/document to substantiate the same. Further, the licence was not issued by a statutory authority such as Airports Authority/Sea Port Authority. The licence was also not issued in the name of the second respondent but in the name of one AGM Duty Free (Tengah) Sdn.Bhd which is an associate of the second respondent. The second respondent also did not comply with Clause 2.2.2 (A) of RFP wherein it is specifically indicated that the bidder should have experience in operating duty free shop during the preceding 3 years in the duty free business in passenger transport terminal. To comply with the above clause 2.2.2 (A), the second respondent has only submitted statutory auditor certificate pertaining to only one location namely Pasir Gudant and not in respect of the 7 other alleged locations where the second

respondent claims to be operating business. In such circumstances, the learned Senior counsel for the petitioner would only contend that the order of rejection passed by the first respondent on 24.03.2016 and the consequential award of tender in favour of the second respondent have to be set aside.

8. Mr. Vijaynarayan, learned Senior counsel appearing for the first respondent would vehemently oppose the writ petition by relying on the counter affidavit filed on behalf of the respondents 1 and 3. The learned Senior counsel for the first respondent, at the outset, would contend that invitation of tender or the conditions stipulated therein cannot be challenged before the Court of law as they are beyond the scope of judicial review. The petitioner has only challenged the order dated 24.03.2016 by which the objections raised by them as regards the documents produced by the second respondent were rejected. However, the petitioner has not challenged the order dated 29.03.2016 of the first respondent by which tender was awarded in favour of the second respondent. As far as compliance of clause 2.2.2 (A) of the RFP is concerned, the second respondent do possess the requisite threshold eligibility criteria which was carefully analysed and evaluated by the tender evaluation committee, which is an expert body. The committee concluded that the second respondent obtained necessary approval from the Customs Department namely Royal Malaysia Customs Department for selling duty free goods to the ultimate customers and also obtained year to year licence. The second respondent also obtained experience certificate from the Director of Pasir Gudant Passenger Terminal SDN, BHD and these documents establish that the second respondent is having requisite experience for more than three years in running full fledged duty free shop. It is further submitted that the Committee, on scanning the documents submitted by the second respondent, has concluded that the second respondent has obtained permission from the customs authorities to supply duty free goods to crew and passengers departing and arriving through the following terminals/port namely (i) Johor Port, Pasir Gudant (ii) Tanjung Pelapas Port (iii) Tanjung Ponggerang Port (iv) Tanjung Langsat Port (v) Belungkor Ferry Terminal (vi) Senai International Airport and (vii) Kukup Ferry Terminal. Even as regards the annual turnover, the second respondent has produced documents certified by a statutory auditor and it is in compliance with the term "annual turnover" indicated in REP. Even though the petitioner repeatedly harped upon saying that the second respondent has not produced documentary evidence to prove their eligibility, the petitioner has not produced any documents to the contrary. As regards the plea of malafide, the petitioner, though made averments to the effect that the decision to award tender in favour of the second respondent is malafide, they have not

impleaded any of the respondents in the personal capacity. According to the learned Senior counsel for the first respondent, the petitioner is bound to plead and prove the allegations relating to malafide and in the absence of the same, the writ petition itself is not maintainable. The learned Senior counsel for the first respondent would further contend that the tender was floated in public interest to sell duty free goods at Madurai Airport. By virtue of the writ petition filed by the petitioner and the interim order granted thereof, the entire tender processing and the decision taken thereon have been stalled with the result, even after award of the tender, the second respondent could not run the duty free business and it had an indirect bearing on the revenue of the first respondent. In such circumstances, the learned Senior counsel for the first respondent only prayed for dismissal of the writ petition.

9. Mr. Ar.L. Sundaresan, learned Senior counsel appearing for the second respondent would vehemently oppose the writ petition by placing reliance on the counter of the second respondent. At the outset, the learned Senior counsel for the second respondent would contend that the entire e-tender process has been completed and the first respondent has issued licence in favour of the second respondent to operate duty free shops in certain airports under their control. While so, the writ petition is not maintainable. The tendering process has been commenced and completed by the first respondent in a manner known to law and the allegations of favourism or malafide in award of contract in favour of the second respondent is not sustainable. According to the learned Senior counsel for the second respondent, the very same arguments have been advanced by the petitioner as regards the eligibility of the second respondent before the Kerala High Court and it was dismissed. As against the order passed by the Writ Court, a writ appeal has been filed before the Vacation Bench of the Kerala High Court and an interim order was granted.

10. As regards the eligibility of the second respondent, it is contended by the learned Senior counsel for the second respondent that Clause 2.2.1 (g) of the REP stipulates that the tenderer should not have undergone any punishment or proceedings pending against them. In this case, the petitioner herein suffered a punishment on 26.02.2010 for seizure of non-duty paid cigarettes. Similarly, on 13.09.2013, the Commissioner of Customs (Import) cancelled the licence issued to the petitioner at Chennai Sea Port. Therefore, according to the learned Senior counsel for the second respondent, it is the petitioner who is not qualified to participate in the tender by reason of the disqualification suffered by them and consequently, they have no

right to question the eligibility of the second respondent in the tender. Even as regards the tender, the petitioner quoted only 29% and the second respondent quoted 43% of the revenue share and that is also one of the reasons why the first respondent has awarded the contract in favour of the second respondent. In any view of the matter, the petitioner has not challenged the award dated 29.03.2016 in favour of the petitioner and what is challenged is only a order rejecting the objections raised by the petitioner. Further, subsequent to the award passed in favour of the second respondent, the second respondent has paid security deposit of Rs.17,96,738/- to the respondents 1 and 3 on 22.04.2016 and they were also allotted space for establishing duty free shop at Madurai Airport at Arrival and Departure lounge measuring 50 square meters and 40 square meters respectively. However, due to the interim order granted in this writ petition, the second respondent is not in a position to operationalise the duty free business and therefore, the learned Senior counsel for the second respondent would pray for dismissal of the writ petition.

11. The petitioner has filed a reply statement to the counter affidavits filed by the respondents 1 and 3 as well as the second respondent. In the reply statement, the petitioner, while reiterating the averments made in the affidavit filed in support of the writ petition, would contend that in the writ appeal filed before the Kerala High Court, both sides have advanced arguments and orders have been reserved. Therefore, if any order passed in the writ appeal either way may have an impact in the adjudication of the present writ petition and it may operate as an estoppel. It was further stated that during the arguments advanced in the writ petition before the Kerala High Court, it was admitted on behalf of the second respondent that the second respondent has only one place at Pasir Gudang where they have a duty free shop. However, the second respondent mislead the Writ Court and got an order of dismissal. In any event, the writ appeal filed thereagainst has been heard and orders have been reserved by the Division Bench of the Kerala High Court, while so, the Judgment to be passed in the writ appeal will have a bearing on the outcome of this writ petition. In the reply affidavit, it was reiterated that the second respondent did not possess the requisite qualification as per RFP and they are ineligible for being awarded the tender. The rates quoted by the petitioner and the second respondent need not be considered especially when the second respondent is ineligible to participate in the tender. Further, at the time of filing the writ petition, the petitioner was not aware of the letter dated 29.03.2016 issued by the first respondent in favour of the second respondent and therefore the petitioner has filed WMP No. 33437 of 2017 for amending the prayer in the writ

petition by subjecting the letter dated 29.03.2016 also to challenge in this writ petition.

12. I heard the learned Senior counsel appearing on either side and perused the materials placed for consideration. Even though the petitioner did not file the writ petition challenging the order dated 29.03.2016 passed by the first respondent awarding the contract in favour of the second respondent, during the pendency of the writ petition, the petitioner has filed WMP No. 33437 of 2016 seeking to permit them to amend the prayer and WMP No. 33590 of 2016 to dispense with the production of the certified copy of the order dated 29.03.2016. Having regard to the nature of the disputes involved in this case and in the interest of justice, it is appropriate to order WMP No. 33437 and 33590 of 2016. Accordingly, both WMP No. 33437 and 33590 of 2016 are ordered as prayed for.

13. The main ground on which the present writ petition has been filed is that the second respondent is not eligible for participating in the bid inasmuch as the second respondent did not comply with the conditions laid down in RFP. According to the learned Senior counsel for the petitioner, the order dated 29.03.2016, awarding the contract in favour of the second respondent, is a malafide action on the part of the first respondent. When the petitioner fulfilled all the conditions incorporated in the tender notification, entertaining the bid submitted by the second respondent, who is ineligible even to participate in the tender, calls for interference of this Court.

14. On the contrary, the learned Senior counsel for the second respondent contended that the bids submitted by them has been scrutinised by a committee consisting of experts. The committee arrived at a subjective satisfaction with regard to the eligibility criteria and to award the contract in their favour, while so, the petitioner has no locus standi to contend that the second respondent is ineligible to participate in the bids. Above all, the second respondent, in the counter has specifically contended that it is the petitioner who has suffered punishment on 26.02.2010 for seizure of non-duty paid cigarettes and also an order dated 13.09.2013 passed by the Commissioner of Customs (Import) cancelling the licence issued to the petitioner at Chennai Sea Port.

15. Even though the petitioner has filed separate reply affidavit to the counter affidavit of the respondents 1 and 3 as well as the second respondent, in the reply, the petitioner, while denying the various averments made in the counter affidavits, has not chosen to deny the specific allegations raised by the second respondent with respect to the punishment suffered by the petitioner on 26.02.2010 and on 13.09.2013. The

reply affidavit of the petitioner is silent in this regard. Therefore, this Court can only take an adverse inference to the pleadings raised by the petitioner as regards the ineligibility of the second respondent. Furthermore, as regards the eligibility of the second respondent, the first respondent in the counter has specifically enlisted the terminals/ports in which the second respondent is carrying on business of supply of duty free goods to crew and passengers. Further, the first respondent in the counter affidavit has categorically indicated that the second respondent is eligible to participate in the tender in all respects and the documents submitted by the second respondent were also subjected to scrutiny by a committee consisting of experts. In such circumstances, this Court cannot, in this writ petition, adjudicate the disputed facts pleaded by the petitioner on the one hand and the respondents 1 and 2 on the other and come to a conclusion that the averments of the petitioner as regards ineligibility of the second respondent to participate in the tender are sustainable. To be precise, the disputed questions of facts cannot be adjudicated by this Court in exercise of the powers conferred under Article 226 of The Constitution of India.

16. As regards the writ appeal filed by the petitioner and pending before the Division Bench of the Kerala High Court, this Court is of the view that adjudication of the Writ Appeal No. 354 of 2016 by the Division Bench of the Kerala High Court will not have a bearing for disposal of this writ petition based on its own the facts and circumstances involved in this case relating to grant of licence and/or permission to the tenderer to run a duty free shop at Madurai Airport.

17. Above all, this Court is of the view that while adjudicating the disputes involving contractual obligations or disputes, this Court has to exercise refrain. The judicial review exercisable by this Court is limited to find out as to whether the decision arrived at by the respondents is arbitrary, malafide and capricious which has resulted in miscarriage of justice. Though in this writ petition the petitioner has pleaded malafide acts on the part of the first respondent in awarding the contract in favour of the second respondent, the petitioner did not array the first respondent in his personal capacity or proved the specific nature of favouritism as against the first respondent. It is well settled that merely making allegations of malafide is not sufficient and the person who makes such allegation has equally an obligation to prove those allegations to the satisfaction of the Court. In this case, the petitioner has merely raised allegations of favouritism on the part of the first respondent but failed to prove the same.

18. The learned Senior counsel for the petitioner would vehemently contend that first respondent has recommended a team of officials to be sent to various locations for gaining first hand information, on physical verification, about the various facilities made available in other airports, their impact in passenger handling and other factors so as to create such facilities in all the airports under the control of the first respondent. The team was accordingly sent to Malaysian Airport to get necessary help and assistance from the Malaysian Government in regard to conducting inspection in their airport. According to the learned Senior counsel for the petitioner, the inspecting officials were entertained and accommodated by the second respondent and thereafter, the contract was awarded in favour of the second respondent and it creates an impression that there was a nexus between the officials of the first respondent and the second respondent. Therefore, the learned Senior counsel for the petitioner would contend that the contract has been awarded in favour of the second respondent who has accommodated the team of officials of the first respondent during their visit to Malaysia and therefore, the entire tender proceedings are vitiated by acts of nepotism

19. In response, the learned Senior counsel for the first respondent would contend that the tender applications submitted by various tenderers has been scrutinised by a committee consisting of experts in the field. It is not known as to whether the person who has actually participated in the inspection of the Malaysian team and who was allegedly accommodated by the second respondent during such visit was one among the persons who decided to award the contract in favour of the second respondent. It is also not the case of the petitioner that the person who allegedly received favours from the second respondent was the one who awarded the contract in favour of the second respondent or he was the decision making authority to award the contract. The inspection was arranged by the Ministry of Civil Aviation and it has got nothing to do with the selection of the tenderer. In such view of the matter, there may not be any nexus to the team of officials inspecting the various airports and the decision taken to award the contract in favour of the second respondent or it cannot be construed to be an act of nepotism. The alleged imputations made by the learned Senior counsel for the petitioner in so far as the second respondent entertaining the team of officials much prior to the awarding the contract in favour of the second respondent, cannot be construed as a reason to attribute motive or nexus on the part of the first respondent. It is further submitted by the learned Senior counsel for the first respondent that such inspections will be conducted on a regular basis to make better amenities to the travelling passengers and it cannot

be said to be having any nexus with the award of contract in favour of the second respondent.

20. It is not the case of the petitioner that immediately after the tender notification was issued or just before issuing of the tender notification, the team of officials of the first respondent visited the Malaysian Airport where they were accommodated by the second respondent. It is also not specifically pleaded by the petitioner that the persons who were part of the inspecting team were instrumental in taking a decision to award the contract in favour of the second respondent. It is also not made known as to whether a particular person who accompanied the team of officials for inspection was part of the committee which decided to award the contract in favour of the second respondent. In any event, merely a delegation visited Malaysian Airport or interacted with the second respondent during the course of such delegation, that itself will not vitiate the award of contract in favour of the second respondent or it will be a ground for the petitioner to allege nepotism on the part of the first respondent. In any event, it is not pleaded in the affidavit filed in support of the writ petition about a particular person who was part of the delegation to Malaysian Airport and who also formed part of the committee which selected the second respondent to award the contract. It is quite natural that when a team of officials inspected a particular establishment to study and/or gain first hand information about the amenities or facilities made available therein along with other units or establishments, which are in existence in the relevant field, inter alia causing inspection in the establishment of the second respondent herein and later the units or establishments inspected by the officials was one of the participants in the bid floated by them, no motive can be attributed in the process of awarding the tender in favour of a particular establishment to which inspection was caused. In such circumstances, the alleged acts of nepotism or favouritism raised on behalf of the petitioner cannot be accepted.

21. The learned Senior counsel appearing for the first respondent placed reliance on the decision of the Honourable Supreme Court in the case of (Tejas Constructions and Infrastructure Private Limited vs. Municipal Council, Sendhwa and another) (2012) 6 Supreme Court Cases 464 wherein the Honourable Supreme Court held that in the absence of any malafides or arbitrariness in process of evaluation of bids and determination of eligibility of bidders, the High Court, in exercise of powers under Article 226 of The Constitution of India cannot interfere with the award of the contract. In para No.15 and 16 of the said decision, it was held as follows:-

"15. A challenge to the award of the project work in favour of Respondent 2 involved judicial review of administrative action. The scope and the approach to be adopted in the process of any such review, has been settled by a long line of decision of this Court. Reference to all such decisions is in our opinion unnecessary as the principles of law settled therefor are fairly well recognised by now. We may, therefore, refer to some of the said decisions only to recapitulate and refresh the tests applicable to such cases and the approach which a writ court has to adopt while examining the validity of an action questioned before it.

16. In *Tata Cellular vs. Union of India*, this Court emphasised the need to find the right balance between administrative decision to decide the matters, on the one hand, and the need to remedy any unfairness, on the other, and observed:-

(1) The modern trend points to judicial restraint in administrative action

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made

(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted, it will be substituting its own decision, without the necessary expertise, which itself may be fallible

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract

(5) The government must have freedom of contract. In other words, a fair play in the points is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of *Wednesbury* principle of reasonableness (including its other facets pointed out above) but must be free from arbitrariness not affected by bias or actuated by malafides

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

22. Applying the decision rendered by the Honourable Supreme Court mentioned above to the facts of this case, the petitioner repeatedly harped upon the ineligibility of the second respondent to participate in the tender process, which

was denied by the second respondent by contending that they are eligible. The first respondent in the counter affidavit pleaded that the eligibility or otherwise of the tenderers have been scrutinised by a committee constituted by it and the committee consists of expert in the technical field. While so, as mentioned by the Honourable Supreme Court, this Court does not have the expertise to correct the administrative decision and if a review of the administrative decision is permitted, it will amount to substituting it's own decision without the necessary expertise, which itself may be fallible. Therefore, this Court is of the considered view that the eligibility or otherwise of the second respondent has been determined by a committee consisting of experts and the decision taken by such committee does not call for interference by this Court.

23. The learned Senior counsel for the second respondent relied on the decision of the Honourable Supreme Court in (Jagdish Mandal vs. State of Orissa and others) reported in (2007) 14 Supreme Court Cases 517 wherein in Para No.22, it was held as follows:-

"22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and malafides. Its purpose is to check whether choice or decision is made "lawfully" and not to check whether choice or decision is "sound". When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be born in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts, will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderes with imaginary grievances, wounded pride and business rivalry, to make mountains out of a molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years,

or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:-

(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 the relevant law could have reached"

(ii) Whether public interest is affected

If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse (adjustment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action."

24. The above decision was reiterated by the Honourable Supreme Court in the other decision rendered in (Elektron Lighting Systems Private Limited and others vs. Shah Investments Financial Developments and Consultants Private Limited and others) reported in (2015) (12) SCALE 538 wherein it was held that evaluating tenders and awarding contracts are essentially commercial functions of the State in which the principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, the Courts will not, in exercise of judicial power, interfere even if a procedural aberration or error in assessment or prejudice is shown to a tenderer. Such power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. In this case, the respondents have pleaded that because of the present writ petition and the interim order granted thereof, the second respondent could not carry on the business which had an indirect bearing on the revenue of the official respondents and it is taken note of by this Court.

25. Above all, in the decision of the Honourable Supreme Court rendered in (Vijay vs. State of Maharashtra) reported in AIR 2009 Supreme Court 1217 it was categorically held that

judicial review cannot be exercised by this Court with respect to a contractual powers of government or instrumentalities of the government unless there is clear and cogent material made available to show that the decision made by the authorities is an outcome of bias and arbitrary exercise of power. In this case, even though the petitioner raised allegations of malafide and favouritism, such allegations have not been proved to the satisfaction of this Court.

26. To summarise, the tender process has been adopted by the respondents 1 to 3 in a fair and transparent manner in which the eligibility of the second respondent has been assessed by a committee consisting of experts in the field. The second respondent also deposited the security deposit of Rs.17,96,738/- to the respondents 1 and 3 on 22.04.2016 and they were also allotted space for establishing duty free shop at Madurai Airport at Arrival and Departure lounge measuring 50 square meters and 40 square meters respectively. However, due to the interim order granted in this writ petition, the second respondent is not in a position to operationalise the duty free business till date. In such view of the matter, this Court finds no reason to interfere with the award of contract in favour of the second respondent. The writ petition fails and it deserves only to be dismissed.

27. In the result, the writ petition is dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

rsh

WEB COPY

To

1. The Regional Executive Director
Airports Authority of India (Southern Region)
Office of Regional Executive Director
Operational Offices, Southern Region
Chennai - 600 027
2. AGM Duty Free Selatan Sdo BH
16th Floor, Menara Safaun
50450, Kulalampur, Malaysia
With present office (local) at
Door No.86/A, Royal Complex
Sankari Road, Seetharampalayam
Tiruchengode, Namakkal District
Tamilnadu - 637 209
3. The Chairman
Airports Authority of India
Rajiv Gandhi Bhawan
Safdarjung Airport
New Delhi - 110 003

+1cc to Mr.Murali Krishnan, Advocate, S.R.No.18266
+1cc to Mr.Parthiban, Advocate, S.R.No.18102
+1cc to Mr.Naliniyappan, Advocate, S.R.No.18262

WP No. 15777 of 2016

KS (CO)
RS (27/03/2017)

सत्यमेव जयते

WEB COPY