BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED: 07.08.2017
CORAM
THE HON'BLE MR.JUSTICE K.KALYANASUNDARAM
W.P.(MD)No.11598 of 2017
and
WMP(MD)No.8935 of 2017

M/s.TDI International India (P) Ltd.,
represented by Berryson Kagoo,
General Manager (Sales),
Sir Usman Court,
F-6, First Floor, New No.63, Esdams Road,
Alwarpet, Chennai &
Regd. Office at No.42, Rani Jhansi Road,
New Delhi-100 055. : Petitioner

-vs-

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. : Respondents

Prayer: Petition filed under Article 226 of the Constitution of India for the issuance of a Writ of Certiorarified Mandamus, to call 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 petitioner in the event the petitioner is found to be the highest bidder (H-1).

For Petitioner : Mr.M.Ajmal Khan
Senior counsel
for Mr.R.Maheswari
For Respondents : Mr.C.Godwin

O R D E R

The prayer sought for in this writ petition is to quash the order of the 2nd respondent, in Letter No.AAI/MDU/C-1(A), dated 15.06.2017 in respect of E-bid (Tender) No.1000021231, dated 22.02.2017 and consequently direct the respondents to award advertising rights license at Madurai Airport to the petitioner in the event the petitioner is found to be the highest bidder (H-1).

2.The undisputed facts are follows:-

(i)The petitioner is a registered Company registered under the Companies Act, 1956 and it is engaged in the business of indoor and outdoor advertisement business.

(ii)The petitioner is one of the concessionaires in the advertisement segment. During the course of the business, due to certain disputes, the petitioner invoked arbitration clause and the disputes are pending before the sole Arbitrator, a former Judge of the Supreme Court Justice Mr.Deepak Verma.

(iii)The Hon'ble sole Arbitrator has passed the following order, on 07.10.2015:-

> "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 case, 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 any 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.

(iv)Another Company namely Bhadra International (India) Private Ltd., which was granted licence by the Airports Authority of India for providing ground handling services at Chennai and Kolkata Airports filed Arbitration case before the Sole Arbitrator, a former Judge of the Supreme Court Hon'ble Justice S.S.Nijjar. The order of passed by the sole Arbitrator, on 25.08.2016 and 2107.2017, which would run thus:-

> "(i)That Airports Authority of India, till pronouncement of final award would not initiate any coercive steps against claimant's I.e.,Bhadra International India (P) Limited. These orders dated 25.08.2016 of the Arbitral Tribunal have been

voluntarily undertaken to be complied with by Airports Authority of India. The record of such unequivocal assurance by Airports Authority of India has been formed part of the Arbitral Order under reference;

(ii)That Bhadra International India (P) Limited, vide Arbitral Orders, dated 27.01.2017 would start paying a royalty to Airports Authority of India @ 13% without service tax of the Gross Turnover achieved from Ground Handling Services w.e.f. 01.01.2017 as against 32.5% in respect of Chennai and Kolkata Airports, and 31.81% in respect of Southern Region Airports contracted as envisaged on the commercial commencement date of these licenses.

(iii)That the status of amounts already paid by Bhadra International India (P) Limited and claimed by Airports Authority of India would continue to be withheld/status quo till pronouncement of final Arbitral Orders."

3.When the matter stood thus, the 2nd respondent floated a tender calling for Request for Proposal (RFP) for advertising rights concession to design, develop, operate and market, the advertising opportunity in the entire Airport estate at Madurai Airport. The petitioner submitted tender application and on 15.06.2017, the technical bid of the petitioner was rejected on the ground that the petitioner has not submitted the Annexure 4 in Form I and Annexure 5 in Form I as per the Clause 2.2.1(d) of the RFP.

4.It is not in dispute that Annexure 4 in Form 1 and Annexure 5 in Form 1 relate to production/submission of 'No Due Certificate' in the Airports controlled by Airports Authority of India. It is also not in dispute that though, according to the respondents, the petitioner was not technically qualified, the petitioner's financial bid was opened.

5.Mr.M.Ajmal Khan, learned Senior counsel appearing for the petitioner would urge that the petitioner Company is one of the largest concessionaires of the respondents with regard to advertisement segment and in view of the dispute arose between the petitioner and the respondents, arbitration case is pending before the Sole Arbitrator, a former Judge of the Supreme Court Justice Mr.Deepak Verma and the order of the Arbitrator would reveal that the petitioner was allowed to participate in the tender floated by the first respondent and the petitioner is allowed to participate in the tender process, subject to furnishing Bank Guarantee for 50% of the dues of the respondents for the particular Airport. On such furnishing the Bank Guarantee, the claimant shall be permitted to participate in the tender process and its bid cannot be rejected on the ground of non-furnishing of 'No Dues Certificate'.

6.The learned Senior counsel further contended that some of the Directors of the petitioner company are also the Directors in another company called ''Bhadra International (India) Pvt. Ltd. According to the learned Senior counsel, the petitioner does not own any share in Bhadra International (India) Pvt. Ltd and both the companies are not subsidiaries to each other. Further, in respect of the dispute between Bhadra International (India) Pvt. Ltd and the first respondent, an arbitration proceeding is pending before the sole Arbitrator Hon'ble Justice Mr.S.S.Nijjar and before the Arbitrator, the respondents have given an undertaking that till the pronouncement of the final award, they will not initiate any coercive steps and as per the order of the Hon'ble Arbitrator, on 21.07.2017, the said Bhadra International (India) Pvt. Ltd has been paying licence in respect of Chennai and Kolkata Airports.

7.It is further contended that the petitioner and Bhadra International (India) Pvt. Ltd are different entities and there is no material to show that the petitioner is having sufficient influence over the company, as per the definition expressed “Associate” and therefore, Bhadra International India (P) Ltd cannot be construed as Associate company of the petitioner. It is further submitted that both the companies have no business with the 2nd respondent earlier and therefore, there is no due from the petitioner as well as the associate companies.

8.According to the learned Senior counsel, even assuming without admitting that M/s.Badra International India (P) Ltd., is an associate company of the petitioner, in view of the order passed by the Hon'ble Arbitrator, the tender cannot be rejected and hence, the impugned order is liable to be set aside.

9.Per contra, Mr.C.Godwin, learned counsel for the respondents, by referring the counter, would contend that the technical bid of the petitioner was rejected for the reason that the petitioner has not submitted Annexure 4 in Form 1 and Annexure 5 in Form 1 as per clause 2.2.1(d). The petitioner has claimed exemption for this, vide letter dated 06.04.2017, which was accepted for petitioner company alone and not in respect of the associate company of the petitioner.

10.According to the learned counsel for the respondents, the petitioner and M/s.Bhadra International India (P) Ltd., are having common shareholders and directors and admittedly, the said Bhadra International India (P) Ltd., is having undisputed dues to the first respondent and as per the tender condition, if the entity participating in any tender is a company and any of the directors of the said company is also a director of any other company having established business with Airports Authority of India and has having outstanding dues payable to the Authority, then the entity may not be allowed to participate in the tender process. It is further submitted that by mistake, the financial bid of the petitioner was opened, which is a human error.

11.The learned counsel further submitted that the petitioner is estopped from challenging the tender condition after taking part in the tender process and in respect of commercial contract, the petition filed invoking Article 226 of the Constitution of India is not maintainable, by placing reliance of the following judgments:-

(i)In (1995) 3 SCC 486 [Madan Lal and others vs. State of J & K and another], the Hon'ble Apex Court held as follows:-

"9.Before dealing with this contention, we must keep in view the salient fact that the petitioners as well as the contesting successful candidates being respondents concerned herein, were all found eligible in the light of marks obtained in the written test, to be eligible to be called for oral interview. Up to this stage there is no dispute between the parties. The petitioners also appeared at the oral interview conducted by the Members concerned of the Commission who interviewed the petitioners as well as the contesting respondents concerned. Thus the petitioners took a chance to get themselves selected at the said oral interview. Only because they did not find themselves to have emerged successful as a result of their combined performance both at written test and oral interview, they have filed this petition. In is now well settled that if a candidate takes a calculated chance and appears at the interview, then, only because the result of the interview is not palatable to him, he cannot turn round and subsequently contend that the process of interview was unfair or the Selection Committee was not properly constituted. In the case of Om Prakash Shukla vs. Akhilesh Kumar Shukla [1986 Supp SCC 285: 1986 SCC (L & S) 644: air 1986 SC 1043, it has been clearly laid down by a Bench of three learned Judges of this Court that when the petitioner appeared at the examination without protest and when he found that he would not succeed in examination he filed a petition challenging the said examination, the High Court should not have granted any relief to such a petitioner."

(ii)In 2010(1) CWC 824 [Chandragiri Construction Company Vs. State of Tamil Nadu], this court held that the petitioner at the first instance has not challenged the tender condition and he is estopped from questioning the same, after participation in the tender. In my considered view, both the decisions have not applicable to the facts of this case for the reason that according to the petitioner, he has complied the condition set out in the tender document and the rejection is invalid. In other words, the petitioner has not challenged the conditions set forth in the tender document.

(iii).The Hon'ble Supreme Court in the judgment reported in (2007)14 SCC 517 [Jagdish Mandal vs. State of Orissa] and the judgment made in Civil Appeal No.3422 of 2017, dated 01.03.2017 observed that the power of judicial review is narrow campus with regard to contractual matters.

12.The question whether a writ petition under Article 226 is maintainable to enforce the contractual obligation of the State, has already been well settled by the decision of the Ho'nble Apex Court. It has been held that the aggrieved party can approach the court by way of a writ petition under Article 226 and the court depending upon the facts of the case is empowered to grant relief. In this regard, it is appropriate to refer the following decisions:-

(i)In (2007)14 SCC 517 [Jagdish Mandal vs. State of Orissa and others] relied on by the learned counsel for the respondents, it has been held as follows:-

"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 tender 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

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 Stage 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."

13.In (1990)3 SCC 752 [Mahabir Auto Stores and others vs. Indian Oil Corporation and others], the Hon'ble Apex Court has held 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 and Ors. v. State of Bihar and Ors., (1977)3 SCC 457. 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. See Mis Radha Krishna Agarwal v. State of Bihar, (supra) at p. 462, 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 v. State of Tamil Nadu and Anr., (1974)4 SSC 3: 1974 SCC (L & S) 165, Maneka Gandhi v. Union of India and Anr., (1978)1 SCC 248, Ajay Hasia and Ors. v. Khalid Mujib Sehravardi and Ors., ((1981)1 SCC 722: 1981 SCC (L & S) 258, R.D.Shetty v. International Airport Authority of India and Ors., (1979)3 SCC 489 and also Dwarkadas Marfatia and sons v. Board of Trustees of the Port of Bombay, (1989)3 SCC 293. 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 action by 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.”

14.In (2004)3 SCC 553 [ABL International Ltd., and another vs. Export Credit Guarantee Corporation of India Ltd., and another], the Hon'ble Apex Court has held as follows:-

“23.It is clear from the above observations of this Court, once State or an instrumentality of 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 above said requirement of Article 14 then we have no hesitation that a writ court can issue suitable directions to set right the arbitrary actions of the first respondent.

15.In (2006)10 SCC 236 [Noble Resources Ltd., vs. State of Orissa and another], the Apex Court held as follows:-

“15.It is trite that if an action on the part of the State is violative 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 its 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. (supra), 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 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....

Contractual matters are, thus, not beyond the realm of judicial review. Its application may, however, be limited."

16.In the cae of JSW Infrastructure Ltd., (Indiankannon.org/doc/139043673) one of the tender conditions in that case was, that if there is only one private terminal/berth operator in a port for a specific cargo, the operator of that berth or his associates shall not be allowed to bid for the next terminal/berth for handling the same cargo in the same port. The selection of the highest bidder was objected on the ground that they were operating one berth for dry cargo. The objection was upheld by the High Court. However, the Hon'ble Supreme Court interpreting the clause held that it will apply only when there is a signal private operator operating a single berth. Once there are more than one private operators then the clause will not apply. In the above context, the Honble Supreme court observed that the superior courts while exercising their power of judicial review must act with restraint while dealing with contractual matters.

17.In the case on hand, the technical bid of the petitioner was rejected only on the ground of non filing of ''No Due Certificate, as per Annexure 4 in Form 1 and Annexure 5 in Form 1. It is not in dispute that both the the petitioner and the alleged associate company M/s.Bhadra International (India) Private Limited have invoked arbitration clause and the arbitration cases are pending before the former Judges of the Supreme Court. The Hon'ble Arbitrators have also passed interim orders to protect the interest of the petitioner and its associate company. Indisputably, the letter, dated 06.04.2017 is sent seeking exemption from filing 'No Due Certificate'. It is to be noted that in respect of the petitioner, the respondents have granted exemption, but the technical bid was rejected only with regard to the associate company, namely Bhadra International (India) Private Limited.

18.It is also to be noted that in the tender document, the word 'Associate' is defined as follows:-

> "Associate" 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."

19.According to the petitioner, Bhadra International (India) Private Limited is not the associate company of the petitioner, as the petitioner does not own any share in Bhadra International (India) Private Limited and it is also not a subsidiary company.

20.It is contended by the respondents that admittedly, the directors of the petitioner company are also directors in Bhadra International (India) Private Limited and in view of the undisputed dues by Bhadra International (India) Private Limited to the 1st respondent, the petitioner is disqualified.

21.I am unable to accept the stand taken by the respondents for the reason that the respondents have not produced any material to show that the petitioner has a significant influence with Bhadra International India (P) Limited and the petitioner is having minimum 20% of the total share capital of business decisions to satisfy the definition "Associate" as per the tender condition.

22.It is specifically contended by the petitioner that the arbitral cases are still pending and as per the order passed by the Sole Arbitrator, a former Judge of the Supreme Court Justice Mr.S.S.Nijjar, Bhadra International (India) Pvt. Ltd., is paying licence fee to the Chennai and Kolkata Airports. Further, admittedly both the petitioner and Bhadra International India (P) Limited had no prior business dealing with the 2nd respondent and the petitioner, for the first time, applies with the 2nd respondent and hence, there cannot be no outstanding to the 2nd respondent.

23.It is well settled law that in respect of commercial contracts, there shall be judicial restraint in review of administrative action and after taking part in the tender process, the parties are estopped from challenging the tender conditions. At the same time, if the parties could establish arbitrariness, mala fides, irrationality and perversity with the decision making process or the decision, Article 226 could be invoked questioning the same.

24.Though the petitioner claims to be the successful bider by quotting 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 regards 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 1st 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.

27.Accordingly, the writ petition is allowed. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar

/True Copy/

Sub Assistant Registrar

To

+1cc to M/S.C.Godwin, Advocate SR.No. 70975
+1cc to M/S.M.S.Suresh Kumar, Advocate SR.No. 71043

W.P.(MD)No.11598 of 2017
07.08.2017

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JM/SV MMS/SAR 2/21.08.2017/13P/3C