



BEFORE THE MADURAI BENCH OF MADRAS HIGHCOURT
RESERVED ON : 28.11.2017
DELIVERED ON : 13.12.2017
CORAM

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THE HONOURABLE MR.JUSTICE M.VENUGOPAL
and
THE HONOURABLE MR.JUSTICE ABDUL QUDDHOSE

W.A.(MD) Nos.1380 and 1315 of 2017
and
M.P.(MD) Nos.9837, 9220 & 9221 of 2017

W.A.(MD)No.1380 of 2017:

M/s. TDI International India (P) Ltd.,
Represented by General Manager (Sales),
Sir Usman Court,
F-6, First Floor, 63, Eldams Roads,
Alwarpet, Chennai - 600 018 &
Regd. Off. At No.42, Rani Jhansi Road,
New Delhi - 100 055. : Appellant/Petitioner

Vs

1.The Regional Executive Director,
Southern Region, Administrative Bldg,
Chennai International Airport,
Chennai - 600 027.

2.The Airport Director,
Airports Authority of India,
Madurai Airport, Perungudi,
Madurai - 625 022. : Respondents/Respondents

PRAYER: Appeal filed under Clause 15 of Letters Patent, praying to set aside the order dated 07.08.2017 made in W.P.(MD) No.11598 of 2017 insofar as it relates to invitation of fresh bids alone.

Prayer in WP(MD). 11598/ 2017 :

Writ Petition is filed under Article 226 of the Constitution of India, praying this Court To issue a Writ of Certiorarified Mandamus calling for the records in the office order in Letter No. AAI/MDU/C-1(A) dated 15.06.2017 passed by the office of the 2nd Respondent in respect of E-Bid (Tender) No. 1000021231 dated : 22.02.2017 and quash the same and consequently direct the Respondents to award the advertising rights license at Madurai Airport to the Petitioners in the event the Petitioner is found to be the highest bidder (H-1).



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For Appellant

: Mr.Ajmal Khan,
Senior Counsel
for Mrs.R.Maheswari

For Respondents

: Mr.Isaac Mohanlal
Senior Counsel
for Mr.C.Godwin

W.A. (MD) No.1315 of 2017:

1.The Regional Executive Director,
Southern Region, Administrative Building,
Chennai International Airport,
Chennai - 600 027.

2.The Airport Director,
Airports Authority of India,
Madurai Airport, Perungudi,
Madurai - 625 022.

: Appellants/Respondents

Vs

M/s. TDI International India (P) Ltd.,
Represented by General Manager (Sales),
Sir Usman Court,
F-6, First Floor, Old No.27, New 63, Eldams Roads,
Alwarpet, Chennai - 600 018 &
Regd. Off. At No.42, Rani Jhansi Road,
New Delhi - 100 055.

: Respondent/Petitioner

PRAYER: Appeal filed under Clause 15 of Letters Patent, praying to set aside the order dated 07.08.2017 made in W.P.(MD) No.11598 of 2017 on the file of this Court.

Prayer in WP(MD). 11598/ 2017 :

Writ Petition is filed under Article 226 of the Constitution of India, praying this Court To issue a Writ of Certiorarified Mandamus calling for the records in the office order in Letter No. AAI/MDU/C-1(A) dated 15.06.2017 passed by the office of the 2nd Respondent in respect of E-Bid (Tender) No. 1000021231 dated : 22.02.2017 and quash the same and consequently direct the Respondents to award the advertising rights license at Madurai Airport to the Petitioners in the event the Petitioner is found to be the highest bidder (H-1).

For Appellant

: Mr.Isaac Mohanlal
Senior Counsel
for Mr.C.Godwin

For Respondents

: Mr.Ajmal Khan,
Senior Counsel
for Mrs.R.Maheswari

**COMMON JUDGMENT****ABDUL QUDDHOSE, J.**

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The points for consideration in these Writ Appeals are
(a) whether the bidding company, the Appellant in W.A(MD) No.1380 of 2017 are exempted from submitting the forms and annexures required under the terms and conditions of the tender by virtue of the orders passed by the Arbitral Tribunal in favour of the bidding company as well as the Associate Company?

(b) Whether the Learned Single Judge having quashed the impugned letter dated 15.06.2017 and directing the Appellants in W.A(MD) No.1315 of 2017 to accept the bid of the Appellant in W.A. (MD) No.1380 of 2017 was right in permitting the Appellants in W.A. (MD) No.1315 of 2017 to conduct a fresh auction and invite fresh bids?

(c) Whether the impugned letter dated 15.06.2017 suffers from arbitrariness, irrationality, malafides and perversity?

(d) Whether this Court under the given facts and circumstances can exercise judicial review over the decision of the Appellants in W.A.(MD) No.1380 of 2017 to reject the technical bid of the Appellant in W.A.(MD) No.1380 of 2017?

2.W.A.(MD) No.1380 of 2017 has been filed against the order dated 07.08.2017 of the Learned Single Judge in W.P.(MD) No.11598 of 2017, permitting the Respondents to invite fresh bids despite quashing the impugned letter and giving a direction to the Respondents to accept the bid of the Appellant. The Appellant in W.A.(MD) No.1380 of 2017 who is the writ petitioner may henceforth be referred to as the Appellant and the Appellants in W.A.(MD) No.1315 of 2017 who are the Respondents in the Writ Petition may henceforth be referred to as the Respondents in the forthcoming paragraphs.

3.W.A.(MD) No.1315 of 2017 has been filed by the Respondents in W.P.(MD) No.11598 of 2017, against the same order dated 07.08.2017, passed by the Learned Single Judge, quashing the impugned letter dated 15.06.2017 of the Respondents, rejecting the technical bid of the Petitioner in W.P.(MD) No.11598 of 2017 on the ground that they have not submitted Annexure 4 in Form I as per Clause 2.2.1 (d) of the RFP and Annexure 5 in Form I as per Clause 2.2.1 (d) of the RFP.

4.Since both the Writ Appeals arise out of the same common order passed by the Learned Single Judge, the Appeals are being disposed of by a common judgment.

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5. In order to adjudicate on the issues involved in these Writ Appeals, it is necessary to first narrate the brief facts of



the case which has necessitated the filing of these Writ Appeals against the order of the Learned Single Judge.

I.FACTUAL MATRIX:

6.The Appellant is a regular participant in the auctions conducted by the Respondents for various services at various airports in India. In a tender quoted by the Second Respondent for advertising rights concession to design, develop, operate and market, the advertising opportunity in the entire Airport estate at Madurai Airport, the Appellant in W.A.(MD)No.1380 of 2017, who is the Writ Petitioner, participated in the e-auction in accordance with the terms and conditions contained in the Request for Proposal (RFP) issued in February 2017.

7.According to the Appellant, they successfully submitted their bid in response to the aforesaid tender in the prescribed manner and also submitted all the requisite documents to show its technical qualification. On 15.06.2017, the Second Respondent vide its letter to the Appellant informed the Appellant that the technical bid of the Appellant has been rejected/disqualified. Aggrieved by the rejection of the technical bid by the Respondents, the Appellant challenged the rejection by filing a Writ Petition in W.P.(MD)No.11598 of 2017. The Learned Single Judge, agreed with the contention of the Appellant and quashed the impugned proceedings dated 15.06.2017, but permitted the Respondents to either accept the bid of the Appellant or to invite fresh bids. The operative portion of the order of the Learned Single Judge reads as follows:-

"26.In the light of the above facts, since the respondents have not acted fairly and reasonably, this Court could see arbitrariness and mala fides in the decision of the respondents. In that view, the order impugned in this Writ Petition is liable to be set aside and accordingly, it is set aside. The respondents are directed to either accept the bid of the petitioner or they may invite fresh bids"

II.SUBMISSIONS OF THE COUNSELS:

8.According to Mr.Ajmal Khan, Learned Senior Counsel for the Appellants in W.A.(MD)No.1380 of 2017, the Learned Single Judge having quashed the impugned proceedings dated 15.06.2017, ought not to have permitted the Respondents to invite fresh bids. According to the Learned Senior Counsel, the Appellant is aggrieved only by the permission granted by the Respondents to invite fresh bids, despite the findings of the Learned Single Judge were in favour of the Appellant. The Respondents in W.P.(MD)No.11599 of 2017, who are the Appellants in W.A.(MD)No.1315 of 2017 have challenged the impugned order of the Learned Single Judge. The impugned proceedings dated 15.06.2017.

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9.According to the Learned Senior Counsel for the



Appellant in W.A. (MD) No. 1380 of 2017, the Learned Single Judge has given a clear finding that the Respondents have not given due regard to the order passed by the Hon'ble Arbitrators (former Judges of the Hon'ble Supreme Court). Further, apart from quashing the impugned proceedings dated 15.06.2017, the Learned Single Judge ought not to have granted permission to the Respondents to invite fresh bids. The Learned Senior Counsel submitted that pursuant to the impugned order dated 07.08.2017 of the Learned Single Judge, the Respondents have issued a fresh notification dated 14.09.2017, calling for tenders for the same work.

10. The Learned Senior Counsel drew our attention to Clause 2.2.1 (d) in the fresh notification dated 14.09.2017, which reads as follows:

"2.2.1 (d) A Bidder shall be liable for disqualification for submission of its proposal on the Proposal Due Date if such Bidder or its Associate (s) have any amounts including interest outstanding and payable to Authority (the "Outstanding Dues") in respect of Commercial licenses held at airports fully controlled and operated by AAI as on the date of publication of RFP. The existing commercial concessionaires of Authority intending to participate in response to this RFP should have "NIL" Undisputed Outstanding Dues at all the Units of Authority where the participating party's having current/past Concessions up to previous month excluding the month of publication of this RFP.

If the entity participating in any of the tenders is a private or public limited company, partnership Firm or Sole proprietor and any of the Directors/Partners/Sole Proprietor of such company is also a Director of any other company or partner of a concern or a Sole Proprietor having established business with AAI and has outstanding dues payable to the Authority, then the said entity may not be allowed in AAI tenders.

The term "as up to previous month excluding the month of publication of the RFP/Fresh Tender" would mean as follows:

For Example if the RFP/Tender is published on any date in the month of August 2016 the participating existing concessionaire of Authority would need to ensure "Nil" Outstanding balance in respect of Undisputed Amounts as up to the month of July/2016.

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However the disputed amounts which are referred for Conciliation/Arbitration shall not be considered



as Outstanding Dues provided the bidder has furnished an additional Bank Guarantee equivalent to 50% of the value of the disputed amounts in addition to the contract directed Security Deposit already available with Authority. The Contract directed and additional bank guarantees will have to be kept valid till the expiry of the contract/finalization of the Conciliation/Arbitration process respectively.

Provided further, that in the event of an order from a Judicial Court/Arbitral Tribunal staying/withholding the realisation of certain dues the adherence to the above conditions will be exempted and regulated in accordance with those orders.

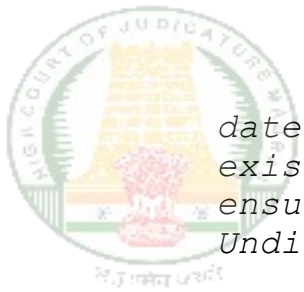
In this respect, the Bidder shall produce and submit a No Outstanding Dues Certificate from the Authority with the Proposal. The Applicant should also submit the details of contracts held (Current and Past), if any, at all AAI controlled airports, in the format as set forth in Annexure-4 of Form-1. The decision of the Authority in respect of Outstanding Dues shall be final and binding on the Bidder."

11. According to the Learned Senior Counsel, the new disqualification Clause is completely different from the disqualification Clause as per the earlier notification dated February 2017, under which the technical bid submitted by the Appellant was rejected and was challenged in W.P.(MD)No.11598 of 2017, before this Court. The disqualification Clause contained in clause 2.2.1(d) in the earlier notification dated February 2017 reads as follows:

"2.2.1 (d) A Bidder shall be liable for disqualification for submission of its proposal on the Proposal Due Date if such Bidder or its Associate (s) have any amounts including interest outstanding and payable to Authority (the "Outstanding Dues") in respect of Commercial licenses held at airports fully controlled and operated by AAI as on the date of publication of RFP. The existing commercial concessionaires of Authority intending to participate in response to this RFP should have "NIL" Undisputed Outstanding Dues at all the Units of Authority where the participating party's having current/past Concessions up to previous month excluding the month of publication of this RFP.

The term "as up to previous month excluding the month of publication of the RFP/Fresh Tender" would mean as follows:

For Example if the RFP/Tender is published on any



date in the month of August 2016 the participating existing concessionaire of Authority would need to ensure "Nil" Outstanding balance in respect of Undisputed Amounts as up to the month of July/2016.

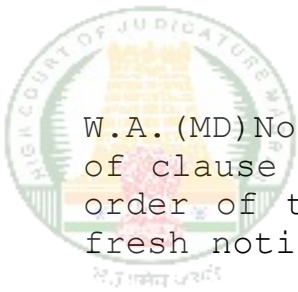
However the disputed amounts which are referred for Conciliation/Arbitration shall not be considered as Outstanding Dues provided the bidder has furnished an additional Bank Guarantee equivalent to 50% of the value of the disputed amounts in addition to the contract directed Security Deposit already available with Authority. The Contract directed and additional bank guarantees will have to be kept valid till the expiry of the contract/finalization of the Conciliation/Arbitration process respectively.

Provided further, that in the event of an order from a Judicial Court/Arbitral Tribunal staying/withholding the realisation of certain dues the adherence to the above conditions will be exempted and regulated in accordance with those orders.

In this respect, the Bidder shall produce and submit a No Outstanding Dues Certificate from the Authority with the Proposal. The Applicant should also submit the details of contracts held (Current and Past), if any, at all AAI controlled airports, in the format as set forth in Annexure-4 of Form-1. The decision of the Authority in respect of Outstanding Dues shall be final and binding on the Bidder."

12. According to the Learned Senior Counsel, under the fresh notification dated 14.09.2017, if the entity participating in any of the tender is a private or public limited company, partnership Firm or Sole Proprietor and any of the Directors/Partners/Sole Proprietor of such company is also a Director of any other company or partner of a concern or a sole proprietor having established business with Airports Authority of India and has outstanding dues payable to the authority, then the said entity may not be allowed in the Airports Authority of India (AAI) tenders. According to the learned Senior Counsel, this disqualification clause was introduced by the Respondents under the fresh notification, only to deprive the Appellants from participating in the tenders conducted by the Respondents.

13. The Learned Senior Counsel for the Appellant in W.A. (MD) No. 1380 of 2017 further submitted that the Appellants in W.A. (MD) No. 1315 of 2017, who are the Respondents in the Writ Petition cannot file an Appeal against the order of the Learned Single Judge having acquiesced to the order of the Learned Single Judge. The Learned Senior Counsel submitted that the Appellants in



W.A.(MD)No.1315 of 2017 are not aggrieved persons for the purpose of clause 12 of the Letters Patent as they have complied with the order of the Learned Single Judge by inviting fresh bids under a fresh notification.

14.The Learned Senior Counsel relied upon two judgments of the Hon'ble Supreme Court reported in (2000) 9 SCC 244 (*Kumud Kumar Vs. Central Bank of India and Another*) and (2007) 8 SCC 793 (*Prabir Banerjee Vs. Union of Indian and others*) in support of this proposition. The above referred judgments of the Hon'ble Supreme Court were cited by the Learned Senior Counsel for the Appellant in W.A.(MD)No.1380 of 2017 to substantiate his arguments that W.A.(MD)No.1315 of 2017 is not maintainable.

15.Insofar as the merits of the case is concerned, the Learned Senior Counsel for the Appellant in W.A.(MD)No.1380 of 2017, drew our attention to the impugned letter dated 15.06.2017 of the Respondents which reads as follows:

AIRPORTS AUTHORITY OF INDIA

Ref:AAI/MDU/C-1(A)

To

M/s TDI INTERNATIONAL INDIA LIMITED

42, RANI JHANSI ROAD,

MM ROAD, NEW DELHI-110 005

TELE-011-42534300/011-425343306

E-MAIL:hijav.bajaj@ tdindia.com

SUB: E-Tender for Request for proposal for Advertising Rights Concession at Madurai Airport- Reg.

Sir,

Reference may please be made to your E-Teader submitted for Request for proposal for Advertising Rights Concession at Madurai Airport.

It is informed that your tender has not been qualified in technical bid based on the following reasons.

You have not submitted the Annexure 4 in Form I as per clause 2.2.1 (d) of the RFP which is compulsory for your company and other associate company also.

You have. not. submitted the Annexure 5 in form I as per clause 2.2.1 (d) of the RFP which is compulsory for your company and other associate company also. You have claimed exemption for this Vide letter dated 06.04.2017 which is accepted in respect of your company but not accepted in respect of your Associate company.



Kindly acknowledge the receipt.

yours faithfully,

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(T.S.JEYAKUMAR)
ASST.MANAGER (COMML.)
FOR AIRPORT DIRECTOR

16.As seen from the impugned proceedings, the technical bid of the Appellant was rejected by the Respondents on the ground that the Associate Company has not submitted Annexure 4 in Form 1 and Annexure 5 in Form 1 as per clause 2.2.1 (d) of the RFP which is compulsory for the Appellant as well as its associate company. Since the Appellant by its letter dated 06.04.2017 sought exemption from the production of the "Outstanding Dues Certificate" in satisfaction of Clause 2.2.1(D) and Form-I (Annexure-4) under the RFP, the Respondents exempted the Appellants from submitting the relevant Forms and Annexures for the Appellant company but did not grant exemption from submission by the alleged Associate company, Bhadra International.

17.According to the Learned Senior Counsel for the Appellant, TDI International (India) Private Limited, the Appellant in W.A(MD)No.1380 of 2017 and Bhadra International (India) Private Limited are two different entities having no connection whatsoever. According to the Learned Senior Counsel, TDI International, the Appellant company is an advertising company whereas the core business of Bhadra International is ground handling services at various airports in India. According to the Learned Senior Counsel, Bhadra International is not an Associate company of TDI International, the Appellant in W.A.(MD)No.1380 of 2017.

18.The Learned Senior Counsel then drew our attention to the tender notification dated February 2017, which is the subject matter of the Writ Petition. He referred to the eligibility criteria for the bidders which is found at clause 2.2 of the tender notification. In particular, he drew our attention to clause 2.2.1 (d) referred to supra. He submitted that as per the said clause, the Respondents shall exempt the bidders from complying with the conditions imposed under clause 2.2.1 (d) if a judicial Court/Arbitral tribunal grants a stay of recovery of the alleged outstanding dues. Under the same clause, the bidder will have to submit the details of the contracts held (current and past) if any at all Airports Authority of India, Madurai Airport, as set forth in Annexure 4 of Form 1. Bhadra International is a joint venture partner of the Appellant in W.A.(MD)No.1380 of 2017 in some of the projects at various airports in India. The core business of the Appellant and the core business of Bhadra International were totally different and since the service of Bhadra International were required for effective implementation of the contracts awarded by the Respondents, the Appellants had to



enter into a joint venture agreement with Bhadra International.

19. According to the Learned Senior Counsel, the Appellants and Bhadra International are two separate entities and one is not a subsidiary of the other or an Associate company as declared by the Respondents. The Learned Senior Counsel drew our attention to the definition of an associate company as contained in the tender notification dated February 2017. As per the tender notification, an associate company is defined as follows:

"Associate company" in relation to another company means a company in which that other company has a significant influence, but which is not a subsidiary company of the company having such influence and includes a joint venture company as per Companies Act, 2013.

Explanation: For the purpose of this clause "significant influence means control of at least twenty percent of total share capital or of business decisions".

20. The Learned Senior Counsel submitted that the explanation to the definition of Associate company makes it clear that significant influence means control of at least 20% of total share capital or of business decisions. According to the Learned Senior Counsel, that requirement is not satisfied as far as Bhadra International is concerned. According to the Learned Senior Counsel, the Appellant and the Respondent company are two different entities and they have no control over each other. Unless and until these conditions are satisfied, Bhadra International cannot be termed as an Associate company of the Appellant. The Appellant company TDI International does not hold any shares in Bhadra International and Bhadra International is also not its subsidiary company.

21. The Learned Senior Counsel relied upon the judgment of the Hon'ble Supreme Court reported in (2002) 9 SCC 463 (Alembic Glass Industries Ltd. Vs. Collector of Central Excise & Customs) and referred to paragraph 7 of the said judgment which reads as follows:

"7. In our view, this is the heart of the matter. The Shareholders of a public limited company do not by reason only of their shareholding, have an interest in the business of the company. Equally, the fact that two public limited companies have common Directors does not mean that one company has an interest in the business of the other. It is, therefore, not possible to uphold the conclusion of the Tribunal that the assessee and the chemical company were related persons. This being so, it is unnecessary to go into the alternate arguments advanced on behalf of the assessee."



22. The Learned Senior Counsel also relied upon the judgment of the Hon'ble Supreme Court reported in (2010) 5 SCC 306 (*Indowind Energy Limited Vs. Wescare (India) Limited and another*) and referred to paragraph 17 of the said judgment, which reads as follows:

"17. It is not in dispute that Subuthi and Indowind are two independent companies incorporated under the Companies Act, 1956. Each company is a separate and distinct legal entity and the mere fact that the two Companies have common shareholders or common Board of Directors, will not make the two Companies a single entity. Nor will the existence of common shareholders or Directors lead to an interference that one company will be bound by the acts of the other. If the Director who signed on behalf of Subuthi was also a Director of Indowind and if the intention of the parties was that Indowind should be bound by the agreement, nothing prevented Wescare insisting that Indowind should be made a party to the agreement and requesting the Director who signed for Subuthi also to sign on behalf of Indowind."

23. According to the Learned Senior Counsel, as seen from the above judgments, just because Directors are common, the Company will not become an Associate company.

24. According to the Learned Senior Counsel, even if this Court comes to the conclusion that Badhra International is an Associate company, the Respondents ought not to have rejected their technical bid since the Arbitrator, Hon'ble Mr. Justice Deepak Verma, former Judge of the Hon'ble Supreme Court of India, in the arbitration dispute between the Petitioner and the Respondents has passed the following order in favour of the Appellant in an application filed under Section 17 of the Arbitration and Conciliation Act, 1996. Paragraph 24 of the order passed by the Arbitrator reads as follows:

"24. In the light of the foregoing discussions, Claimant's IA's are partly allowed and it is directed as and when Tenders are floated by the Respondent for different Airports, Claimant would be allowed to participate in the same, subject to its furnishing Bank Guarantee for 50% of the said or alleged dues of the Respondent for that particular Airport, Meaning thereby that whatever amount for that particular Airport is found to be due against the Claimant, only towards licence fees by the Claimant, Bank Guarantees to the extent of 50% of the same would be furnished by the Claimant. On such furnishing of the Bank Guarantees to the extent of 50% of the alleged dues



towards licence fees, claimant would be permitted to participate in the Tender process. In other words, it would mean that Claimant has furnished "No Objection Certificate" in favour of the Respondent by compliance hereinabove. Thus, claimant's Bid shall not be rejected on the ground of not filing of "No Objection Certificate" by the claimant."

25. According to the Learned Senior Counsel, the Appellant has made a claim against the Respondents for a sum of Rs.860 Crores. The Learned Senior Counsel also submitted that Badhra International is also protected from the tender requirements by order of the sole Arbitrator Mr. Justice Surinder Singh Nijjar, Former Judge of the Hon'ble Supreme Court of India, in the Arbitration claim between Badhra International India Private Limited and the Respondent. He referred to the order dated 25.08.2016 passed by the Arbitrator under Section 17 of the Arbitration and Conciliation Act, 1996, which reads as follows:

"Having considered the entire matter, I am of the considered opinion that the prayer made by the Claimants cannot be permitted in so many terms. However, at the same time, I am of the opinion that till the matter is finally adjudicated, it is necessary to protect the interests of both the parties. In my opinion, interests of justice would be sub-served by directing the respondents not to take any coercive steps against the claimants. At this stage, Mr. Tushar Mehta, ASG has submitted that he has advised the respondents to voluntarily not to take any coercive steps, and this Tribunal need not pass any directions as indicated above. I am of the opinion that the course adopted by Mr. Tushar Mehta is reasonable. On the advice of Mr. Mehta, Mr. Ajay Shiva, GM (Ops), AAI, has stated that no coercive measures would be taken against the claimants during the pendency of these proceedings. The Statement and advice of Mr. Mehta is wholly without prejudice to the rights and contentions of the respondents and will have no effect at the time of rendering of the final or any interim award."

26. The Learned Senior Counsel also drew our attention to another order dated 27.01.2017 passed by the same Arbitrator and the relevant portion of the order reads as follows:

"However, I cannot lose sight of the fact that the Claimants is still performing Ground handling services, which is generating revenue. Surely, the claimants cannot be permitted to perform such services without paying royalty. Therefore, keeping in view the equities involved, I direct the Claimants to pay royalty @ 13% of the gross revenue generated henceforth. Although, the respondents have made a



prayer that they may be directed to pay the service tax also on the aforesaid amount, I am not inclined to accept their prayer.

It is made clear that application for clarification stands dismissed on the ground that Tribunal has no power to review its earlier order dated 25.08.2016. The direction to pay 13% royalty henceforth, is passed keeping in view the equities during the pendency of these proceedings. The claimants will start making the payments of the aforesaid amount @ 13% with effect from 1st January, 2017. The amount shall be deposited on/or before 15th of each succeeding month.

It is clarified that this order will apply to both the Licenses held by the Claimants at all the Airports.

The application of respondent is disposed of accordingly in terms of aforesaid directions."

27. Since Badhra International has complied with the orders passed by the Arbitrator on 25.08.2016 and 27.01.2017, they are protected as per the proviso to Clause 2.2.1 (d) of the RFP.

28. According to the Learned Senior Counsel, both the Appellant as well as Bhadra International by virtue of the orders passed by the Arbitral Tribunal are exempted from adhering to the conditions mentioned in Clause 2.2.1 (d) of the RFP.

29. The Learned Senior Counsel then drew our attention to Form I Annexure 4 and the letter of undertaking dated 09.05.2017 given by the Appellant to the Respondents and submitted that there is no justification to withhold opening of the financial bid of the Appellant. The Learned Senior Counsel for the Appellant submitted that there is no necessity for the Appellant to submit outstanding due certificate in view of the orders passed by the Hon'ble Arbitral Tribunal. According to him, the reason for non-submission of Form I Annexure 4 is fully explained by the Appellant.

30. The Learned Senior Counsel also relied upon the undertaking letter dated 06.04.2017 of the Appellant and the relevant portion reads as follows:

"5. It is therefore established beyond doubt that on the strength of above facts and Arbitral orders on record, the requirement to submit "Outstanding Dues Certificate" in satisfaction of Clause 2.2.1 (d) and Annexure-4) of this RFP by TDI International India (P) Limited being the existing AAI concessionaire and in respect of its perceived to be



Associate Company Bhadra International India (P) Limited stands complied with legally, logically and justifiably."

31.The Learned Senior Counsel then drew our attention to the order of the Learned Single Judge in W.P.(MD)No.11598 of 2017 and referred to paragraphs 24, 25 and 26, which reads as follows:

"24.Though the petitioner claims to be the successful bidder by quoting Rs.360/- per sq. feet, there is no material to establish the same. In the counter also, it is stated that due to human error, the financial bid of the petitioner was opened, however, the bid amounts of the tenderers have not been mentioned. If the claim of the petitioner is true, then it would benefit the respondents in getting more revenue.

25.In the instant case, in my considered view, the respondents have not given due regard to the order passed by the Hon'ble Arbitrators (Former Judges of the Supreme Court), but simply ignored them. The orders have not been implemented in letter and spirit. The respondents cannot plead ignorance, because the first respondent is a party to the Arbitration proceedings and further in the letter, dated 06.04.2017 reference is made to the orders of the Hon'ble Arbitrators.

"26.In the light of the above facts, since the respondents have not acted fairly and reasonably, this Court could see arbitrariness and mala fides in the decision of the respondents. In that view, the order impugned in this Writ Petition is liable to be set aside and accordingly, it is set aside. The respondents are directed to either accept the bid of the petitioner or they may invite fresh bids"

32.According to the Learned Senior Counsel, the rejection of the technical bid of the Appellant in respect of Madurai International Airport is arbitrary and is illegal. According to him, the Learned Single Judge has rightly given a finding in favour of the Appellant but unfortunately he has permitted the Respondents to invite fresh bids, which is erroneous and irrational.

33.The Learned Senior Counsel then referred to the following decisions of the Hon'ble Supreme Court giving powers of judicial review to the Courts to interfere in contractual matters:-

<https://hcservices.ecourts.gov.in/hcservices/> (2006) 10 SCC 236 (Noble Resources Ltd Vs. State of Orissa and another) and referred to paragraphs 15 and 26 of the said judgment which reads as follows:



"15. It is trite that if an action on the part of the State is violative of the equality clause contained in Article 14 of the Constitution of India, a writ petition would be maintainable even in the contractual field. A distinction indisputably must be made between a matter which is at the threshold of a contract and a breach of contract; whereas in the former the Court's scrutiny would be more intrusive, in the latter the court may not ordinarily exercise its discretionary jurisdiction of judicial review, unless it is found to be violative of Article 14 of the Constitution. While exercising contractual powers also, the Government bodies may be subjected to judicial review in order to prevent arbitrariness or favouritism on their part. Indisputably, inherent limitations exist, but it would not be correct to opine that under no circumstances a writ will lie only because it involves a contractual matter.

.....

26. In ABL International Ltd., this Court opined that on a given set of facts, if a State acts in an arbitrary manner even in a matter of contract, a writ petition would be maintainable. It was opined:

"23. It is clear from the above observations of this Court, once the State or an instrumentality of the State is a party to the contract, it has an obligation in law to act fairly, justly and reasonably which is the requirement of Article 14 of the Constitution of India. Therefore, if by the impugned repudiation of the claim of the Appellants the first respondent as an instrumentality of the State has acted in contravention of the abovesaid requirement of Article 14, then we have no hesitation in holding that a writ court can issue suitable directions to set right the arbitrary actions of the first respondent."

ii) (1990) 3 SCC 752 (Mahabir Auto Stores and others Vs. Indian Oil Corporation and others) and referred to paragraphs 12, 13 and 18 which reads as follows:

"12. It is well settled that every action of the State or an instrumentality of the State in exercise of its executive power, must be informed by reason. In appropriate cases, actions uninformed by reason may be questioned as arbitrary in proceedings under Article 226 or Article 32 of the Constitution. Reliance in this connection may be placed on the observations of this Court in Radha Krishna Agarwal Vs. State of Bihar. It appears to us, at the outset



that in the facts and circumstances of the case, the respondent company IOC is an organ of the State or an instrumentality of the State as contemplated under Article 12 of the Constitution. The State acts in its executive power under Article 298 of the Constitution in entering or not entering in contracts with individual parties. Article 14 of the Constitution would be applicable to those exercises of power. Therefore, the action of State organ under Article 14 can be checked. But Article 14 of the Constitution cannot and has not been construed as a charter for judicial review of State action after the contract has been entered into, to call upon the State to account for its actions in its manifold activities by stating reasons for such actions. In a situation of this nature certain activities of the respondent company which constituted State under Article 12 of the Constitution may be in certain circumstances subject to Article 14 of the Constitution in entering or not entering into contracts and must be reasonable and taken only upon lawful and relevant consideration; it depends upon facts and circumstances of a particular transaction whether hearing is necessary and reasons have to be stated. In case any right conferred on the citizens which is sought to be interfered, such action is subject to Article 14 of the Constitution, and must be reasonable and can be taken only upon lawful and relevant grounds of public interest. Where there is arbitrariness in State action of this type of entering or not entering into contracts, Article 14 springs up and judicial review strikes such an action down. Every action of the State executive authority must be subject to rule of law and must be informed by reason. So, whatever be the activity of the public authority, in such monopoly or semi-monopoly dealings, it should meet the test of Article 14 of the Constitution. If a governmental action even in the matters of entering or not entering into contracts, fails to satisfy the test of reasonableness, the same would be unreasonable. In this connection reference may be made to *E.P. Royappa Vs. State of Tamil Nadu*, *Maneka Gandhi Vs. Union of India*, *Ajay Hasia Vs. Khalid Mujib Sehravardi*, *R.D. Shetty Vs. International Airport Authority of India* and also *Dwarkadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay*. It appears to us that rule of reason and rule against arbitrariness and discrimination, rules of fair play and natural justice are part of the rule of law applicable in situation or

<https://hcservices.ecourt.gov.in/hcservices/> State instrumentality in dealing with citizens in a situation like the present one. Even though the rights of the citizens are in the nature of



contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural justice, equality and non-discrimination in the type of the transactions and nature of the dealing as in the present case.

13. The existence of the power of judicial review however depends upon the nature and right involved in the facts and circumstances of the particular case. It is well settled that there can be "malice in law". Existence of such "malice in law" is part of the critical apparatus of a particular action in administrative law. Indeed "malice in law" is part of the dimension of the rule of relevance and reason as well as the rule of fair play in action.

.....

18. Having considered the facts and circumstances of the case and the nature of the contentions and the dealing between the parties and in view of the present state of law, we are of the opinion that decision of the State/public authority under Article 298 of the Constitution, is an administrative decision and can be impeached on the ground that the decision is arbitrary or violative of Article 14 of the Constitution of India on any of the grounds available in public law field. It appears to us that in respect of corporation like IOC when without informing the parties concerned, as in the case of the Appellant firm herein on alleged change of policy and on that basis action to seek to bring to an end to course of transaction over 18 years involving large amounts of money is not fair action, especially in view of the monopolistic nature of the power of the respondent in this field. Therefore, it is necessary to reiterate that even in the field of public law, the relevant persons concerned or to be affected, should be taken into confidence. Whether and in what circumstances that confidence should be taken into consideration cannot be laid down on any strait-jacket basis. It depends on the nature of the right involved and nature of the power sought to be exercised in a particular situation. It is true that there is discrimination between power and right but whether the State or the instrumentality of a State has the right to function in public field or private field is a matter which, in our opinion, depends upon the facts and circumstances of the situation, but such exercise of power cannot be



dealt with by the State or the instrumentality of the State without informing and taking into confidence, the party whose rights and powers are affected or sought to be affected, into confidence. In such situations most often people feel aggrieved by exclusion of knowledge if not taken into confidence."

iii) (2004) 3 SCC 553 (ABL International Ltd. And another Vs. Export Credit Guarantee Corporation of India Ltd. And others) and referred to paragraphs 10, 16 and 23, which reads as follows:

"10. It is clear from the above observations of this Court in the said case, though a writ was not issued on the facts of that case, this Court has held that on a given set of facts if a State acts in an arbitrary manner even in a matter of contract, an aggrieved party can approach the court by way of writ under Article 226 of the Constitution and the Court depending on facts of the said case is empowered to grant the relief. This judgment in K.N. Guruswamy Vs. State of Mysore was followed subsequently by this Court in the case of D.F.O. Vs. Ram Sanahi Singh wherein this Court held:

"By that order he has deprived the respondent of a valuable right. We are unable to hold that merely because the source of the right which the respondent claims was initially in a contract, for obtaining relief against any arbitrary and unlawful action on the part of a public authority he must resort to a suit and not to a petition by way of a writ. In view of the judgment of this Court in K.N. Guruswamy case there can be no doubt that the petition was maintainable, even if the right to relief arose out of an alleged breach of contract, where the action challenged was of a public authority invested with statutory power."

.....

16. A perusal of this judgment though shows that a writ petition involving serious disputed questions of facts which requires consideration of evidence which is not on record, will not normally be entertained by a Court in the exercise of its jurisdiction under Article 226 of the Constitution of India. This decision again, in our opinion, does not lay down an absolute rule that in all cases involving disputed questions of fact the parties should be relegated to a civil suit. In this view of ours, we are supported by a judgment of this Court in the case of Gunwant Kaur Vs. Municipal Committee, Bhatinda where dealing with



such a situation of disputed questions of fact in a writ petition this Court held:

"14. The High Court observed that they will not determine disputed question of fact in a writ petition. But what facts were in dispute and what were admitted could only be determined after an affidavit-in-reply was filed by the State. The High Court, however, proceeded to dismiss the petition in limine. The High Court is not deprived of its jurisdiction to entertain a petition under Article 226 merely because in considering the petitioner's right to relief questions of fact may fail to be determined. In a petition under Article 226 the High Court has jurisdiction to try issues both of fact and law. Exercise of the jurisdiction is, it is true, discretionary, but the discretion must be exercised on sound judicial principles. When the petition raises questions of fact of a complex nature, which may for their determination require oral evidence to be taken, and on that account the High Court is of the view that the dispute may not appropriately be tried in a writ petition, the High Court may decline to try a petition. Rejection of a petition in limine will normally be justified, where the High Court is of the view that the petition is frivolous or because of the nature of the claim made dispute sought to be agitated, or that the petition against the party against whom relief is claimed is not maintainable or that the dispute raised thereby is such that it would be inappropriate to try it in the writ jurisdiction, or for analogous reasons.

15. From the averments made in the petition filed by the Appellants it is clear that in proof of a large number of allegations the Appellants relied upon documentary evidence and the only matter in respect of which conflict of facts may possibly arise related to the due publication of the notification under Section 4 by the Collector.

16. In the present case, in our judgment, the High Court was not justified in dismissing the petition on the ground that it will not determine disputed question of fact. The High Court has jurisdiction to determine questions of fact, even if they are in dispute and the present, in our judgment, is a case in which in the interests of both the parties the High Court should have entertained the petition and called for an affidavit-in-reply from the respondents, and should have proceeded to try the petition instead of relegating the Appellants to a separate suit."



.....

23. It is clear from the above observations of this Court, once the State or an instrumentality of the State is a party of the contract, it has an obligation in law to act fairly, justly and reasonably which is the requirement of Article 14 of the Constitution of India. Therefore, if by the impugned repudiation of the claim of the Appellants the first respondent as an instrumentality of the State has acted in contravention of the abovesaid requirement of Article 14, then we have no hesitation in holding that a writ court can issue suitable directions to set right the arbitrary actions of the first respondent. In this context, we may note that though the first respondent is a company registered under the Companies Act, it is wholly owned by the Government of India. The total subscribed share capital of this Company is Rs.2,50,000 shares out of which 2,49,998 shares are held by the President of India while one share each is held by the Joint Secretary, Ministry of Commerce and Industry and Officer on Special Duty, Ministry of Commerce and Industry respectively. The objects enumerated in the memorandum of association of the first respondent at para 10 reads:

"To undertake such functions as may be entrusted to it by the Government from time to time, including grant of credits and guarantees in foreign currency for the purpose of facilitating the import of raw materials and semi-finished goods for manufacture or processing goods for export."

Para 11 of the said object reads thus:

"To act as agent of the Government, or with the sanction of the Government on its own account, to give the guarantees, undertake such responsibilities and discharge such functions as are considered by the Government as necessary in national interest."

iv) (2007) 14 SCC 517 (Jagdish Mandal Vs. State of Orissa and others) and referred to paragraphs 21, 21.2, 21.5 and 22, which reads as follows:

"21. We may refer to some of the decisions of this Court which have dealt with the scope of judicial review of award of contracts.

.....

<https://hcservices.ecourts.gov.in/hcservices/> 21.2. In Tata Cellular Vs. Union of India, this Court referred to the limitations relating to the scope of judicial review of administrative decisions



reasonably, fairly and in public interest in awarding contract. At the same time, no person can claim a fundamental right to carry on business with the Government. All that he can claim is that in competing for the contract, he should not be unfairly treated and discriminated, to the detriment of public interest."

22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. 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 borne 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 tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of 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

<https://hcservices.ecourts.gov.in/hcservices/> 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.

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 (allotment 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."

34. After placing reliance on the above said judgments, the Learned Senior Counsel submitted that judicial review of administrative action is intended to prevent arbitrariness, irrationality and unreasonableness, bias and malafides. Having quashed the impugned letter dated 15.06.2017, the order of the Learned Single Judge permitting fresh bids is irrational and therefore, according to the Learned Senior Counsel, the consequential order permitting fresh bids has to be set aside.

35. Learned Senior Counsel then submitted that the Appellate Court is a Court of correction. It has the powers to correct the irrational and erroneous order passed by the Learned Single Judge. He relied upon the following authorities for the said proposition:-

i) (2006) 13 SCC 449 (B. Venkatamuni Vs. C.J. Ayodhya Ram Singh and others) and referred to paragraphs 11 and 12 of the said judgment.

"11. In an intra-court appeal, the Division Bench undoubtedly may be entitled to reappraise both questions of fact and law, but the following dicta of this Court in Umabai Vs. Nilkanth Dhondiba Chavan could not have been ignored by it, whereupon the learned counsel for the respondents relied:

"52. It may be, as has been held in Asha Devi Vs. Dukhi Sao that the power of the appellate Court in intra-court appeal is not exactly the same as contained in Section 100 of the Code of Civil Procedure but it is also well known that entertainment of a letters patent appeal is discretionary and normally the Division Bench would not, unless there exist cogent reasons, differ from a finding of fact arrived at by the learned Single Judge. Even as noticed hereinbefore, a Court of first appeal which is the final Court of appeal on fact may have to exercise



some amount of restraint."

12. In the said decision, it was further noticed:

"50. Yet in *Manjunath Anandappa Vs. Tammanasa* it was held:

'36. It is now also well settled that a Court of appeal should not ordinarily interfere with the discretion exercised by the Courts below.'"

ii) An unreported judgment of the Division Bench of the Orissa High Court dated 01.07.2015 in W.A.No.24 of 2015 and referred to one of the passages in paragraph 6 of the said judgment which reads as follows:

"6. A writ appeal is an appeal on principle where the legality and validity of the judgment and/or order of the Single Judge is tested and it can be set aside only when there is a patent error on the face of the record or the judgment is against established or settled principle of law. If two views are possible and a view, which is reasonable and logical, has been adopted by a Single Judge, the other view, howsoever appealing may be to the Division Bench; it is the view adopted by the Single Judge, which would, normally be allowed to prevail. If the discretion has been exercised by the Single Judge in good faith and after giving due weight to relevant matters and without being swayed away by irrelevant matters and if two views are possible on the question, then also the Division Bench in writ appeal should not interfere, even though it would have exercised its discretion in a different manner, where the case comes initially before it. The exercise of discretion by the Single Judge should manifestly be wrong which would then give scope of interference to the Division Bench....."

iii) A Division Bench judgment of the Madras High Court reported in 1997 III CTC 55 (*TTK Textiles Ltd., Vs. Seagull Clothing (Pvt.) Ltd., and another*) and referred to paragraph 18 of the said judgment.

"18. Even assuming that two views are possible, it is well settled that in matters like this, in appeals, the discretionary orders are not interfered with unless the orders are shown to be either arbitrary, capricious or perverse. In this view, having regard to the judgment and order appealed, we do not find any good or valid ground to interfere with the same."



36.The Learned Senior Counsel therefore prayed that the Writ Appeal (MD)No.1380 of 2017 will have to be allowed and order permitting fresh bids is irrational and therefore, according to the Learned Senior Counsel, the consequential order permitting fresh bids has to be set aside.

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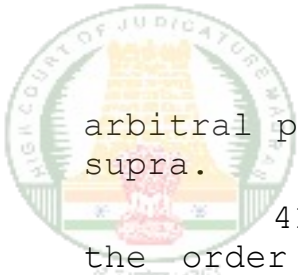
37.Per contra, Mr.Isaac Mohanlal, Learned Senior Counsel for the Respondents submitted that the Respondents have also filed a separate Writ Appeal in W.A.(MD)No.1315 of 2017, challenging the order dated 07.08.2017 passed by the Learned Single Judge quashing the impugned letter dated 15.06.2017.

38.The Learned Senior Counsel submitted that by the undertaking letter dated 06.04.2017 issued by the Appellant in W.A.(MD)No.1380 of 2017, they have admitted that Bhadra International is perceived to be an Associate company of TDI International private limited, the Appellant herein. The relevant portion of the undertaking letter dated 06.04.2017 reads as follows:

"5.It is therefore established beyond doubt, that on the strength of above facts and Arbitral orders on record, the requirement to submit "Outstanding Dues Certificate" in satisfaction of Clause 2.2.1 (d) and Form-I (Annexure-4) of this RFP by TDI International India (P) Limited being the existing AAI concessionaire and in respect of its perceived to be Associate Company Bhadra International India (P) Limited stands complied with legally, logically and justifiably."

39.Therefore, according to the Learned Senior Counsel, having admitted that Bhadra International is an Associate company, the Appellant is now estopped from going back on their undertaking. The Learned Senior Counsel then referred to the definition of an Associate company under the RFP which was extracted supra and submitted that some of the Directors of both the companies are one and the same and the Appellant company TDI International has got significant influence and control over Bhadra International. Further, Bhadra International is also a joint venture partner. Hence, Bhadra International is an Associate company of the Appellant.

40.According to the Learned Senior Counsel, Bhadra International is not protected by the Arbitral Tribunal's order. Exemption is available only for TDI International, the Appellant herein. He also referred to the Arbitral Tribunal's order dated 25.08.2016 passed by the sole Arbitrator Mr.Justice Surinder Singh Nijjar, Former Judge of the Hon'ble Supreme Court of India in the



arbitral proceedings initiated by Bhadra International referred to supra.

41. According to the Learned Senior Counsel, as seen from the order passed by the Arbitrator, the Airports Authority of India is restrained only from taking coercive steps for the recovery of the dues and there is no restraint for any other purpose. According to the Learned Senior Counsel, the submission of Forms and Annexures as per the RFP is mandatory. According to him, exemption from submitting the forms and Annexures as per Clause 2.2.1 (d) under the RFP is not available for Bhadra International as there is no such order from a Judicial Court/Arbitral Tribunal as in the case of TDI International setting/withholding of certain dues and to the adherence of the tender conditions. The order passed by the Arbitral Tribunal in favour of Bhadra International is only a restraint order for initiating coercive steps for the recovery of its dues pending adjudication by the arbitral tribunal. The Learned Senior Counsel then drew our attention to Form-I Annexure -4 and Form-I Annexure-5 which are pre-requisites and mandatory to be submitted by the bidders as part of the tender documents. Form I Annexure-4 and Form I Annexure 5 are reproduced hereunder:

Advertising Rights Concession, Madurai Airport

No.AAI/MDU/ET02

Form-I
Annexure V
"Outstanding Dues Certificate"

(A separate certificate is required to be obtained and submitted along with RFP for all the contracts, Airport Units, Officers as mentioned at Form-I, Annexure IV)

File

No:.....

Date of Issuance of
Certificate:.....

Name of

Contract:.....

Agreement

Dated:.....

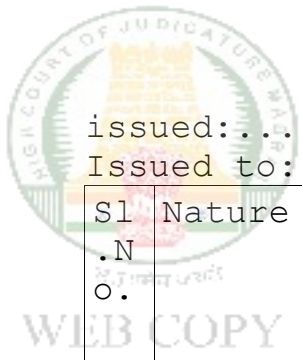
Commencement

Date:.....

Expiry

<https://hcservices.ecourts.gov.in/hcservices/>

Period up to which "Outstanding Dues Certificate"



issued:.....

Issued to: (Name of the Party)

Sl No.	Nature of Dues	Amount of Dues in Indian Rupees	Amount of Security Deposit Available with AAI/Reference to Orders of Judicial Court/Arbitral Tribunal	Validity of the Security Deposit/Validit y of the Orders of Judicial Court/Arbitral Tribunal
01	*** Undisputed Licese Fee Dues			
02	*** Undisputed Other Dues			
03	Disputed Dues referred to conciliation / Arbitration			
04	Dues Stayed/ Withheld from Realistion by order of a Judicial court/arbitral Tribunal			
	Total			

The Composite amount shown if not "NIL" on the date of issue for a dn up to the relevant period must be bifurcated and clearly defined so as to indicate the month up to which the undisputed licese fee and Other Dues have been cleared by the party.

The above certificate is issued in line with the Joint Reconciliation Statement dated..... between the parties subject to errrs and omissions in the due course of business.

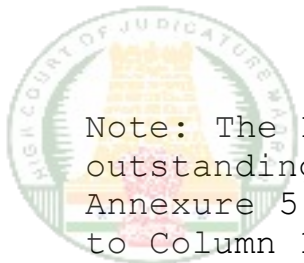
(Authorised Signatory of AAI)

Advertusing Rights Concession, Madurai Airport
No.AAI/MDU/ET02

**Form-I****Annexure-IV****DETAILS OF OUTSTANDING DUES AT AIRPORT UNITS UNDER MANAGEMENT OF AUTHORITY**

The Bidder (including all consortium members) shall submit the details of commercial licenses held/operated (current and past) from the date of publication of RFP in respect of all Airport Units and Offices under management of Authority along with details of undisputed/disputed/stayed by Arbitral Tribunals or Judicial Courts outstanding dues and Security Deposits held up to the relevant period in the following Perfoma.

Figures in Indian Rupees											
S l . N o .	Detail s of Contr act	Sta us of Con tra ct	Commen cement Date	Expi ry Date	Brief Reasons of Expiry of Contrac t if applica ble	Status of Outstanding Dues as up to.....					
						Undis puted	Disp uted Unde r Arbi trat ion	Staye d by a Judic ial Court or Arbit ral Tribu nal	Tot al	Cont ract ual Secu rity Depo sit	Addit ional Secui ty Depos tiy Depos ti again st Dispu ted Dues
0 1	02	03	04	05	06	07	08	09	10	11	12
0 1											
0 2											
0 3											
0 4											
0 5											



Note: The Bidder (including all consortium members) shall submit a outstanding dues cetificate from the Authority (as per Form 1-Annexure 5) in respect of the figures being indicated at Column 07 to Column 12.

Signatur Authorised Signatory

Name, Designation, Seal/Stamp of Bidder, Date & Place

42. According to the Learned Senior Counsel, the Appellant and its Associate company Bhadra International have not furnished the mandatory details as required under Form-I Annexure 4 and Form I Annexure 5.

43. According to the Learned Senior Counsel, the judgments relied upon by the Learned Senior Counsel for the Appellant in W.A.(MD)No.1315 of 2017, reported in 2002 9 SCC 463 (*Alembic Glass Industries Ltd., Vs. Collector of Central Excise and Customs*) and 2010 5 SCC 306 (*Indowind Energy Limited Vs. Wescare (India) Limited and another*) are not applicable for the instant case.

44. According to the Learned Senior Counsel, what is to be seen for the purpose of an Associate company is that whether one company has a significant influence over the other. Having declared that Bhadra International is perceived to be an Associate Company of TDI International, the Appellant in W.A.(MD)No.1380 of 2017 having Common Directors in Bhadra International is certainly an Associate company which satisfies the definition of an Associate company as per the RFP dated February 2017. The facts of the judgment relied upon by the Learned Senior Counsel for the Appellant in W.A.(MD)No.1380 of 2017 are different from the facts of the instant case. In fact, the Associate company under the RFP dated February 2017 includes a joint venture company as per the Companies Act, 2013. Therefore, according to the Learned Senior Counsel for the Respondents, assuming Bhadra International is not an Associate company, *stricto sensu*, being a joint venture company, it can be treated as an Associate company as per the definition of an Associate company under the RFP dated February 2017. The Learned Senior Counsel also submitted that the Appeal filed by the Appellants against the order of the Learned Single Judge was filed within time. The fresh notification issued in September 2017 calling for fresh bids was not done pursuant to the order of the Learned Single Judge as alleged by the Appellant in W.A.(MD)No.1380 of 2017. According to the Learned Senior Counsel, the invitation for fresh bids under the new notification dated September 2017 was done in the usual course. According to the Learned Senior Counsel, there cannot be a stalemate, that too in tender matters which involves public interest and revenue generation for Government companies like that of the respondents.



45.The Learned Senior Counsel further submitted that despite no clear directions given by the Arbitral Tribunal comprising of Hon'ble Mr.Justice Deepak Verma, (former Judge of the Hon'ble Supreme Court), granting specific exemptions to TDI International from submitting the mandatory forms and annexures required by the Respondent for participation of the tender, in order to avoid any unnecessary interpretation of the order of the Hon'ble Tribunal, exempted TDI International alone from submitting the necessary mandatory forms and annexures for participation in the tender. As regards Bhadra International, the Associate Company of TDI International, as per the order of the Hon'ble Arbitral Tribunal comprising of Hon'ble Mr.Justice Surinder Singh Nijjar, Former Judge of the Hon'ble Supreme Court of India, there is no such order similar to the order passed in favour of TDI International.

46.The Learned Senior Counsel also drew our attention to the bid conditions under the RFP. He referred to the Outstanding Dues Criteria and referred to clause 2.2.3 and he also referred to the general terms of bid contained in 2.3.4, which reads as follows:

"II. Outstanding Dues Criteria:

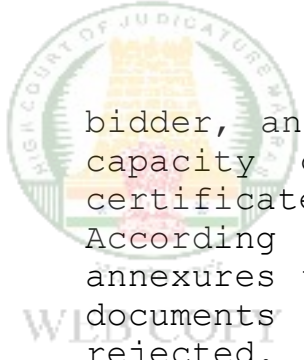
In order to meet the Financial Capacity eligibility condition, if the bidder is an existing licensee of AAI, it should be meeting the criteria outlined at Clause 2.2.1(d) above as a response to this RFP and submit scanned self attested copies of the latest and relevant Outstanding Dues Certificates with the Technical Proposal.

2.2.3.The Bidders shall enclose with its Proposal, to be submitted as per the format at Form-I, complete with its Annexures, the Certificate(s) from its Chartered Accountant or the concerned Principals stating the number of years of experience in operating the Advertising Business as specified at [Clause 2.2.2 (A) I] above.

.....

2.3.4.Any condition or qualification or any other stipulation contained in the Proposal shall render the Proposal liable to rejection as a non-responsive Proposal."

47.The Learned Senior Counsel also drew our attention to the contents of the forms/annexures/appendixes under clause 2.9, wherein he pointed out that annexure 1 gives the details of



bidder, annexure 2 furnishes the technical capacity and financial capacity of the bidder, annexure 4 is the outstanding due certificate and annexure 5 is the format of outstanding dues. According to the Learned Senior Counsel, the non-enclosure of the annexures with the relevant details will tantamount to the tender documents being incomplete and the tender is liable to be rejected. The Learned Senior Counsel also referred to clause 2.13 relating format and submission of proposal and the relevant clause reads as follows:

"2.13 Format and Submission of Proposal:

2.13.1. The Bidder shall provide all the information sought under this RFP. The Authority will evaluate only those Proposals that are received in the required formats and complete in all respects. Incomplete and/or conditional Proposals shall be liable to rejection.

.....

2.12.5. The Technical Proposal shall contain:

- (i) Index of Submissions*
- (ii) Proposals in the prescribed format (Form-I) along with Annexures and supporting documents;*
 - (a) Annexure 1 - Details of Bidder*
 - (b) Annexure 2 - Technical and Financial Capacity of the Bidder.*
 - (c) Annexure 3 - Certificate from Chartered Accountant.*
 - (d) Annexure 4 - Details of Outstanding Dues.*
 - (e) Annexure 5 - Outstanding Dues Certificate*
- (iii) Statement of Legal Capacity as per format at Form-II duly notarized;*
- (iv) Power of Attorney for signing the proposal as per the format at Form-III; duly notarized;*
- (v) If applicable, the Power of Attorney for Lead Member of Consortium as per the format at Form-IV; duly notarized;*
- (vi) copy of the Joint Bidding Agreement, in case of a Consortium, substantially in the format at Form-V; duly notarized;*



(vii) Affidavit as per Form-VI, duly notarized;

(viii) Integrity Pact as per format at Form-VII, duly notarized;

(ix) Documents of Incorporation (in case of a Consortium, for all Members), duly notarized;

(x) Copy of PAN card, Copy of Memorandum and Articles of Association, if the Applicant is a body corporate, and if a partnership then a copy of its partnership deed (in case of Consortium, for all Members);

(xi) Audited Balance Sheet and Profit and Loss Account for last Five financial years (in case of a Consortium, for Lead Member);

(xii) Self Attested Copy of proof of payment of Earnest Money Deposit,

(xiii) Self Attested Copy of proof of payment of Tender cost;

(xiv) Check-list of Submissions Form-VIII.

The Bidders are advised to arrange the submissions/documents in the above order. Each page of Technical Proposal is to be serially numbered, signed and stamped by the Authorized Signatory of the Bidder."

48. The Learned Senior Counsel also referred to evaluation of technical proposals contained in Clause 3.3, which reads as follows:

"3.3. Evaluation of Technical Proposals:

3.3.1. During this stage, Authority shall determine whether each Technical Proposal is in compliance with the requirements of the RFP. A Technical Proposal shall be considered to be in compliance with the requirement of the RFP only if:

(i) the Bidder satisfies the Threshold Eligibility Criteria, as set forth in Clause 2.2.2 along with clause 2.2.1

(ii) it contains all the information and documents in support as requested in this RFP.

3.3.2. Such Technical Proposals which are not in compliance with the requirements of the RFP shall be rejected forthwith and no request for alteration, modification, substitution or withdrawal shall be



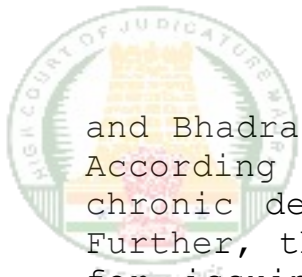
entertained by Authority in respect of such Proposals (s).

3.3.3. Authority reserves the right to seek clarifications or additional information/documents from any Bidder regarding its Proposal. Such clarification(s) for additional information/document (s) shall be provided within the time specified by Authority for the purpose. Any request and response thereto shall be in writing. If the Bidder does not furnish the clarification(s) or additional information/document(s) within the prescribed time, the Proposal shall be liable to be rejected. In case the Proposal is not rejected, Authority may proceed to evaluate the Proposal by construing the particulars requiring the clarification to the best of its understanding, and the Bidder shall be barred from subsequently questioning such interpretation of Authority.

3.3.4. After the evaluation of Technical Proposals, Authority would announce a short-list of Bidders ("Qualified Bidders"), whose Technical Proposals have been found to be responsive and in compliance with the requirements of the RFP. The Qualified Bidders are eligible for further evaluation of their Financial Proposals. The Financial Proposals of such Bidders whose Technical Proposal has been found to be not in compliance with the requirements of RFP will be rejected."

49. The reasons given by the Appellant in W.A.(MD)No.1380 of 2017 as per the letter dated 06.04.2017 for non-submission of the mandatory forms and annexures for TDI International India Private Limited as well as the Associate company Bhadra International India Private Limited was rejected since the Arbitral Tribunal never granted any exemption for the Associate company Bhadra International. Therefore, according to the Learned Senior Counsel, without submission of the mandatory forms and annexures, the Appellant in W.A.(MD)No.1380 of 2017 cannot participate in the tender as per the RFP dated February 2017.

50. The Learned Senior Counsel then submitted the Appellant in W.A.(MD)No.1380 of 2017 and Bhadra International are due to the Airports Authority of India a huge sum running to several crores of Rupees. The Airports Authority of India has also made a counter claim for the said sum against TDI International



and Bhadra International before the respective Arbitral Tribunals. According to the Learned Senior Counsel both the companies are chronic defaulters and their tenders are liable to be rejected. Further, the Learned Senior Counsel submitted that there is no bar for issuing fresh tender notification for inviting fresh bids. According to the Learned Senior Counsel, tenders are called for only in public interest and for generation of maximum revenue to the Government.

51.The Learned Senior Counsel submitted that strictest interpretation will have to be given to the tender conditions and for this proposition, he relied upon the following authorities of the Hon'ble Supreme Court:-

1) (2016) 8 SCC 622 (Central Coalfields Limited and another Vs. SSL-SML (Joint Venture Consortium) and others) and referred to paragraphs 41 to 43, 47, 48 and 51, which reads as follows:

"41.In appeal, this Court in Poddar Steel accepted the theory of essential and non-essential or ancillary or subsidiary terms of an NIT. It was held that the cheque of Union Bank of India issued by Poddar Steel (though a deviation from the terms of NIT) was sufficient for meeting the conditions of NIT, the condition being ancillary or subsidiary to the main object to be achieved by the condition and that the employer could waive the "technical literal compliance" of the earnest money clause of NIT "specially when it was in its interest not to reject the said bid which was the highest." In other words, this Court concluded that an essential term of the tender document could not be deviated from but an ancillary or subsidiary or non-essential term could be deviated from, and that the deviation could be without any reference to potential bidders.

42.Unfortunately, this Court in Poddar Steel did not at all advert to the privilege of participation principle laid down in Ramana Dayaram Shetty and accepted in G.J.Fernandez. In other words, this Court did not consider whether, as a result of the deviation, others could also have become eligible to participate in the bidding process. This principle was ignored in Poddar Steel.

43.Continuing in the vein of accepting the inherent authority of an employer to deviate from the terms and conditions of an NIT and reintroducing the



privilege of participation principle and the level playing field concept, this Court laid emphasis on the decision-making process, particularly in respect of a commercial contract. One of the more significant cases on the subject is the three-Judge decision in *Tata Cellular Vs. Union of India* which gave importance to the lawfulness of a decision and not its soundness. If an administrative decision, such as a deviation in the terms of NIT is not arbitrary, irrational, unreasonable, mala fide or biased, the Courts will not judicially review the decision taken. Similarly, the Courts will not countenance interference with the decision at the behest of an unsuccessful bidder in respect of a technical or procedural violation. This was quite clearly stated by this Court (following *Tata Cellular*) in *Jagdish Mandal Vs. State of Orissa* in the following words:

"22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. 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 borne 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 tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of 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."



This Court then laid down the questions that ought to be asked in such a situation. It was said:

"22.....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 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."

.....

47. The result of this discussion is that the issue of the acceptance or rejection of a bid or a bidder should be looked at not only from the point of view of the unsuccessful party but also from the point of view of the employer. As held in *Ramana Dayaram Shetty* the terms of NIT cannot be ignored as being redundant or superfluous. They must be given a meaning and the necessary significance. As pointed out in *Tata Cellular* there must be judicial restraint in interfering with administrative action. Ordinarily, the soundness of the decision taken by the employer ought not to be questioned but the decision making process can certainly be subject to judicial review. The soundness of the decision may be questioned if it is irrational or mala fide or intended to favour someone or a decision "that no responsible authority acting reasonably and in accordance with relevant law could have reached" as held in *Jagdish Mandal* followed in *Michigan Rubber*.

48. Therefore, whether a term of NIT is essential or not is a decision taken by the employer which should be respected. Even if the term is essential, the employer has the inherent authority to deviate from it provided the deviation is made applicable to all bidders and potential bidders as held in *Ramana Dayaram Shetty*. However, if the term is held by the



employer to be ancillary or subsidiary, even that decision should be respected. The lawfulness of that decision can be questioned on very limited grounds, as mentioned in the various decisions discussed above, but the soundness of the decision cannot be questioned, otherwise this Court would be taking over the function of the tender issuing authority, which it cannot.

.....

51. Not only this, any decision taken by the employer in accepting or rejecting a particular bank guarantee in a format not prescribed by it could lead to (avoidable) litigation requiring the employer to justify the rejection or acceptance of each bank guarantee. This is hardly conducive to a smooth and hassle-free bidding process."

2) (2016) 8 SCC 446 (Bakshi Security and Personnel Services Private Limited Vs. Devkishan Computed Private Limited and others) and referred to paragraphs 14 to 20, which reads as follows:

"14. The law is settled that an essential condition of a tender has to be strictly complied with. In Poddar Steel Corpn. Vs. Ganesh Engg. Works, this Court held as under:

"6. The requirements in a tender notice can be classified into two categories - those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case the authority issuing the tender may be required to enforce them rigidly. In the other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases."

15. Similarly in B.S.N. Joshi & Sons Ltd., Vs. Nair Coal Services Ltd., this Court held as under:

"(i) if there are essential conditions, the same must be adhered to:

(ii) if there is no power of general relaxation, ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully;

(iii) if, however, a deviation is made in relation



to all the parties in regard to any of such conditions, ordinarily again a power of relaxation may be held to be existing;

(iv) the parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation to compliance with another part of tender contract, particularly when he was also not in a position to comply with all the conditions of tender fully, unless the court otherwise finds relaxation of a condition which being essential in nature could not be relaxed and thus the same was wholly illegal and without jurisdiction;

(v) When a decision is taken by the appropriate authority upon due consideration of the tender document submitted by all the tenderers on their own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with;"

16. We also agree with the contention of Shri Raval that the writ jurisdiction cannot be utilised to make a fresh bargain between parties.

17. In *General Assurance Society Ltd. Vs. Chandmull Jain*, this Court in a slightly different context stated:

"11.....In other respects there is no difference between a contract of insurance and any other contract except that in a contract of insurance there is a requirement of *uberrima fides* i.e., good faith on the part of the assured and the contract is likely to be construed *contra proferentem* that against the company in case of ambiguity or doubt. A contract is formed when there is an unqualified acceptance of the proposal. Acceptance may be expressed in writing or it may even be implied if the insurer accepts the premium and retains it. In the case of the assured, a positive act on his part by which he recognises or seeks to enforce the policy amounts to an affirmation of it. This position was clearly recognised by the assured himself, because he wrote, close upon the expiry of the time of the cover notes that either a policy should be issued to him before that period had expired or the cover, note extended in time. In interpreting documents relating to a contract of insurance, the duty of the court is to interpret the



words in which the contract is expressed by the parties, because it is not for the court to make a new contract, however reasonable, if the parties have not made it themselves. Looking at the proposal, the letter of acceptance and the cover notes, it is clear that a contract of insurance under the standard policy for fire and extended to cover flood, cyclone, etc. had come into being."

18. In the light of the aforesaid judgment, the High Court was not correct in treating Respondent 1's offer as matching with the revised minimum wage calculation, as that would make a new contract between the parties that the parties have not made themselves.

19. It is not well to remember the admonition given by this Court in *Michingan Rubber (India) Ltd., Vs. State of Karnataka* in cases like the present as under:

"22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. 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 borne 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 tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of 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:

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(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.

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 largessee (allotment 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.' "

20. We have seen that the present tender has not gotten off the ground since May 2015, and one year's precious time has been wasted due to litigation between the parties. We must hasten to add that the Government of Gujarat is partly to blame for this inasmuch as it arrived at a minimum wage figure and did not disclose the same to the tendering parties twice. Even in the second round of litigation, the Government did not disclose the newly arrived at minimum wage figure of Rs.2,91,00,000/- to the two persons in the fray before us. Ordinarily, therefore, we would have asked the Government to disclose the second figure of minimum wage and restart the tendering process. However, we do not think that the justice of the case requires us to do so, for two reasons. First and foremost, Respondent 1 before us has clearly violated the strict terms of the tender condition on every occasion and hence cannot be given relief. And, secondly, we already find that due to litigation the present tender has not taken off for over one year. In the absence of mala fides, and indeed the High Court judgment has found that mala fides did not vitiate the calculation of minimum wage by the Labour Department, we cannot accept Shri



Divan's submission that the figure of Rs.2,91,00,000/- was tailor-made to suit the bid offered by the Appellant herein. We, therefore, set aside the decision of the Gujarat High Court and allow the Government to proceed further in finalising the tender in favour of the Appellant herein."

3) (2017) 4 SCC 269 (Reliance Telecom Limited and another Vs. Union of India and another) and referred to paragraphs 35 to 46, which reads as follows:

"35. In *Tata Cellular*, a three Judge Bench, after extensive consideration of the earlier decisions in the matter of judicial review and its scope of applicability to government contracts and tenders, ruled that the modern trend points to judicial restraint in administrative action and the court does not sit as a court of appeal but merely reviews the manner in which the decision was made. It further opined that the court does not have the expertise to correct the administrative decision and 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. The Court further expressed that the terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract and the Government must be allowed to have a fair play in the joints as it is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. It was also observed that the decision must not only be tested by the application of *Wednesbury* principle of reasonableness but must also be free from arbitrariness and must not be affected by bias or actuated by *mala fides* and while quashing decisions, heavy administrative burden on the administration and increase on expenditure have to be kept in view.

36. In *Raunaq International Ltd. Vs. I.V.R. Construction Ltd.*, it has been held that the award of a contract, whether it is by private party or by a public body or the State, is essentially a commercial transaction and prudent principle of commerce do weigh while making a commercial decision.

37. In *Monarch Infrastructure (P) Ltd., Vs. Ulhasnagar Municipal Corpn.*, this Court was concerned with the question relating to NIT issued by



Ulhasnagar Municipal Corporation for appointment of agents for collection of octroi and revision of terms and conditions thereof. The Court held that it cannot say whether the conditions are better than what were prescribed earlier, for in such matters, the authority calling for tenders is the best judge. The Court declined to restore status quo ante.

38. In Cellular Operators Assn. Of India Vs. Union of India, this Court, after referring to TISCO Ltd. Vs. Union of India, held that where legal issues are intertwined with those involving determination of policy and a plethora of technical issues, courts of law have to be very wary and must exercise their jurisdiction with circumspection for they must not transgress into the realm of policy-making, unless the policy is inconsistent with the Constitution and the laws. It has been further ruled that on matters affecting policy and those that require technical expertise, the court should show deference to and follow the recommendations of the Committee which is more qualified to address the issues.

39. In Union of India Vs. International Trading Co., this Court held that non-renewal of permit by the Government to a private party on the ground of change in its policy cannot be faulted if such change is founded on reasonableness and is otherwise not arbitrary, irrational and perverse. It was observed that if the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities and adopt trade policies and the ultimate test is whether, on the touchstone of reasonableness, the policy decision comes out unscathed. It further ruled that reasonableness of restriction is to be determined in an objective manner and from the standpoint of the interests of the general public and not from the standpoint of the interest of the persons upon whom the restrictions have been imposed or upon abstract consideration. A restriction cannot be said to be unreasonable merely because in a given case, it operates harshly. In determining whether there is any unfairness involved, the nature of the right alleged to have been infringed, the underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition and the prevailing condition at the relevant time enter into the judicial verdict. The Court further held that the reasonableness of the legitimate expectation has to be determined with respect to the circumstances



relating to the trade or business in question and canalisation of a particular business in favour of even a specified individual is reasonable where the interests of the country are concerned or where the business affects the economy of the country.

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40. In Directorate of Education Vs. Educomp Datamatics Ltd., this Court, applying the principles enunciated in Tata Cellular and Monarch Infrastructure (P) Ltd., held that the terms of the invitation to tender are not open to judicial scrutiny, the same being in the realm of contract; that the Government must have a free hand in setting the terms of the tender; that it must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere and the courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, mala fide or actuated by bias and the courts cannot strike down the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical. The Courts can interfere only if the policy decision is arbitrary, discriminatory or mala fide.

41. In Bannari Amman Sugars Ltd., Vs. CTO, this Court was concerned with the question relating to withdrawal of benefits extended to the Appellant therein as subsidy and it was held that while taking policy decision, the Government is not required to hear the persons who have been granted the benefit which is sought to be withdrawn.

42. In Global Energy Ltd., Vs. Adani Exports Ltd., this Court reiterated the principles that:

"10..... the terms of the invitation to tender are not open to judicial scrutiny and the courts cannot whittle down the terms of the tender as they are in the realm of contract unless they are wholly arbitrary, discriminatory or actuated by malice."

43. In Master Marine Services (P) Ltd. Vs. Metcalfe & Hodgkinson (P) Ltd, the Court, after referring to the principles stated in Tata Cellular, observed that the government policy can be changed with changing circumstances and only on the ground of change, such policy will not be vitiated and the Government has discretion to adopt a different policy or change its policy calculated to serve the public interest and make it more effective as the



choice in the balancing of the pros and cons relevant to the change in policy lies with the authority, but change in policy must be in conformity with Wednesbury reasonableness and free from arbitrariness, irrationality, bias and malice.

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44. In *Michigam Rubber (India) Ltd., Vs. State of Karnataka*, the Court, after referring to *Jagdish Mandal Vs. State of Orissa* and *Tejas Constructions & Infrastructure (P) Ltd Vs. Municipal Council, Sendhwa* expressed the view that the basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play and actions are amenable to judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose and if the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities. It further observed that fixation of a value of the tender is entirely within the purview of the executive and the courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by courts is very limited unless the action of the tendering authority is found to be malicious and a misuse of its statutory powers and greater latitude is required to be conceded to the State authorities in the matter of formulating conditions of a tender document and awarding a contract. The Court also laid emphasis on public interest and the prudence in applying the principle of restraint where the action is fair and reasonable and does not smack of mala fides. It was also emphasised that the Courts cannot interfere with the terms of the tender prescribed by the Government simply because it feels that some other terms in the tender would have been fair, wise or logical.

45. In *Maa Binda Express Carrier Vs. North-East Frontier Railway*, this Court held that the scope of judicial review in matters relating to award of contracts by the State and its instrumentalities is settled by a long line of decisions of this Court which clearly recognise that the power exercised by the Government and its instrumentalities in regard to allotment of contract is subject to judicial review at the instance of an aggrieved party and the submission of a tender in response to a notice



inviting such tenders is no more than making an offer which the State or its agencies are under no obligation to accept and therefore, the bidders participating in the tender process cannot insist that their tenders should be accepted simply because a given tender is the highest or lowest depending upon whether the contract is for sale of public property or for execution of works on behalf of the Government. It further ruled that all that the participating bidders are entitled to is a fair, equal and non-discriminatory treatment in the matter of evaluation of their tenders and it is well settled that award of a contract is essentially a commercial transaction which must be determined on the basis of considerations that are relevant to such commercial decision and hence, the terms subject to which tenders are invited are not open to judicial scrutiny unless it is found that the same have been tailor-made to benefit any particular tenderer or class of tenderers. The Court further held that in the matter of award of contracts, the Government and its agencies have to act reasonably and fairly at all points of time and to that extent, the tenderer has an enforceable right in the Court which is competent to examine whether the aggrieved party has been treated unfairly or discriminated against to the detriment of public interest.

46. In *Census Commr. Vs. R. Krishnamurthy*, a three Judge Bench of this Court, after noting several decisions, held that it is not within the domain of the courts to embark upon an enquiry as to whether a particular public policy is wise and acceptable or whether a better policy could be evolved and the courts can only interfere if the policy framed is absolutely capricious or not informed by reasons or totally arbitrary and founded on ipse dixit offending the basic requirement of Article 14 of the Constitution. It further observed that in certain matters, as often said, there can be opinions but the court is not expected to sit as an appellate authority on an opinion."

52. The Learned Senior Counsel further submitted that the contract is a commercial transaction and evaluating tenders and awarding contracts are essentially commercial functions. Therefore, in such cases proposals of equity and natural justice are not applicable. He relied upon the judgment reported in (2008) 18 SCC 215 (*Siemens Public Communication Networks Private Limited and another Vs. Union of India and others*) and referred to



paragraph 40, which reads as follows:

"40. On examining the facts and circumstances of the present case, we are of the view that none of the criteria has been satisfied justifying Court's interference in the grant of contract in favour of the Appellants. When the power of judicial review is invoked in the matters relating to tenders or award of contracts, certain special features have to be considered. A contract is a commercial transaction and evaluating tenders and awarding contracts are essentially commercial functions. In such cases principles of equity and natural justice stay at a distance. If the decision relating to award of contracts is bona fide and is in public interest, courts will not exercise the power of judicial review and interfere even if it is accepted for the sake of argument that there is a procedural lacuna."

53. The Learned Senior Counsel also finally referred to the company's Master data for both TDI International and Bhadra International to show that the Directors are in common for both the companies and therefore, according to him, Bhadra International is an Associate company of TDI International. According to the Learned Senior Counsel, the findings of the Learned Single Judge is contrary to law and is liable to be set aside.

III. FINDINGS AND CONCLUSION:

54. The dispute revolves upon submission of forms and annexures by the bidding company (TDI International) as well as its Associate company (Bhadra International), which is a mandatory requirement as part of the tender conditions. As seen from the tender conditions, the only exception available to the Bidding and Associate company from submission of those forms and annexures is that they must be exempted from submitting the same by orders of a Judicial/Arbitral Tribunal. As seen from the order passed by the Arbitral Tribunal in the claim made by the Bidding Company which is the Appellant in W.A.(MD)No.1380 of 2017 and the Associate Company Bhadra International which were extracted supra and also find a place in the order of the Learned Single Judge does not specifically exempt the Bidding Company and the Associate Company from submitting the forms and annexures. As seen from Form-I Annexure-4 and Form-I Annexure-5 which was not submitted by the bidding company TDI International and the Associate company Bhadra International, we find that filling up the said forms and enclosing the annexures will not amount to any admission of liability, either by the Bidding company or by the Associate



company.

55.The said forms discloses only the details of the contracts including the disputed and undisputed amounts as well as the pending proceedings before the Arbitral Tribunals and Courts. Since, the Appellant in W.A.(MD)No.1380 of 2017 did not comply with the requirements as per the tender, the Respondents rejected the technical bid submitted by the Appellant. The Respondents had granted exemption from submission of the forms and annexures only for the bidding company, namely, TDI International which is the Appellant and refused exemption sought for by Bhadra International as the Arbitral Tribunal did not grant any exemption to Bhadra International. The Arbitral Tribunal granted only stay of any coercive steps for the recovery of Outstanding Dues from Bhadra International.

56.Further, the definition of Associate company under the RFP issued in February 2017 includes a joint venture company of the Bidding company. In the instant case, TDI International has declared that Bhadra International is a joint venture partner in some of the Airport projects of the Airports Authority of India. Apart from that we find that some of the Directors of both the companies are in common. Further, the name of Bhadra International was voluntarily disclosed only by TDI International, the Appellant in W.A.(MD)No.1380 of 2017, which is the bidding company. Even as per their undertaking letter dated 06.04.2017, the Appellant has declared that Bhadra International is perceived to be an Associate company.

57.Both the Bidding company as well as the Associate company have initiated separate arbitration claims against Airports Authority of India, the Respondents in W.A.(MD)No.1380 of 2017 and the Appellants in W.A.(MD)No.1315 of 2017 and the individual claims exceed more than thousand crores. The Airports Authority have also made a counter claim in the arbitration against the Bidding company as well as the Associate company. In such circumstances, no prudent person will attempt to participate in a tender conducted by the same authority from whom substantial sums of money are payable. But, in the instant case, despite the huge claim made against the respondents, Airports Authority of India, the Appellant in W.A.(MD)No.1380 of 2017, has participated in the tender as per the RFP dated February 2017. It is settled law that judicial review of commercial contracts like tenders under Article 226 of the Constitution is restricted and it can be exercised only if the subject decision which is challenged is arbitrary, irrational, malafide, bias and perverse.



58.As held by a catena of decisions of the Hon'ble Supreme Court which was also relied upon by the learned senior counsel for the respondents in W.A.(MD)No.1380 of 2017 and the Appellants in W.A.(MD)No.1315 of 2017, referred to supra, judicial review is permissible only in case of arbitrariness, irrationality, malafides, bias and perversity. The role of the Court under Article 226 of the Constitution is only to review the manner in which the decision was taken by the respondents. The Court lacks the expertise to decide whether the requirements under the tender have been complied with or not by the Bidding company. Tenders are floated and offers are invited for highly complex technical subjects. It requires understanding and appreciation of the nature of work and the purpose, it is going to serve. It is common knowledge that in the competitive commercial field, technical bids pursuant to the notice inviting tenders are scrutinised by the technical experts and sometime third party assistance from those unconnected with the owner's organisation is taken. This ensures objectivity, Bidder's expertise and technical capability and capacity must be assessed by the experts. In the matters of financial assessments, consultants are appointed. It is because to check and ascertain that technical ability and the financial feasibility have sanguinity and are workable and realistic. Its aim is to achieve high degree of perfection in execution and adherence to the time schedule. Exercise of power of judicial review would be called for if the approach is arbitrary or malafide or procedure adopted is meant to favour one. The decision making process should clearly show that the said maladies are kept at bay. But, where a decision is taken that is manifestly in consonance with the language of the tender document or subserves the purpose for which the tender is floated, the Court should follow the principle of restraint. Technical evaluation or comparison by the Court would be impermissible. The owner should be allowed to carry out the purposes and there has to be allowance of fair play in the joints. In the case on hand, the following facts are undisputed.

a) huge claim has been made by the bidding company TDI International, Appellant herein and the Associate company herein Bhadra International against Airports Authority of India, the respondents which is pending before the respective Arbitral Tribunals.

b) The Airports Authority of India Limited have also made a counter claim against both the Bidding company as well as the Associate company running to thousands of crores before the respective Arbitral Tribunals.

c) The commonality of some of the Directors of both the Bidding company and the Associate company have not been disputed by TDI International, the Appellant.

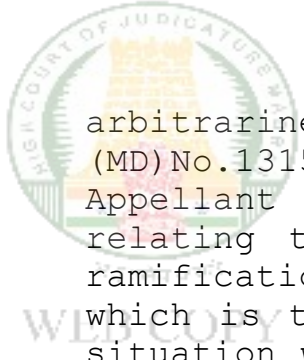
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arbitrariness or favouritism established by the Appellants in W.A. (MD)No.1315 of 2017 for the rejection of the tender of the Appellant under the impugned letter dated 15.06.2017. In matters relating to complex auction procedure having enormous financial ramification, interference by the Courts based upon any perception which is thought to be wise or assumed to be fair can lead to a situation which is not warrantable and may have unforeseen adverse impact. The Appellant in W.A.(MD)No.1380 of 2017 has also not pointed out the favouritism shown by the respondents to any particular company for awarding a contract.

61.The only ground for challenge raised by the Appellant in W.A.(MD)No.1380 of 2017 is that the submission of the forms and annexures which was the ground for rejection of the tender is not required to be submitted in view of the Arbitral Tribunal's order.

62.According to us, the ground for challenge will not come within the sphere of arbitrariness, irrationality, bias, malafides and perversity. Therefore, the Learned Single Judge ought to have dismissed the writ petition instead of quashing the impugned letter dated 15.06.2017. In view of our findings, the invitation of fresh bids as per the fresh notification dated September 2017 is perfectly valid and further the Appellant in W.A.(MD)No.1380 of 2017, admittedly, having participated as one of the participants is estopped from challenging the said notification inviting fresh bids. Therefore, we find merit in the submissions made by the learned Senior Counsel for the Appellants in W.A.(MD)No.1315 of 2017, for allowing the appeal in W.A.(MD) No.1315 of 2017.

63.The learned Single Judge had quashed the impugned letter dated 15.06.2017 only on the ground that the respondents have ignored the order passed by the Arbitral Tribunal and has not given due regard to it before rejecting the technical bid of the Appellants. As seen from the orders passed by the Arbitral Tribunal referred to *supra*, the Arbitral Tribunal has not exempted Bhadra International, the perceived Associate Company from submitting Annexure IV and Form I and Annexure V in Form I as per clause 2.2.1 (D) of the RFP. According to us, the learned Single Judge has erroneously come to the wrong conclusion that the respondents had ignored the orders of the Arbitral Tribunal before rejecting the technical bid of the Appellants.

64.The Hon'ble Supreme Court in its recent decision reported in (2017) 4 SCC 170 (*J.S.W Infrastructure and another others*) has held that the owner or the employer of the project having authored the tender documents is the best person to



understand and appreciate its requirements and interpret its documents. The relevant portion of the said decision is extracted hereunder:-

"8. We may also add that the law is well settled that superior courts while exercising their power of judicial review must act with restraint while dealing with contractual matters. A Three Judge Bench of this Court in *Tata Cellular vs. Union of India* held that (i) there should be judicial restraint in review of administrative action; (ii) the court should not act like court of appeal; it cannot review the decision but can only review the decision making process (iii) the court does not usually have the necessary expertise to correct such technical decisions.; (iv) the employer must have play in the joints i.e., necessary freedom to take administrative decisions within certain boundaries.

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10. In *Afcons Infrastructure Ltd. Vs. Nagpur Metro Rail Corporation Ltd. & Anr.*[5] This Court held as follows :-

"14.....a mere disagreement with the decision making process or the decision of the administrative authority is no reason for a constitutional Court to interfere. The threshold of mala fides, intention to favour someone or arbitrariness, irrationality or perversity must be met before the constitutional Court interferes with the decision making process or the decision.

xxx xxx xxx

16. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional Courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional Courts but that by itself is not a reason for interfering with the interpretation given.

17. In the present appeals, although there does not appear to be any ambiguity or doubt about the interpretation given by NMRCL to the tender conditions, we are of the view that even if there was such an ambiguity or doubt, the High Court ought to have refrained from giving its own interpretation unless it had come to a clear conclusion that the interpretation given by NMRCL



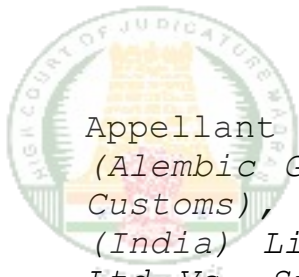
was perverse or mala fide or intended to favour one of the bidders. This was certainly not the case either before the High Court or before this Court...." The view taken in *Afcons (supra)* was followed in *Monte Carlo Ltd. Vs. NTPC Ltd.*[6] . Thus it is apparent that in contractual matters, the Writ Courts should not interfere unless the decision taken is totally arbitrary, perverse or mala fide".

Applying the principles laid down in the above decision of the Hon'ble Supreme Court, we are of the considered view that the learned single Judge has erred in allowing the writ petition.

65. In view of our conclusions, the judgments relied upon by the learned Senior Counsel for the Appellant in W.A(MD)No.1380 of 2017 are not applicable to the facts and circumstances of the present case for the following reasons:-

(a) The fresh auction conducted by the respondents inviting fresh bids is not conducted by the respondents pursuant to the order dated 07.08.2017 passed by the learned single Judge in W.P(MD)No.11598 of 2017. Therefore, the judgments reported in (2006) 10 SCC 236 (*Noble Resources Ltd Vs. State of Orissa and another*), (1990) 3 SCC 752 (*Mahabir Auto Stores and others Vs. Indian Oil Corporation and others*), (2004) 3 SCC 553 (*ABL International Ltd. And another Vs. Export Credit Guarantee Corporation of India Ltd. And others*) (2007) 14 SCC 517 (*Jagdish Mandal Vs. State of Orissa and others*) (2006) 13 SCC 449 (*B.Venkatamuni Vs. C.J. Ayodhya Ram Singh and others*) 1997 III CTC 55 (*TTK Textiles Ltd., Vs. Seagull Clothing (Pvt.) Ltd., and another*) are not applicable to the facts of the instant case.

(b) Admittedly, Bhadra International is a joint venture partner with the Appellant company TDI International Limited. The Appellant company TDI International Limited in their undertaking letter have also disclosed that Bhadra International is perceived to be an Associate Company. Admittedly, there are common Directors in both the companies. Admittedly, the disclosure of Bhadra International was made only by the Appellant company TDI International Limited. There is no exemption for submission of the relevant Forms and Annexures by orders of the Arbitral Tribunal. Further, the Forms and Annexures gives details only about the existing contracts and the disputed and undisputed claims and does not amount to admission of liability. The auction is conducted only in public interest. Any dispute between the private party and the employer (AAI) should not affect public interest. The Appellant, TDI International and Bhadra International having made substantial claims against the respondents cannot now claim that the action of the respondents in rejecting the technical bid submitted during the pendency of the arbitral proceedings, is arbitrary, mala fides and bias. Therefore, the judgments relied upon by the learned Senior Counsel for the



Appellant in W.A.(MD)No.1380 of 2017 reported in (2002) 9 SCC 463 (Alembic Glass Industries Ltd. Vs. Collector of Central Excise & Customs), (2010) 5 SCC 306 (Indowind Energy Limited Vs. Wescare (India) Limited and another), (2006) 10 SCC 236 (Noble Resources Ltd Vs. State of Orissa and another), (1990) 3 SCC 752 (Mahabir Auto Stores and others Vs. Indian Oil Corporation and others), (2004) 3 SCC 553 (ABL International Ltd. And another Vs. Export Credit Guarantee Corporation of India Ltd. And others) and (2007) 14 SCC 517 (Jagdish Mandal Vs. State of Orissa and others) are not applicable for the instant case. We are in agreement with the submissions made by the learned Senior Counsel for the respondents that the learned Single Judge ought not to have quashed the impugned letter dated 15.06.2017 as the decision taken by the respondents is not arbitrary, irrational, mala fides or favours any particular person and the said decision has also given due consideration to the orders of the Arbitral Tribunal (stricto sensu) without any dilution. We therefore, come to the conclusion that:

(i) The Associate Company Bhadra International (India) Private Limited is not exempted from submitting the forms and annexures required under the terms and conditions of the tender by virtue of the orders passed by the arbitral Tribunal.

(ii) The decision of the respondents by the impugned letter dated 15.06.2017 does not suffer from arbitrariness, irrationality, bias, mala fides and perversity. Hence, the learned Single Judge ought not to have quashed the impugned letter dated 15.06.2017 and should not have exercised judicial review over the same.

66. In the result, W.A.(MD)No.1380 of 2017 is dismissed and W.A.(MD)No.1315 of 2017 is allowed. However, there shall be no order as to costs. However, we make it clear that the dismissal of W.A.(MD)No.1380 of 2017 will not deprive the Appellant in W.A.(MD)No.1380 of 2017 to seek relief either before the arbitral Tribunal or before the Civil Court for the recovery of the losses, if any, suffered by them on account of the alleged improper rejection of the bid. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar

/True copy/

Sub Assistant Registrar

+1cc to Mr.C.GODWIN, Advocate, SR.92430

+1cc to Mr.R.MAHESWARI, Advocate, SR.92585

W.A. (MD) Nos.1380 & 1315 of 2017

13.12.2017