

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED : 21-04-2021

CORAM

THE HONOURABLE MR. JUSTICE S.M.SUBRAMANIAM

WP No.23441 of 2017

And

WMP No.24623 of 2017

AGM Duty Free Selatan Sdn BHD,
16th Floor, Menara Safaun,
50450, Kulalumpur, Malaysia,
No.86/18, Royal Complex,
Sankari Road,
Seetharamalayam,
Thiruchengode,
Namakkal District,
Represented by its Manager
Saravanan Subramani. ... Petitioner

vs.

1. Airport Authority of India,
Represented by its Chairman,
Rajiv Gandhi Bhawan,
Safdarjung Airport,
New Delhi-110 003.
2. Airports Authority of India,
Represented by its Airport Director,
Operational Office Building,
2nd Floor,
Chennai-600 027.
3. The Joint General Manager (Comml)/SR,
Directorate of Commercial Regional Head Quarters,
Southern Region,
Chennai Airport,
Chennai-600 027.
4. M/s. Flemingo Duty Free Shop Pvt Ltd.,
D73/I, TTC Industrial Area,
Navi Mumbai-400 705,
Having Office at
No.39, 1st Floor,

K.V.Apartments,
Poes Garden,
Chennai-600 086.

.. Respondents

PRAYER : Writ Petition is filed under Article 226 of the Constitution of India, praying for the issuance of a Writ of Certiorarified Mandamus, calling for the records with respect of the impugned award dated 06.01.2016 issued by the second respondent in his proceedings in No.AAM/C087/2015/28 and consequent order passed by the third respondent herein dated 27.03.2017 in his proceedings No.AAI/SR/ N/DFS/ TVM-TRY/Vvol-VI/COMML consequently direct the second respondent to issue award license in favour of the petitioner to Develop Operate and Maintain Duty Free Outlet at Integrated International Terminal of Chennai Airport.

For Petitioner : Mr.R.Nalliyappan

For Respondents-1to3 : FR.Xavier Arul Raj,
Senior Counsel for Mr.A.Arulmary

O R D E R

The impugned Award dated 06.01.2016 issued by the second respondent and the consequential order passed by the third respondent in proceedings dated 27.03.2017, are sought to be quashed in the present writ petition and a consequential direction is sought for to direct the respondents to issue Award license in favour of the petitioner to Develop Operate and Maintain Duty Free Outlet at Integrated International Terminal of Chennai Airport.

2. The petitioner is AGM Duty Free Selatan Sdn BHD and is operating duty free shop at No.21, Jalan Ferry, Passenger Terminal, effecting from 01.10.2005 with the permission of Malaysian Government Customs.

3. The petitioner obtained permission/license from the Customs Department to sell the duty free goods for the crew of the ships and passenger departing and arriving through Port of Pasir Gudang Passenger Terminal and the crew of the ships and ppassenger departing through seven other notified custom area.

4. The grievance of the writ petitioner is that pursuant to the Tender Notification issued by the second respondent, the petitioner participated in the tender process.

5. The fourth respondent also participated in the tender process and the tender was confirmed in favour of the fourth respondent.

6. Despite the fact that the petitioner submitted materials to establish that the fourth respondent is not eligible to participate in the process of tender as per the terms and conditions stipulated in the notice inviting tender.

7. In this regard, the learned counsel, appearing on behalf of the writ petitioner, solicited the attention of this Court with reference to instructions to passengers and the relevant condition reads as under:-

"(g) A Bidder including any Consortium Member or Associate should, in the last 3 (three) years, have neither failed to perform on any contract, as evidenced by imposition of a penalty by an arbitral or judicial authority or a judicial pronouncement or arbitration award against the Bidder. Consortium Member or Associate thereof, as the case may be, nor has been expelled from any project or contract by any public entity nor have had any contract terminated by any public entity for breach by such Bidder, member of a Consortium or Associate thereof.

2.2.2 To be eligible for pre-qualification, and short-listing, a Bidder shall fulfill the following conditions of eligibility ("Threshold Eligibility Criteria").

(A) Technical Capacity : For demonstrating technical capacity and experience ("Technical Capacity") "the Bidder shall satisfy each of the following criteria, as on the date of issue of RFP:-

(i) The Bidder (in the case of Consortium, the Lead Member) must have three (3) years experience during the preceding 5 years in the Duty Free business at passenger transport terminal such as Airport, Sea port or Land Port notified as a Custom Station.

There is no pending, active or previous legal action that prevents the applicant from submitting the Bid, executing the Concession Agreement, or fulfilling the conditions of the Concession."

8. With reference to the abovesaid condition, it is contended that the fourth respondent suffered punishment regarding certain proved allegations by the Office of the Commissioner of Customs at Tiruchirappalli. The order dated 26.02.2010 issued by the Joint Commissioner of Customs is relied upon to establish that the fourth respondent suffered punishment.

9. However, the second respondent without considering any of the disqualifications, allowed the fourth respondent to participate in the tender process and confirmed the tender in favour of the fourth respondent and thus, the impugned proceedings are to be set aside.

10. The learned Senior Counsel, appearing on behalf of the respondents 1 to 3, objected the said contention of the learned counsel for the petitioner, by stating that absolutely there is no disqualification, which is traceable under the terms and conditions of the notice inviting tender and the facts and circumstances relatable to the allegations raised by the petitioner were considered by the authorities and then found that the application submitted by the fourth respondent was in the order and accordingly, allowed the fourth respondent to participate in the process of tender.

11. The writ petitioner earlier filed WP No.23246 of 2016 and this Court directed the second respondent to consider the representation and pass an order.

12. Pursuant to the said direction, the Airport Authority of India passed an order on 27.03.2017 and in the said order also, it is stated that the pending case in the case of the fourth respondent should not incapacitate the bidder from executing any contract awarded.

13. Thus, the allegations raised by the petitioner were considered by the second respondent and it is found that the fourth respondent is qualified and accordingly, the fourth respondent, being the highest bidder, the tender was confirmed in his favour. Thus, the writ petition is liable to be dismissed.

14. With reference to the conditions stipulated in the notice inviting tender, paragraph 2.2.2 relied on by the petitioner reveals that there is no pending, active or previous legal action that prevents the applicant from submitting the bid. Thus, it is to be understood that mere pendency of a case is not a bar to participate in the process of tender.

15. However, such pendency or in the event of any interim order, permitting a person from participating in a

tender, then alone, the disqualification clause can be invoked and mere pendency cannot be construed as a bar.

16. It is made clear in the condition that pending or previous legal action that prevents the applicant from submitting the bid. After considering allegations raised by the petitioner, the authorities have found that the punishment sought is not a ground, so as to prevent the fourth respondent from participating in the tender process.

17. As far as the other ground raised in respect of the order passed by the Joint Commissioner of Customs in proceedings dated 26.10.2010 is concerned, the order reveals that ten boxes of non-duty paid cigarettes were confiscated. The Mahindra Scorpio Jeep transporting the said cigarettes were also confiscated.

18. However, perusal of the order reveals that the punishment was imposed on one Mr.A.Gopalakrishnan @ Gopal, Manager, Mr.L.Palanichamy, Sales Assistant and Mr.P.Senthil Kumar, Sales Assistant. The fine amount was imposed on the individuals and it is not made clear whether the offences were committed by the order of the Company or by the individuals at their own instance. However, on the basis of the order, it reveals that the punishment was imposed on the individual officials working in the fourth respondent-Company and the same would not disqualify the Company from participating in the tender process.

19. The impugned order dated 27.03.2017 also reveals that there is no impediments or legal actions preventing the fourth respondent from executing the Concession Agreement with Airport Authority of India. Therefore, the non-disclosure of certain facts are to be considered as irrelevant and cannot be construed as disqualification.

20. In this view of the matter, this Court do not find any acceptable ground for the purpose of considering the relief, as such, sought for by the writ petitioner in the present writ petition.

21. Accordingly, the writ petition stands dismissed. However, there shall be no order as to costs. Consequently, connected miscellaneous petition is also dismissed.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

Svn
To

1.The Chairman,
Airport Authority of India,
Rajiv Gandhi Bhawan,
Safdarjung Airport,
New Delhi-110 003.

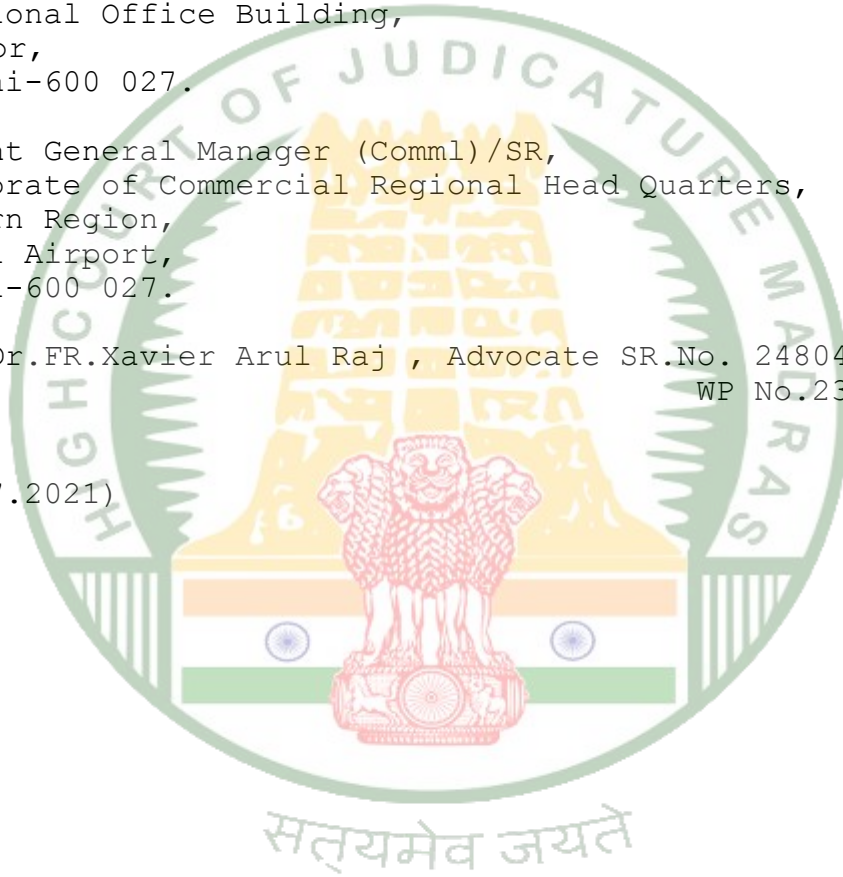
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+2ccs to Dr.FR.Xavier Arul Raj , Advocate SR.No. 24804

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SVI (CO)
A.SK(07.07.2021)



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