

THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 14.03.2018

Delivered on 27.03.2018

CORAM

THE HONOURABLE MR.JUSTICE K.RAVICHANDRABAABU

W.P.No.12472 of 2017

and

W.M.P.Nos.13262, 13263 & 15712 of 2017

M/s. TDI International India (P) Ltd.
Represented by Berryson Kagoo,
General Manager(Sales),
Sir Usman Court,
F-6, First Floor,
Old No.27, New No.63, Eldams Road,
Alwarpet,
Chennai-600 018
& Regd.office at No.42, Rani Jansi Road,
New Delhi 110 055 .. Petitioner

vs.

1. The Airport Director,
Airports Authority of India,
Chennai International Airport,
Chennai - 600 027
2. Airports Authority of India,
Rajiv Gandhi Bhawan,
Safdarjung Airport,
New Delhi 110 003. सत्यमेव जयते ..Respondents

Writ Petition filed under Article 226 of the Constitution of India praying for the issuance of a Writ of Certiorari to call for the records of the respondents pertaining to RFP Bid Invitation No.1000021222 published on 23.02.2017 to award the license for "Exclusive Advertisement Rights" concession to design, develop, operate and market the advertising opportunity in the entire Airport Estate at Chennai Airport and quash the same as illegal and unconstitutional.

For Petitioner : Mr.P.S.Raman,
Senior counsel
for Mrs.R.Maheswari

For Respondents : Dr.A Xavier Arulraj,
Senior counsel
for Mr.A.Arul Mary

O R D E R

This Writ Petition is filed against the bid invitation published by the respondents on 23.02.2017 to award the license for "Exclusive Advertisement Rights", concession to design, develop, operate and market the advertising opportunity in the entire Airport Estate at Chennai Airport.

2. Though the Writ Petition was filed with the above said prayer indicating that the challenge made against the impugned bid invitation is in respect of all the clauses of the bid invitation in general, however while hearing the Writ Petition for final disposal, the learned counsel for the petitioner filed a memo before this Court dated 20.02.2018 stating that the petitioner is restricting the challenge only to the following five clauses of the tender conditions:

1. Eligibility Criteria contained in Clause 2.2.2(A), 2.2.2(B) (I), 2.2.2(B) II and 2.2.1(d).
2. Exclusivity of Advertisement Rights - Definition of Advertising Rights and Concession, Definition of Airport, Location Layout Plan on Clause 5.1.3 and 5.2.5 read with Clause 1.2.8.
3. Obligation of Passenger facilities contained in Clause 1.2.8.
4. Dispute Resolution in Clause 5.16.
5. New Advertising Venture contained in Clause 5.19, 5.18 & 5.17 & Article 10.6 of draft agreement.

3. Therefore, the facts of the case, as narrated by the petitioner in their pleadings confined to the above said five Clauses, are extracted hereunder:

(a) The petitioner is a Company registered under the Companies Act, 1956, engaged in the business of Indoor and Outdoor advertisement business. The petitioner is one of the largest concessionaires of Respondents for the non-traffic revenue generation for the last more than three decades, more particularly, in the Advertisement segment. The last of such contract in respect of Chennai International Airport was awarded to the petitioner through an open competition bidding process on 02.04.2007, awarding the license for "Exclusive Advertisement Rights" in respect of Indoor and Outdoor advertising display sites at the entire Airport Estate at Chennai including the International & Domestic terminals. The License Agreement dated 23.04.2007 was entered between the parties for a period of five years, ending 17.04.2012.

Thereafter, the license period was repeatedly extended though initially for a short duration, however, finally extended by proceedings dated 27.03.2017 with uncertainty in the period of license.

(b) The respondents have now floated e-tender by issuing "Request for Proposal (RFP)" and publish the same on 23.02.2017. The petitioner, through a communication dated 05.03.2017 highlighted the discretionary, vague and ambiguous Clauses of the RFP and sought for necessary modifications and amendments. The first respondent conducted Vendors' meet on 07.03.2017 and invited additional queries if any from all the vendors for its consideration. The petitioner filed their additional information/queries on 15.03.2017. However, the respondents through communication dated 07.04.21017 replied that RFP Provisions would prevail.

(c) The objection regarding Clause 1.2.8 is that the said Clause mandates provision and thereupon entering into a Service Level Agreement for maintenance of mobile/laptop chargers, Q Managers, security frisking rays, news/entertainment/sports content through TV Channels by the selected concessionaire without even quantifying the requirement as contractual obligation. Provision of these facilities is essentially a passenger facilitation activity and should have been owned by the Respondent. Even if the same is to be passed on to the selected on concessionaire it needs to be atleast quantified and the expected service levels clearly defined and a methodology of recovery of cost of providing these services evolved. In the absence of clarity on any of the issues, the provision is highly arbitrary and ambiguous.

(d) The objections regarding Eligibility Criteria contained in Clause 2 in the memo viz., Exclusivity of Advertisement Rights - Definition of Advertising Rights and Concession, Definition of Airport, Location Layout Plan on Clause 5.1.3 and 5.2.5 read with Clause 1.2.8. are as follows:

(i) The eligibility conditions contained in 2.2.21 are discriminatory, irrational, arbitrary and biased as it specifically targets the petitioner herein who is the existing concessionaire and the conditions specified in the said clause is incorporated to prevent the petitioner herein from participating in the tender process. The conditions that (a) there should be no outstanding dues to Respondents as upto the previous month of date of publication of RFP; (b) If any director of the bidder company is a director in any other company engaged in AAI, then there should be no outstanding dues in that company as well; (c) the bidder is required to furnish additional bank guarantee equivalent to 50% of the disputed amounts; (d) the bidder should furnish "No Outstanding Dues Certificate" from the respondents along with the proposal. This

makes it clear that the RFP has been so tailor-made to eliminate the petitioner from participating in the bidder process or to disqualify the petitioner.

(ii) The respondents had issued "Expression of Interest" (EOI) vide letter No.AAM/C.Advt.(EOI)/ dated 16.03.2015 for appointment of a concessionaire, by calling for submission of Media Plan relating to concession to development, operate, market and maintain the indoor and outdoor advertising sites in Chennai Airport, for which the petitioner had submitted the EIO vide letter dated 30.03.2015 together with all details as required under the EOI. The said EOI did not contain any such discriminatory and arbitrary clause to eliminate the petitioner. Therefore, the respondents have now introduced Clause 2.2.1 in the RFP in order to eliminate the petitioner which is bad in law.

(iii) The condition in clause 2.2.1 (d) to produce "No Due Certificate" from the respondents themselves in respect of the petitioner Company and the other companies engaged in AAI in which any of the directors of the petitioner Company are also a director is unreasonable, discriminatory, arbitrary, malafide and actuated by bias. Every corporate identity and contractual arrangement is independent of each other with independent severance clauses and therefore, super imposing condition on a already concluded contract is bad in law.

(iv) In the absence of a relevant clause in the already concluded contracts between the petitioner and its sister companies, incorporated of such a clause in RFP amounts to altering of conditions in already concluded contracts, especially the Advertisement License Agreement dated 23.04.2007 entered between the petitioner and the respondents, which is bad in law.

(e) The objections as against the Clause dealing with Exclusivity of Advertisement Rights are:

i) The action of the respondents in floating the RFP for "Exclusive Advertisement Concession" does not satisfy the test of reasonableness and renders it unconstitutional in terms of Article 14 of the Constitution, which requires fairness in the action by the State.

ii) The petitioner company is greatly aggrieved by the discriminatory, arbitrary, irrational, unfair conditions and eligibility criteria stipulated in the RFP floated in February, 2017 by the Respondents for "Exclusive Advertising rights concession" to design, develop, operate and market the advertising opportunity at Chennai Airport as the same are in violation of Articles 14, 19 & 21 of the Constitution of India.

(f) The objection regarding Clause 5.16 is that the appointment of arbitrator as per Clause 5.16 (Page 63 & 74 of RFP) is an alternate dispute resolution process and the linking of this clause with clause 2.2.1 (d) (Page 30 of RFP) apart from not being relevant to the context, is against the legal provisions of the Arbitration and Conciliation Act.

(g) The objections regarding the Clause dealing with New Advertising Venture are as follows:

(i) Clause 5.18 relates to change in Passenger Terminals/ Traffic Circulation Areas, etc. about which the respondents have to be transparent as it has a direct impact on the advertisement business in terms of financial loss, productivity loss and marketing plans of the intending bidder. Such a situation contributes to the ambiguity and vagueness in the conditions of RFP and would directly affect the bidding competition.

(ii) Clause 5.19 which deals with "New Advertising Ventures" by respondents defeats the very purpose of awarding the license for "Exclusive Advertisement Rights" and is in direct conflict and breach of business offer, apart from being unethical provision.

(iii) The visibility of the outdoor advertisement inventory would be known only after the proposed redevelopment of Chennai Airport comes to share. A Project Management Consultant, viz., M/s. Aecom Asia Company, Gurugram, Haryana has been appointed for the redevelopment project which includes multilevel car park project in front of the present facade of Terminal Spaces. The respondents are not clear if the present RFP exercise will automatically extend to the additional advertisement areas on redeveloped assets. This has a direct bearing on the bid evaluation. It is also obvious from clauses 5.18 & 5.19, that the respondents redevelopment of Chennai Airport is underway. Such a situation is akin to deliberately withholding crucial and substantial commercial information with a fraudulent intent.

(iv) Clause 5.18 & 5.19 relating to redevelopment of Chennai Airport is ambiguous and vague as it has a direct bearing on the bid evaluation.

4. The respondents filed a counter affidavit dated 01.06.2017, wherein it is stated as follows:

(a) The petitioner was awarded license for "Exclusive Advertisement Rights" with effect from 23.04.2007 for five years. Extension was granted till the floating of regular tender and finalising the same. The respondents have finally come out with elaborate "Concession for Exclusive Advertisement Rights to Design, Develop, Operate and Market the Advertising Opportunity

in the Airport Estates" all over India. This ongoing tender process calling for RFP is sought to be implemented in 26 Airports operated by the respondent authority across India. The terms and conditions of RFP in all the said tenders are the same and common to all the Airports. With the said terms and conditions, RFP was invited for 26 Airports, in which, the petitioner has participated in 7 Airports namely, Jodhpur, Srinagar, Varanasi, Calicut, Madurai, Vijayawada and Goa by accepting the terms and conditions therein. Therefore, the petitioner is estopped from challenging the very same terms selectively in Chennai Airport. The ulterior motive of the petitioner is to frustrate the ongoing tender process and only to continue his license. The very same terms and conditions have been well received by all other leading Advertising Agencies. The entire tender process has been fair and transparent and there is no complaint from any quarters except from the writ petitioner for vested interest. The Airport Authority of India Act, 1994, empowers the respondents to evolve such tender process for the purpose of contracts. The petitioner is a chronic defaulter along with its Associate M/s. Bhadra and their outstanding over dues payable to the respondent Authority is approximately estimated around Rs.5000 to Rs.7000 crores. They have resorted to arbitration and other litigations across India only to avoid contractual payments. The above statement of the respondents in respect of the quantum of arrears is subsequently corrected as mistake of fact by filing additional counter affidavit dated 27.02.2017 wherein it is stated that the outstanding over due payable by the petitioner and its Associate stands approximately more than Rs.200 crores and the earlier statement made regarding the quantum was inadvertent clerical mistake.

(b) Inputs were received from various quarters before finalising the terms and conditions for issuing RFP. That does not mean that the authority has to accept whatever was proposed by the writ petitioner after floating e-tender. Physical inspection was also permitted to the intending bidders. Fresh queries in writing was also invited by the intending bidders. A pre-bid meeting of potential bidders was conducted on 10.03.2017 and after giving sufficient explanation to the queries of different bidders, online submissions of proposals were invited. Sufficient time has been given to the prospective bidders to evaluate and submit their proposals. The allegation that the Terms and Conditions were modified only to eliminate the petitioner from the bidding competition is baseless, especially when the petitioner themselves have participated in seven other Airports under the same terms and conditions.

(c) Clause 2.2.1 (d) r/w. Annexure-4, in respect of outstanding over dues, as a ground for disqualification is a required and reasonable eligibility clause and the petitioner cannot be permitted to call the same as a practicably impossible

condition. As already stated supra, the petitioner M/s TDI and its Associate M/s. Badhra are chronic defaulters and notice have been issued U/s. 28 (G) of AAI Act, 1994, for recovering the rental arrears and damages. Therefore, the petitioner has no moral right to raise the issue to selectively buttress its case, when the condition is common to all. There cannot be a separate condition or RFP to accommodate a defaulter. Clause 2.2.2(A)(i) & (iv) in respect of Threshold Eligibility of technical capacity and financial capacity there is no ambiguity in stipulation of a minimum of 3 years experience. The stand of the petitioner that these advertisements are surrogate and conflict with its business, cannot be justified. Similarly, objection to Lay-out Plans, as stated in page 16 of the Definition Clause, is not indirect marketing intervention as stated by the petitioner. The Exclusive Advertisement Rights mentioned in the concessionaire is in reference to the particular Assigned Area for advertising in the Airport premises and in no way can compromise the passenger facility, guidance and movements in the Airport. The petitioner is trying to overstretch its rights, beyond the scope of concession.

(d) In Clause 1.2.8 the successful bidder has to enter into "Service Level Agreement" for providing certain passenger facilities. There is no ground for the petitioner to abdicate the responsibility and dictate to the Authority, "that these facilities should have been owned by the respondent". It has no right to say so. There is no absence of clarity in the matter, as stated by the petitioner.

(e) In respect of New Advertising Venture, under Clause 5.19, there is a preemptive offer in favour of the Concessionaire holding the "Advertising Rights". Only on refusal of the same, the respondent will be free to offer to any other entity by competitive bidding. It is in no way infringing into the rights of the petitioner. There is a static understanding of the advertisement opportunity on the part of the petitioner. Anyone having acquired Concession for Advertisement Rights only for 16,000 sq.ft, cannot claim monopoly and stand on the way of expanding other opportunities for advertisement space. In this context the word "Exclusive Advertisement Rights" has to be given a purposive and contextual interpretation, rather than literal interpretation. The term "Exclusive" is to differentiate from other players who are in the Airport with limited right to advertise based on their services provided.

(f) The word "Exclusive Advertisement Concession" cannot be interpreted in the absolute and in the abstract. It is a relative term that requires to be interpreted in the context, wherein there are multiple players in the vicinity of the Airport, warranted by their respective service provided by them and which are essential for the operation of the Airport. These service providers cannot be dubbed by the petitioner as competitors or backdoor entries. Their service are essential for

the operation of the Airport and for providing facilities to the passengers. The petitioner interprets even the television advertisements inside the Airport as backdoor entries. This is ludicrous to say the least. It cannot attribute its own meanings to the scope of "Exclusive Advertisement Concession". The petitioner cannot treat the entire Airport premises, as it fiefdom to encompass within the meaning of the word "Exclusive". It is strictly confined to the extent of 16,000 sq.ft., as mentioned in the RFP and location lay-out. The RFP is well within the scope of reasonableness and legality. There is no discriminatory treatment to the petitioner as alleged by the petitioner.

(g) When the Concession has been awarded in Kolkata under the very same RFP, the AAI has enhanced its revenue to the tune of Rs. One crore per month. This only indicates that the petitioner is trying to block the legitimate revenue to Chennai Airport, by filing a frivolous writ petition and that too for personal monetary gains.

5. A rejoinder affidavit dated 10.08.2017 is filed by the petitioner, wherein it is stated as follows:

(a) Each RFP notification is independent and isolated and not inter linked to any of the other stations. The petitioner is always willing to participate in a fair and just competitive bidding process. The petitioner only seeks redressal of deliberate inclusion of the tailor-made discriminatory clauses intended to restrain in particular participation of the petitioner and serious ambiguities which make the business model evaluation a totally speculative task. The allegation that the petitioner and its alleged associate M/s. Bhadra International (India) Private Limited is a chronic defaulter is strongly denied. The petitioner Company had nil outstanding as late as upto 31.03.2017 as per the certificate issued by the respondents in Chennai Airport itself. Need to invoke arbitrations have been caused by consistent breaches in the License Agreements committed by the respondents only.

(b) It is most important to take note that the participation has been thrown open to anybody meeting the technical eligibility criteria as outlined at Clause 2.2.2(A)(i) to (vi) and Clause 2.2.2 b (I)(a) to (c) only wherein as the petitioner has been classified under a special category of "Existing Concessionaire of AAI" and is being obligated meet an additional condition undue Clause 2.2.2(B)(II) linked and as defined at Clause 2.2.1(d). It is therefore clear beyond doubt that the demand from a particular bidder alone is discriminatory as the said clause cannot be applied to any other participant. (c)

As regards participation in other airports, it is submitted that the circumstances, commercial environment, and business viability of each tender depending on various factors such as Minimum Reserve License fee, geographical Location, the quality and quantity of Airport Advertisement assets, and the specific

market perception.

(d) The Technical and Financial Eligibility Conditions are laid down at Clause 2.2.2(A)(i) to (vi), Clause 2.2.2 (B)(I)(a) to (c). Any party meeting these requirements is considered Technically Qualified and considered for opening of financial bids and award of license if found to be the highest bidder. Whereas the petitioner in addition to the above clauses have to meet the requirements of an additional discriminatory tailor-made clause termed as Clause 2.2.2(B)(II) and Clause 2.21(d). This is a clear case of discrimination because it is mandating additional punitive eligibility criteria for the petitioner alone whereas providing a favourable and preferential criteria for others.

6. To the additional counter affidavit filed by the respondents dated 27.02.2018, a reply affidavit dated 14.03.2018 is filed by the petitioner wherein it is reiterated that the petitioner is not a chronic defaulter as alleged by the respondents and the outstanding due certificate issued by the respondent dated 31.01.2018 would show that there is absolutely NIL undisputed dues and the disputed dues are a subject matter of arbitration. It is further stated therein that the composite amount being paid by the petitioner per month is Rs.3,36,70,339/- and therefore the submission of the respondent that it is suffering loss of revenue untenable and totally false statement made to prejudice this Court. The so called typographical error regarding the inflated figure was a statement made with malicious intent to mislead this Court.

7. Mr.P.S.Raman, learned senior counsel appeared and argued for the petitioner. A written argument is also filed by the learned counsel for the petitioner. The sum and substance of the submissions made on behalf of the petitioner are as follows:

(a) The Technical and Financial Eligibility Conditions are laid down at Clause 2.2.2(A)(i) to (vi), Clause 2.2.2(B)(I)(a) to (c). The petitioner has to meet the requirements of an additional discriminatory clauses, Clauses 2.2.2(B)(II) and Clause 2.2.1(d) which are discriminatory and tailor made clauses applicable only to the petitioner as bidder who is being classified as existing licensee of AAI. The definition of 'Associate' incorporated in the RFP is not in accordance with Section 2(6) of the companies Act, 2013. Therefore, the RFP is liable to be struck down. The mere commonality of Directors cannot be utilised as a tool for denying participation in competitive bids as it tantamount to discrimination by creation of unlawful barrier in a healthy competitive bidding. When the bidders who are not the Existing Licensees of AAI are not required to submit any proof of understanding dues. The petitioner cannot be discriminated on this ground from the other bidders. Clauses 2.2.1(d) & 2.2.2 (B)(II) have been incorporated

to discriminate and eliminate the petitioner by alleging that Bhadra International Pvt.Ltd., a company engaged in Ground Handling Services and having some directors in common is an Associate of the Petitioner Company. While the Bhadra is not an associate company as per definition contained in the Companies Act. The existing or past contracts of the petitioner with the respondent or the contracts of its alleged Associate Company are independent juridical contracts and in all those contracts there is not mention of producing such certificate if the petitioner wishes to participate in any future tenders floated by the respondents either in respect of itself or by its alleged associate company. Therefore, by means of insistence of Clause 2.2.1(d) and Clause 2.2.2(B)(II) are retrospectively altering the contract conditions. The malafide intention of the respondents is clear from the additional affidavit of withdrawal of their statement on alleged dues. On 27.02.2018, the respondent themselves issued No Due Certificates. Clause 2.2.2. (A)(i) & (ii) of RFP relating to technical capacity and experience leaves ambiguity and vagueness insofar as it relates to the definition of Advertising Rights Concessionaire. In respect of Exclusivity of Advertisement Rights - definition of Advertising Rights Concession, Definition of Airport, Clauses 5.1.3 and 5.2.5 read with clause 1.2.8 and Obligation of Passenger Facilities contained in Clause 1.2.8, it is to be noted that the order passed on 4.8.2014 by the learned Arbitrator holding that the respondents had indulged in parallel and surrogate advertising to the detriment of the petitioner and that fraud has been committed by the respondents in indulging in granting rights to other licensees on lesser amount amounts to fraud by the respondents.

(b) Clause 1.2.8 are ambiguous and the same is not quantified in terms of number of LCD/LED TVs to be provided, number of Wi-Fi connections to be provided as passenger facilitation, etc. Dispute Resolution in Clause 5.16 is against the legal provisions of law contained in the Arbitration & Conciliation Act, 1996. Clause 5.16 provides for alternate dispute resolution process and cannot be subjected to any eligibility condition by linking of the same to Clause 2.2.1(d) of RFP. Therefore, fixing the eligibility Criteria for reference of any dispute to Arbitration, is per se illegal and unsustainable in law.

(c) The new Advertising Venture contained in clause 5.19 is contrary to the definition provided in the RFP viz., "Advertising Rights Concession" would mean "Exclusive Advertisement Rights" and cover all types of indoor and outdoor advertising/brand promotion media, such as Bill Boards, Gantries, ..., display o LCD/LED TV,.... Mobile/Laptop chargers, Sponsorship/advertising on Security, Trays, Que Managers, Planters and any future advertising innovations. etc. "Airport" shall mean the entire location at Chennai Airport and would

include all its present and future terminal buildings, land, buildings, roads, car parks, equipments, facilities and systems." Therefore, the definition of "Airport" clearly includes the entire premises of "Chennai Airport Estate" and the pre-dominant intent of the proposed grant of Advertisement License is nothing but "Exclusive".

(d) Clauses 5.17 & 5.18 are contradictory to Clause 5.19 and causes ambiguity. Clause 5.19 intends to raise additional license fee at the cost of the licensee creates ambiguity.

(e) From the above, it is clear that the Clause 5.19 would defeat the very purpose of awarding the license of "Exclusive Advertisement Rights" and is in direct conflict with the intention and the definitions as stated hereinabove.

(f) The following decisions are relied on in support of the above contentions:

2002(9) SCC 463 (Alembic Glass Industries Ltd. v. CCE) and 2010(5) SCC 306 (Indowind Energy Limited vs. Wescare (India) Limited)

8. Mr. A. Xavier Arulraj, learned senior counsel for the respondents made the following submissions. A written submission is also filed by the learned counsel for the respondents. The sum and substances are:

(a) The writ petition is not maintainable in law. In a catena of judgments of the Hon'ble Supreme Court, it has been repeatedly held that the tender condition falls within the contractual realm and therefore, they are not open to judicial review, except on the ground of illegality, irrationality and procedural impropriety.

(b) In this connection, the following decisions are relied on:

2004(4) SCC 19 (Directorate of Education v. Educomp Datamatics Ltd.), 2005(4) SCC 435 (Global Energy Ltd. v. Adani Exports Ltd.), 2005(1) SCC 679 (Seema v. Ashwani Kumar) and 2017 (4) SCC 170 (JSW Infrastructure Ltd. v. Kakinada Seaports Ltd.)

(c) The writ petition has been filed on frivolous grounds, preventing the entire tender process only for the purpose of continuing the present license on the strength of the interim orders.

(d) The RFP was released in respect of 26 Airports. The very same petitioner who had participated in seven airports under the same terms and conditions of the said RFP cannot turn around and challenge the said terms and conditions only in respect of Chennai Airport. The principle of estoppel will operate against the petitioner. Before floating the RFP, inputs were received from the stake holders/ potential bidder agencies, physical inspection was permitted, a pre-bid meeting was arranged potential bidders and then only RFP was finalised. There was no complaint in respect of the terms and conditions of the other

leading advertising agencies of India. The petitioner is challenging the terms and conditions with ulterior motive for personal interest. Just because it is not suitable to the petitioner, the terms and conditions cannot be tailored to buttress his convenience. Unless the terms are against the public interest, this court need not interfere in such commercial contracts. The dues of the petitioner or its associates, whether disputed or undisputed is not the subject matter in this writ petition. The petitioner cannot claim a special treatment even before filing tender. It is a common condition applicable to all. In respect of all the dues of the associates, as stipulated in Clause 2.2.1(d) it pertains only to the associates having commercial licenses at Airport, controlled by AAI and does not apply to other associates. The very same issue has already been decided against the very same petitioner by the Honourable Division Bench in its order dated 13.12.2017 made in W.A.(MD) Nos.1380 and 1315 of 2017. The issue in the said case was one of the conditions of the very same RFP whereas the petitioner has extended the challenge to some other terms in this writ petition. The only difference in the said case was that it was filed after the award, while this case was filed previous to the award, even before opening the technical bids. The above orders of the Division Bench were already confirmed by the Honourable Supreme court by its order dated 05.02.2018 made in SLP(C)Nos.2637-2638/2018.

9. Heard both sides and perused the materials placed before this Court.

10. The points for consideration in this writ petition is as to whether the disputed Clauses contained in the Request For Proposal (RFP) in bid invitation published by the respondents on 23.02.2017 for awarding Exclusive Advertisement Rights in Chennai Airport, are liable to be quashed or declared as illegal and unconstitutional at the instance of the petitioner.

11. I have already extracted in detail the respective pleadings of the parties and their submissions made on the subject matter in dispute. Therefore, I am not reiterating them once again hereunder except by referring to certain facts which are sufficient for deciding this writ petition.

12. The petitioner is a Company engaged in the business of Indoor and Outdoor advertisement. In pursuant to the earlier open competition bidding process floated by the first respondent, the petitioner was awarded the license for Exclusive Advertisement Rights on 02.04.2007 in respect of Indoor and Outdoor Advertising display site at the entire Airport Estate at Chennai including the International and Domestic Terminals. Admittedly, such license agreement was originally for a period

of five years ending on 17.04.2012 and thereafter, extended periodically and finally extended on 27.03.2017 without fixing the period of extension. Therefore, it is an admitted fact that the petitioner as a licensee, in pursuant to the earlier tender process, is enjoying such exclusive advertisement rights at the Chennai Airport all these years commencing from the month of April, 2007, under the strength of extended license period. Now, the respondents wanted to float a fresh tender in the form of RFP for the purpose of issuing license to the successful bidder for the future period. Such RFP was published on 23.02.2017. The petitioner, who is enjoying the Exclusive Advertisement Rights as an existing licensee, has now filed the present writ petition and chosen to challenge the following Clauses by raising very many objections against each Clause. They are as follows:

(1) Eligibility Criteria contained in Clause 2.2.2(A), 2.2.2(B) (I), 2.2.2(B) (II) and 2.2.1(d).

(2) Exclusivity of Advertisement Rights - Definition of Advertising Rights and Concession, Definition of Airport, Location Layout Plan on Clause 5.1.3 and 5.2.5 read with Clause 1.2.8.

(3) Obligation of Passenger facilities contained in Clause 1.2.8.

(4) Dispute Resolution in Clause 5.16.

(5) New Advertising Venture contained in Clause 5.19, 5.18 & 5.17 & Article 10.6 of draft agreement.

13. It is mainly contended by the petitioner that particular eligibility conditions are tailor made only to see that the petitioner is not participating in the tender. Their main grievance is in respect of Clauses 2.2.2(b)(II) and 2.2.1(d), wherein it is contemplated that a Company is not permitted to participate in the bidding process if the Director/s of the participating bidder are also represented as Directors in another Company which establishes business with respondents and has undisputed outstanding dues. According to the petitioner Bhadra International India Pvt.Ltd., a Company engaged in Ground Handling Services and having some Directors in common is not an associated Company as per the definition contained in Companies Act. Likewise, the petitioner has raised the objections in respect of other Clauses as referred supra.

14. This Court, upon careful consideration of the facts and circumstances as well as the scope of the writ Court in dealing with the commercial contractual matters, is of the firm view that the petitioner is not entitled to succeed in this writ petition for the simple reason that an intending bidder is not entitled to question certain terms and conditions of tender merely because such clauses are against his interest or disqualify him. It is unheard that a willing or proposed

participant in a tender process would dictate terms on the owner as to how the terms and conditions of such tender should be. The attitude of the petitioner would only exhibit their unjust claim with unfair advantage. Moreover, admittedly, when the very same terms and conditions are stipulated in common in respect of 26 Airports in this Country and the very same petitioner has participated in 7 Airports under the same terms and conditions without any demour, I fail to conceive even a little justification as to how the petitioner can now turn around and challenge certain terms and conditions as stated supra in respect of Chennai Airport alone, only because the particular clause which deals with dues of the existing licensee of AAI comes in the way of the petitioner in participating in the tender. The petitioner contends that such clause is tailor made against the petitioner to discriminate and eliminate them.

15. I wonder as to how the petitioner is justified in making such contention when this particular clause is not introduced only in respect of the Chennai Airport alone. On the other hand, admittedly this Clause is incorporated in all the RFPs in respect of other Airports where the petitioner has also participated accepting the same terms and conditions. Therefore, as rightly pointed out by the respondents, it is evident that the intention of the petitioner is only to prolong their stay by filing this frivolous writ petition by challenging certain terms and conditions of the tender document.

16. Needless to say that it is for the owner to impose terms and conditions which suit them to select a qualified person. Neither the intended bidder or any other 3rd party has any right whatsoever or justification to dictate terms to the owner as to how the terms and conditions should be, so long as those terms and conditions are not opposed to public policy. If such contention is accepted, it would only mean that the owner has to impose only the conditions which would suit the intending bidder. I do not think that such could be the concept of the commercial contracts. The Honourable Apex Court in very many decisions has categorically held that the power of the Court to interfere with the commercial contracts is very limited. Moreover, when it is concerned with the terms and conditions of the contract, the Court should desist from interfering with such terms and conditions either by substituting the one as projected by the petitioner/intending bidder or diluting the existing condition in a way that would suit the intending bidder.

17. It is to be noted that the subject matter RFP was published by the respondents only after having the preliminary meetings with the intending bidders and also after allowing them to inspect the premises. Therefore, after considering the inputs

received from such of those persons, the respondents have finalised their RFP and published the same accordingly. Once such RFP is published, then the participants in the pre-bid meeting cannot have any say or vested rights to insist upon the respondents to either alter or delete the some of the terms and conditions of RFP, assuming such terms and conditions are not comfortable to those persons.

18. In this case, yet another factor to be noted is that the very same petitioner, by accepting the same RFP issued in respect of other airports, has participated in those tender process. The petitioner did not raise any objection insofar as those bids are concerned. Therefore, the petitioner cannot pick and choose the challenge in respect of one of the airports alone where such conditions are not comfortable to them. Thus, the petitioner is bound to lose his fight even on the principles of estoppel, even assuming that the petitioner has some right to question the terms and conditions.

19. It is further to be noted that the very same petitioner filed a writ petition in W.P.(MD) No.11598/2017 before the Madurai Bench of this Court challenging the rejection of their technical bid arising out of the same RFP with the same set of terms and conditions issued in respect of Madurai Airport. In that case, though the learned single Judge quashed the order of rejection, the Division Bench, in W.A.(MD) Nos.1380 and 1315 of 2017, rejected the contention of the petitioner and dismissed the writ petition. The subject matter of challenge before the Madurai Bench is also in respect of the very same clause 2.2.1 (d) which deals with "outstanding dues" issue. The Division Bench, apart from finding that Bhadra International is a joint venture partner with the petitioner in some of the Airport projects of the Airport Authority of India, has specifically found that filling up Form-I Annexure 4 and Form-I Annexure 5 by the petitioner company were not exempted by the Arbitral Tribunal. It was further observed therein that the Airport Authority of India have every right to reject the technical bid submitted by the petitioner herein in respect of Madurai Airport for non-fulfilment of clause 2.2.1(d) of the RFP. The Division Bench, in clear and categorical terms, found that Bhadra International is a joint venture partner with the petitioner company and that such fact is evident from the undertaking letter given by the petitioner disclosing that Bhadra International is perceived to be an associate Company and that there are common Directors in both the companies. It is further to be noted that the said decision of the Division Bench of this Court was challenged by the petitioner before the Honourable Supreme Court in SLP.Nos.2637-2638/2018 and that the said SLPs were dismissed on 05.02.2018. Therefore, when the findings rendered by the Honourable Division Bench of this Court to the effect as stated supra have become final, conclusive and binding

on the parties, the petitioner is not entitled to once again canvass before this Court the very same contentions by challenging the very same terms and conditions, more particularly, by contending that Bhadra International will not come under the purview of "associate company" as defined under the Companies Act. Needless to say that this attempt of the petitioner is apparently to drag on the fresh tender proceedings by one way or other so that the petition can continue their business at Chennai Airport under the guise of extended license period.

20. It is further to be stated that right to freedom to carry on any trade or business as conferred under Article 19(1) (g) of the Constitution of India does not mean that such right is an unfettered right. On the other hand, it is well settled that all rights conferred under Article 19 are always subject to reasonable restrictions. If a person wants to carry on a trade or business on his own, he is entitled to do so according to his whims and fancies, so long as such trade or business is not unlawful or oppose to public policy and public interest. At the same time, if the trade or business of such person is in the nature of doing under somebody or on behalf of somebody by way of contract, then such person cannot dictate terms as to how the owner of such business has to carry on such business. In other words, a person, indisputably bound to do a business as a Contractor under a owner, cannot have a say in respect of the terms and conditions inviting such contractors to do such business. If such right is either assumed or conferred, it would only result in allowing encroachment by a third party on the exclusive domain of the owner of such contract, which is impermissible in the eye of law.

21. In 2004(4) SCC 19 (Directorate of Education v. Educomp Datamatics Ltd.), the Honourable Apex Court in paragraph Nos. 12 & 13 has held as follows:

12. It has clearly been held in these decisions 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. It must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere. The courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, mala fide or actuated by bias. It is entitled to pragmatic adjustments which may be called for by the particular circumstances. The courts cannot strike down

the terms of the tender prescribed by the Government because it feels that some other terms of the tender would have been fair, wiser or logical. The courts can interfere only if the policy decision is arbitrary, discriminatory or mala fide.

13.

Moreover, it was for the authority to set the terms of the tender. The courts would not interfere with the terms of the tender notice unless it was shown to be either arbitrary or discriminatory or actuated by malice. While exercising the power of judicial review of the terms of the tender notice the court cannot say that the terms of the earlier tender notice would serve the purpose sought to be achieved better than the terms of the tender notice under consideration and order change in them, unless it is of the opinion that the terms were either arbitrary or discriminatory or actuated by malice.

(emphasis supplied)

22. In 2005(4) SCC 435 (Global Energy Ltd. v. Adani Exports Ltd.), at paragraph Nos.9 and 10, the Honourable Apex Court has held as follows:

9. It was contended before the High Court that the aforesaid condition had been incorporated solely with an intent to deprive a large number of companies imparting computer education from bidding and monopolise the same for big companies. The writ petition was allowed and the clause was struck down as being arbitrary and irrational. In appeal, this Court reversed reversed the judgment of High Court basically on the ground that the terms of the invitation to tender are not open to judicial scrutiny, the same being in the realm of contract and the Government must have a free hand in settling the terms of the tender. The courts would not interfere with the terms of the tender notice unless it was shown to be either arbitrary or discriminatory or actuated by malice. It was further held that while exercising the power of judicial review of the terms of the tender notice, the court cannot order change in them.

10. The principle is, therefore, well settled that 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.

(emphasis supplied)

23. In 2005(1) SCC 679 (Seema v. Ashwani Kumar), the Honourable Apex Court, at paragraph No.42 has held as follows:

42.It is easy to allege but difficult to accept that terms of the notices inviting tenders which were fixed after joint deliberations between State authorities and intending tenderers were so tailored as to benefit only a certain identified manufacturers having foreign collaboration. Merely because a few manufacturers like the petitioners do not qualify to submit the tender, being not in a position to satisfy the terms and conditions laid down, the tender conditions cannot be held to be discriminatory.

(emphasis supplied)

24. In 2007(14) SCC 517 (Jagdish Mandal v. State of Orissa), the Honourable Apex Court in paragraph No.22 has held as follows :

.....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 bonafide 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 the 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.

(emphasis supplied)

25. In 2017(4) SCC 170 (JSW Infrastructure Ltd. v. Kakinada Seaports Ltd.), the Honourable Apex Court in paragraph No.10 has held as follows:

10. In Afcon Infrastructure Ltd. vs. Nagpur Metro Rail Corpn.Ltd., this Court held as follows:

"13. ... 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.

....

15. 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.

16. 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 NM"RCL was perverse or malafide or intended to favour one of the bidders. This was certainly not the case either before the High Court or before this Court."

This view taken in Afcons was followed in Montcarlo Ltd. v. NTPC Ltd. Thus, it is apparent that in contractual matters, the writ courts should not interfere unless the decision taken is totally arbitrary, perverse or malafide.

(emphasis supplied)

26. Thus, the principles that emerge from the above decisions of the Apex Court are summarised as follows:

(a) The terms and conditions of the invitation to tender being in the realm of contract, the owner must have a free hand in setting the terms in the tender which are not open to judicial scrutiny.

(b) Merely because it appears that some other terms would have been fair, wiser or logical, cannot be a ground for the court to strike down the tender prescribed by the owner, as it was for the authority to set the terms of the condition, unless it is established that such administrative policy decision is arbitrary, discriminatory or malafide.

(c) Merely because a particular term or condition of the tender may result in depriving a particular individual bidder to take part in the tender process, that itself cannot be cited as an event of discrimination, since those terms and conditions are issued in common to all intending bidders and not stipulated on the particular individual alone.

(d) If the decision relating to award of contract is

bonafide and is in public interest, Courts will not, in exercise of power to judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer is made out.

(e) 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.

(f) A mere disagreement with the decision-making process or the decision of the administrative authority is no reason for a constitutional court to interfere, as 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.

27. Considering the above principles laid down by the Hon'ble Apex Court in all those decisions and in the absence of any arbitrariness or malafide or discrimination in this case, I find that the present challenge made by the petitioner has to necessarily fail.

28. The decisions of the Supreme Court reported in 2010(5) SCC 306 and 2002(9) SCC 463 are relied on by the petitioner's counsel to contend that mere fact that two companies have common shareholders and common Board of Directors will not make the two Companies a single entity. The issue before this Court is not as to whether the petitioner and the Badra International India Pvt.Ltd., are single entity. On the other hand, the issue is whether the relevant clause stipulated in the RFP with regard to the outstanding dues as referred to under clause 2.2.1(d) is bad in law or liable to be set aside since it affects the petitioner's interest. Therefore, the above decision is not helping the petitioner in any manner. Even otherwise, the petitioner is not entitled to raise this issue after they suffered an order from Madurai Bench of this Court on the very same issue.

29. The very same petitioner has already challenged the very same RFP in respect of Madurai Airport after issuance of award in respect of some other bidder and failed to succeed in his attempt upto the Apex Court. Now, the petitioner is challenging the very same RFP before even awarding the contract in respect of Chennai Airport. It is nothing but a preemptive attempt of the petitioner to see that the new tender is not floated. I find no bonafide on the part of the petitioner in maintaining this writ petition. The petitioner, as a intending bidder, has no right to contend that the terms and conditions of the contract should be in such a way which will suit them. If some of the conditions are not suitable for the petitioner, they can very well keep away from the participation in the tender process as nobody is compelling them to take part. Needless to say that the

commercial contracts are floated only for selecting the persons who are fully eligible and qualified, both in technical as well as the financial aspect of the bid. If the petitioner thinks that they would fail in any one of the test, it is open to them not to participate in the tender process. Instead, by way of filing this Writ petition, the petitioner is not entitled to create an impression as though they have some vested right, which neither in law nor on fact does exist.

30. Considering all these aspects, I do not find any merit in this writ petition. Accordingly, the writ petition fails and the same is dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/--

Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

vsi

+1cc to Mrs.R.Maheswari, Advocate Sr.No.23454

+2cc to Mr.A.Arulmary, Advocate Sr.No.23236

sm:28.3.2018

order made in
W.P.No.12472 of 2017

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