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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 11.10.2021

Date of decision: 22.10.2021

+ **W.P.(C) 9038/2021 & C.M. APPL. 28109/2021**

PIXIE ENTERPRISES PRIVATE LIMITED

..... Petitioner

Through Mr. Dushyant Dave and Mr. Sajan Poovayya, Sr. Advs. with Mr. Gautam Khazanchi, Mr. Pratibhanu Kharola, Ms. Neha and Ms. Sukanya Joshi, Advs.

versus

DELHI INTERNATIONAL AIRPORT LIMITED & ORS.

..... Respondents

Through Mr. Parag Tripathi, Mr. Maninder Singh & Mr. Tarun Gulati, Sr. Advs. with Ms. Anuradha Dutt, Mr. Anish Kapur, Ms. Suman Yadav, Ms. Divya Bhalla and Ms. Nikhita K. Suri, Advs. for R-1.

Mr. Rahul Mehra, Sr. Adv. with Mr. Santosh Kumar Tripathi, Standing Counsel (Civil) GNCTD, Mr. Arun Panwar, Mr. Chaitanya Gosain and Mr. Siddharth Dwivedi, Advs. for R-2.

Mr. Vishal Dabas & Mr. Krishna Dayama, Advs. for R-3.

Mr. Amit Mahajan, CGSC for R-4.

CORAM:

HON'BLE MS. JUSTICE REKHA PALLI

REKHA PALLI, J

JUDGMENT

1. The present petition preferred under Article 226 of the Constitution of India seeks quashing and setting aside of letter dated 17.08.2021 issued by the respondent no.1, refusing to grant a ‘No Objection Certificate’ (*hereinafter referred to as “NOC”*) to the petitioner to operate ten liquor vends at the Indira Gandhi International Airport (Domestic Wing) (*hereinafter referred to as “IGI Airport” or “the Airport”*). Consequently, the petitioner also seeks a direction to the respondent nos.1, 3 and 4 to issue a NOC in its favour to enable it to obtain a licence from respondent no.2 for running these liquor vends.

2. Pixie Enterprises Private Limited, the petitioner herein, is a Pondicherry based company, incorporated in 1998, which claims to have 20 years’ experience in manufacturing packaging products for the liquor industry in Pondicherry and Tamil Nadu. Delhi International Airport Limited/respondent no.1, operates and manages the Indira Gandhi International Airport, New Delhi. The Department of Excise, Entertainment Tax & Luxury Tax, Government of National Capital Territory of Delhi/respondent no.2, is the administrative Department of the Government of NCT of Delhi concerned with regulating excise related activities within the National Capital Territory of Delhi. The Airports Authority of India/respondent no.3 is a statutory body functioning under the Directorate General of Civil Aviation, under the Ministry of Civil Aviation/respondent no.4 and currently holds 26% shareholding in respondent no.1.

3. The Delhi Excise Act, 2009 (*hereinafter referred to as “the Act”*) came into effect from 04.10.2010, whereafter the Delhi Excise Rules, 2010

(hereinafter referred to as “the Rules”) were notified by respondent no.2 by exercise of its powers under Section 81 of the Act empowering it to make rules *inter alia* “prescribing the authority by which, the form and the manner in which, and the terms and conditions, subject to which any licence, permit or pass shall be granted.” Under these Rules, it is open for the respondent no.2/GNCTD to determine as to whether the licences under the Act should be auctioned, tendered, or granted by any other procedure. The various categories of licences which could be issued are prescribed under Rule 32; the licence for “*Retail vend of Indian Liquor and Foreign Liquor in Shopping Malls and Shopping Complex at Airport*” which is the subject matter of the present petition, has been classified as “L-10”.

4. On 17.07.2015, the respondent no.2 issued a public notice prescribing the terms and conditions for grant of L-10 licences, according to which, these licences were to be granted on a “first come first serve” basis. Accordingly, the retail liquor outlets in all the shopping malls in Delhi and the shopping complex at the IGI Airport were, ever since, being run on the basis of licences issued and renewed on an annual basis in pursuance of the said public notice.

5. On 16.03.2021, the respondent no.2, upon realizing that the finalization of the excise policy for the year 2021-2022, proposing to bring some radical changes in the manner of issuance of the licences was likely to take time, issued a circular informing the existing licence holders that subject to payment of *pro-rata* licence fee, they could seek renewal of their licence for a period of three months commencing from 01.04.2021, which period was, on 10.06.2021, extended till 30.09.2021. This circular permitting extension for a limited period was issued to ensure smooth and

uninterrupted supply of liquor in Delhi, till the new excise policy was brought into force.

6. Subsequently, on 05.07.2021, the respondent no.2 published the Delhi Excise Policy for the year 2021-2022 (*hereinafter referred to as “the new excise policy”*) whereunder the framework for the grant of retail licences has been prescribed in Para 4.1.1, which reads as under:

“In view of the above, the framework for grant of retail licences shall be as under.

- i. *The number of retail liquor vends will be 849, including five super premium retail vends.*
- ii. *There shall be no Government owned liquor vends for IMFL/FL and licences in the form of L-6, L-6FG & L-6FE will become redundant.*
- iii. ***Delhi shall be distributed into 32 pre-defined zones. There shall be a new licence in the form of L-7Z to be granted to each zone operator/allottee through e-tender and bidding. This method of zoning and e-tendering shall ensure that each zone operator contributes significant revenue in the form of highest bid per zone. (emphasis supplied)***
- iv. *The revenue collection shall be substantially subsumed into the licence fee of Retail vends in form of L-7Z and the licence fee of each L-7Z shall be paid monthly in equal installments from the date of commencement till the end of the fiscal year as per Rule 48 with The Delhi Excise Rules, 2010.*
- v. ***A new licence category L-7V shall be granted to each zone operator/allottee holding licence in the form of L-7Z enabling the licensee to operate specified number of retail liquor vends in the zone. (emphasis supplied)***
- vi. *Allotment of 32 L-7Z licences and 844 L-7V retail vends licences shall be made through e-tender process with the reserve price for licence fees as the base for bidding.*
- vii. *The vends in the airport zone will be allowed to operate*

- for 24 hours and will be further permitted to have shop in shop concept for exclusive display of various brands.*
- viii. *There shall be a new category of retail vend licence in Form L-7SP1 Super Premium Licence, which shall be 5 in number and shall be premium, international quality retail vends and shall offer high-end walk-in experiences for consumers. These 5 Super Premium licences (L-7SP1) will be tendered separately in one group to one entity to be opened anywhere in the city except the Airport Zone.*
- ix. *The reserve licence fee for Super Premium (L-7SP1) vends shall be two and a half times of the Average reserve licence fees of a L-7V vend in Delhi.*
- x. *Average reserve licence fees of a vend in Delhi = Sum total of reserve price of all zones/ total number of vends (849 vends)''*

7. In anticipation of notification of the new excise policy, whereunder allotment of retail vends was proposed to be done on a zone-wise basis, the respondent no.2 issued a tender on 28.06.2021, inviting bids from interested and eligible private business entities for grant of 32 zonal licences in form L-7Z/L-7V as prescribed in the policy, for running of retail vends of liquor for supply of Indian and Foreign Liquor in the NCT of Delhi for the year 2021-2022. Clause 3.2.1 of the said tender notice, while reiterating the position as stated in the new excise policy that the area in Delhi was being divided into 32 pre-divided zones, also set out the number of vends in each zone. By way of Clause 3.2.3 thereof, it was specified that Zone-32 (Airport Zone) would comprise of ten L-7V retail vends, with the annual reserve licence fee for the year 2021-2022 for the said zone being fixed at Rs. 105 crores.

8. The process for grant of the zonal licences was specified in Clause 5

of this tender notice; Clause 5.7 thereof provided that each L-7Z licensee, except for the Airport Zone licensee, would get a time of 90 days from the date of issue of the L-7Z licence to commence business at all its vends. However, in respect of Airport Zone licences, Clause 5.9 of the tender notice made it clear that an H-1 bidder in this zone would be issued the L-7Z licence only after obtaining a NOC from the Airport Authorities, for which purpose it would be granted 30 days, whereafter it was required to commence business at all the ten vends within a period of 60 days. The said clause also provided that in case the H-1 bidder failed to obtain a NOC from the Airport Authorities, the offer would be given to the subsequent bidder (H-2, H-3, *etc.* in that order) subject to it matching the licence fee offered by H-1.

9. In response to this tender notice, the petitioner, amongst others, submitted its bid for Zone-32. On 09.08.2021, the petitioner was informed by respondent no.2 that it had been declared as the H-1 bidder for Zone-32, having offered the highest annual reserve licence fee of Rs. 234.99 crores. It appears that one Buddy (T1 D) Retail Private Limited, which also happens to be one of the existing operators of the seven liquor vends being run at the IGI Airport on the basis of an L-10 licence issued under the erstwhile excise policy, had also participated in the tender process and based on the annual reserve licence fee offered by it, emerged as the fourth highest bidder (H-4).

10. Upon receiving intimation from respondent no.2 about having been declared as the H-1 bidder, the petitioner, vide its letter dated 12.08.2021, approached the respondent no.1 for issuance of a NOC in terms of Clause 5.9 of the tender notice. The respondent no.1 has, however, vide its impugned letter dated 17.08.2021, refused to grant NOC to the petitioner on

the ground that the contract entered into between the said respondent with the existing operator of duty-paid liquor shops was still subsisting. As per the respondent no.1, as the said contract would remain in force for a further period of about three years, it did not have any space or scope for any additional liquor shops at the IGI Airport.

11. Being aggrieved by respondent no.1's refusal to grant a NOC, the petitioner has approached this Court seeking a direction to the said respondent to grant a NOC in its favour and hand over possession of the retail shops/vends in the Airport on the same terms and conditions as are applicable to the existing operator, with whom the respondent no.1 presently has a contract for running the seven liquor vends.

12. In support of the petition, learned senior counsel for the petitioner Mr.Dushyant Dave and Mr.Sajan Poovayya submit that once the petitioner has emerged as the H-1 bidder, the respondent no.1's role is limited to the extent of granting a NOC to the successful bidder for operating the vends at the airport in accordance with the applicable Excise Policy for the year 2021-22. They submit that since under the new excise policy, there was no precondition that the bidders must necessarily have physical possession of any space for running the liquor vends at the airport, it was evident that upon notification of the policy, the respondent no.1, which is presently managing the airport, would have to automatically enter into a lease agreement with the successful bidder on terms to be mutually decided. They submit that the respondent no.1 could not, therefore, refuse to grant a NOC to the petitioner and that too on the specious ground that its contract with the existing operator is still alive. It is urged that while rejecting the petitioner's request on the ground of an existing contract with a third party, the respondent no.1

has overlooked the fact that the L-10 licence in favour of the existing operator, is no longer valid under the new excise policy, as it is an admitted position that all the existing L-10 licences issued under the erstwhile excise policy stand expired on 30.09.2021. The plea of learned senior counsel for the petitioner therefore, is that once under the now-prevalent excise policy, the petitioner has emerged as the successful bidder for obtaining the licence for running the retail vends at the Airport Zone, no other entity or operator can be permitted to continue to run any liquor vend at the Airport. The running of these vends after 30.09.2021, by any party other than the petitioner, would be contrary to the terms of the new excise policy, which policy is binding on all concerned including respondent no.1. Admittedly, the respondent no.1 never raised any objection to the new excise policy or the issuance of the tender by respondent no.2 inviting bids for the Airport Zone. They contend that Clause 8.1 of the Operations, Management and Development Agreement dated 04.04.2006 (OMDA) under which the respondent no.1 is managing the IGI Airport, makes it incumbent upon the said respondent to comply with all applicable laws and therefore, it cannot permit running of any liquor vends at the Airport in contravention of the new excise policy.

13. Mr. Dave further submits that there is no reason as to why the respondent no.1 should not acknowledge the rights of the petitioner who has succeeded in the bidding process and that too, when under Clause 8.5.7 of the OMDA, even the said respondent is required to follow the procedure of competitive bidding in every case where the value of the contract exceeds Rs.50 crores.

14. Mr. Dave then contends that once the petitioner has emerged as the

successful bidder, its right to operate ten liquor vends in the Airport Zone as specified in the tender, cannot be scuttled merely on the whims and fancies of respondent no.1. The petitioner has been always ready and willing to enter into the requisite lease agreement with respondent no.1, which offer, the respondent no.1 has rejected on wholly *mala fide* and baseless grounds by taking the plea that it has existing contracts with an operator, who the respondent claims has agreed to match the licence fees offered by the petitioner. He, thus, contends that the stand taken by respondent no.1 is in the teeth of the very purpose of the introduction of the new policy, the purpose whereof was to make the excise regime in Delhi less cumbersome and ensure generation of maximum revenue by granting a licence to the highest bidder. Moreover, if the existing operator is permitted to continue operating the liquor vends at the airport, despite having emerged as H-4 Bidder, it will lead to monopolisation of running the liquor vends at the IGI Airport, which would be against public interest.

15. Mr. Dave submits that under Rule 22 of the Delhi Excise Rules 2010, it is for respondent no.2 alone to decide the number of liquor shops that can operate in a particular area. Once the said respondent has, by way of Clause 4.1.4 (iii) of the new excise policy, provided that there shall be ten retail vends at the IGI Airport, it is incumbent upon the respondent no.1 to ensure that ten retail liquor vends are provided to the successful bidder in accordance with the said policy. The respondent no.1 cannot, by taking the plea of its exclusive rights to manage the airport under the OMDA, act in contravention of either these Rules, which have been validly framed under the Act; or the new excise policy, to which there is no challenge by the said respondent.

16. He submits that the respondent no.1 is, by virtue of its agreement with the respondent no.3/Airport Authority of India (AAI), discharging important public functions in public interest and therefore, has the same obligations as cast upon the respondent no.3 to act fairly and in consonance with Article 14 of the Constitution of India. The respondent no.1's plea that it is a private entity and is, therefore, free to decide the criteria on which it will enter into contracts with third parties in respect of the vendors at the airports is patently perverse. The refusal of the respondent no.1 to grant NOC to the petitioner by insisting that there is a subsisting contract with its existing operator is a *mala fide* attempt to frustrate the entire tender process. The impugned actions of the respondent are not only opposed to public interest but are also vitiated by malice in law. In support of his plea that the respondent no.1 cannot be treated as a purely private entity and can therefore, not be permitted to act in an arbitrary or a discriminatory manner, he relies on ***Delhi International Airport (P) Ltd vs. Union of India*, (2011) 12 SCC 449; *Flemingo Duty-Free Shop Pvt. Ltd. vs. Union of India*, (2008) SCC OnLine Bom 508 and *Flemingo Duty-Free Shop Private Limited vs. Union of India*, (2008) SCC OnLine Kar 603 (DB).**

17. Mr. Dave also places reliance on the decisions of the Apex Court in ***Amar Alcohol Ltd. vs. SICOM Ltd.*, (2006) 1 SCC 199 and *Rajbir Surajbhan Singh vs. Institute of Banking Personnel Selection*, (2019) 14 SCC 189** to contend that the respondent no.1 is, even otherwise, a joint venture of respondent no.3, where respondent no.3 not only continues to hold 26% shares but also receives about 46% share in revenue and therefore, its actions, like that of respondent no.3, would remain subject to judicial review by this Court under Article 226 of the Constitution of India.

18. Mr. Dave then submits that even the reasons sought to be given by the respondent no.1 in its impugned rejection letter are perverse and motivated by *mala fide*. He contends that the respondent no.1's plea that it does not have additional space for more liquor vends would clearly show that the respondent no.1 is acting partially towards the existing operator who is admittedly the H-4 bidder, by illegally refusing to grant a NOC to the petitioner within the 30 days' time provided in the tender document to ensure that the H-4 Bidder, which had offered only about Rs.144 crores as the bid amount, succeeds in obtaining the licence to which the petitioner alone is entitled. He contends that such action by the respondent no.1 would not only defeat the very purpose of the competitive bidding envisaged under the policy, but would also be highly unfair to the petitioner who had a legitimate expectation that it will be issued the licence after it emerges as the H-1 bidder. More so, the reason sought to be given by respondent no.1 in its counter affidavit that the petitioner does not meet the criteria prescribed in this regard is equally vague as the respondent no.1 has failed to even disclose as to what these criteria are. Once the respondent no.1 has, in its impugned letter, failed to mention any such reasons regarding the petitioner not meeting the criteria as are now being sought to be advanced, it can, even otherwise, not be permitted to take this ground at this stage, for which purpose reliance is sought to be placed on ***Kranti Associates (P) Ltd vs. Masood Ahmed Khan, (2010) 9 SCC 496.***

19. Mr. Dave finally submits that the only reason, for which a NOC from respondent no.1 was envisaged under the tender conditions as also the new excise policy, was to ensure that the successful bidder is clear from all security related concerns. He would urge that the same could not be read to

give an unbridled power to oust the successful bidder on the purported ground of advancing the commercial interest of respondent no.1, who is merely managing the Airport. In the present case, neither under the impugned letter nor in its counter affidavit, has the respondent no.1 taken the plea that the petitioner is a security threat and therefore, the respondent no.1 ought to be directed to forthwith issue the requisite NOC to the petitioner.

20. Per contra, Mr.Parag Tripathi, learned senior counsel for respondent no.1 vehemently opposes the petition by, at the outset, urging that the said respondent is a private entity, having exclusive rights under the OMDA which rights, it is claimed are sanctified by sections 11, 12 & 12 A of the Airport Authority of India Act, 1994 (AAI Act). He submits that the AAI Act is a Central Act relatable to Entry 29 of List I of the Seventh Schedule of the Constitution of India dealing with Civil Aviation and Operation of Airports and therefore, will have precedence in so far as it relates to the management of the Airport. By referring to Section 12(3) of the AAI Act, Mr. Tripathi urges that this provision clearly contemplates that the respondent no.3 shall, among other functions, undertake any other activity at the airports and the civil enclaves in the best commercial interests of the Airport Authority including cargo handling, setting up of joint ventures for the discharge of any function assigned to the Authority. Once the respondent no.1 has stepped into the shoes of respondent no.3 for exercising these rights by way of the OMDA, it has the exclusive right to take appropriate decisions and therefore, neither the respondent no.2 nor the petitioner can compel it to enter into any contract for allotment of any space at the Airport. The respondent no.2 has no authority whatsoever to select or nominate any entity

for running a vend at the Airport. Consequently, no direction can be issued to respondent no.1 to provide space at the Airport to any entity selected by respondent no.2; more so when it is an admitted position that respondent no.1 was neither consulted by respondent no.2 before floating the tender, nor by the petitioner before submitting its bid.

21. Mr. Tripathi submits that both respondent no.2 and the petitioner were always aware that the Airport Zone was a special zone as respondent no.1 has the exclusive right to develop, operate, manage, and maintain the IGI Airport, for which purpose it is free to enter into contracts with third parties for leasing out spaces at the Airport. The respondent no.1 has an option to sub-contract retail businesses to any third party subject to fulfilment of criteria as considered appropriate by it, which criteria would include security clearance, availability of necessary experience, financial standing of the third parties, availability of space at Airport *etc.* He submits that this freedom is given to the respondent no.1 under the OMDA as apart from sub-contracting any activity (including that of running retail vends of liquor at the Airport) the respondent no.1 retains overall management, responsibility, obligation, and liability in relation to the sub-contracted service and therefore, remains liable for any act, omissions or defaults of the sub-contractor.

22. Mr. Tripathi then submits that the new excise policy for the year 2021-2022 has been issued by the respondent no.2 in exercise of its jurisdiction under Entry 8 of List II of the Seventh Schedule. However, the respondent no.2 cannot interfere with the exclusive jurisdiction of Central Government under Entry 29 of List I to *inter alia* enact laws for matters relating to regulation and organization of aerodromes/the Airport. In view of

the AAI Act enacted by the Central Government under the said powers, the respondent no.2 has no jurisdiction to interfere with the exercise of rights under the said Act by respondent no.1, by the virtue of its OMDA with respondent no.3.

23. He further submits that the requirement of obtaining a NOC from respondent no.1 was a precondition for issuance of any licence by respondent no.2 in favour of the highest bidder in respect of the Airport Zone and that too, with a further condition that in case any of the highest bidders are unable to obtain a NOC within the stipulated period of 30 days, the next highest bidder would be eligible for the licence, subject to its matching the H-1's licence fee. He submits that the petitioner was always aware that this condition was peculiar to the Airport Zone and therefore, it was incumbent upon it to make enquiries from respondent no.1 before submitting its bid. Having failed to do so before submitting its bid, the petitioner cannot now complain or insist that the respondent no.1 must grant a NOC in its favour when it already has existing contracts with third parties. Even otherwise, it is an admitted position that there is no designated space at the airport to run duty-paid liquor shops. The petitioner, thus, could not have had any legitimate expectation that it will be compulsorily allotted space by respondent no.1 to run liquor retail vends at the Airport. Both the petitioner and the respondent no.2 were, therefore, always aware that the existing retail liquor vends at the IGI Airport could be used for running any other commercial activity as deemed appropriate by the respondent no.1.

24. Mr. Tripathi further submits that the Airport Zone is spread over an area of 4799 acres and therefore, if the Petitioner has emerged as the H-1 bidder *qua* the Airport Zone, it is for respondent no.2 to provide space to it

at any place other than the Airport, which is located on land admeasuring only 307 acres within the Airport Zone. He, therefore, contends that the petitioner cannot insist that merely because it has emerged as the successful bidder, the respondent no.1 must enter into an agreement with it for allotting space at the Airport to run the liquor vends, for which purpose, he relies on the decision of the Hon'ble Supreme Court in ***Michigan Rubber India Ltd. vs. State of Karnataka***, (2012) 8 SCC 216.

25. Mr. Tripathi finally submits that the petitioner's entire case is based on a wholly misconceived plea that public interest would be prejudicially affected in case it is not granted a NOC by the respondent no.1. The said plea not only overlooks the fact that the sum of Rs. 30 crores by way of earnest money deposited by the petitioner, like any other bidder, is fully refundable to every bidder in case it is unable to get the NOC, but also the fact that in case any other bidder is granted the licence, it will be required to match the H-1 bidder's offered licence fee. Consequently, it is also pointed out that the inability of the respondent no.1 to issue a NOC in favour of the petitioner will neither cause any undue hardship to the petitioner nor cause any loss to the public exchequer. It is, therefore, contended that this Court ought not to interfere in a purely commercial matter such as this, since allowing the petitioner's prayer would result in this Court directing the eviction of a third party *i.e.*, the existing licensee, from the Airport premises, which party is, as on date, in possession of seven vends at the Airport pursuant to a valid contract with respondent no.1; and that too without impleading the existing licensee as a party in these proceedings. In support of his plea, he relies on the decision of the Hon'ble Supreme Court in ***Raunaq International Limited vs. IVR Constructions Ltd. and Ors.*** (1999)

1 SCC 492, *Jagdish Mandal vs. State of Orissa* (2007) 14 SCC 517, and *Radhakrishna Agarwal vs. State of Bihar* (1977) 3 SCC 457 and therefore prays that the writ petition be, accordingly, dismissed.

26. I have also heard Mr. Rahul Mehra, learned senior counsel for respondent no.2, who has primarily sought to defend the new excise policy for the year 2021-2022 by urging that the same is a flagship policy of GNCTD to ensure optimum revenue generation from the sale of liquor and also bring significant liberalisation in the working of different types of excise licences. While submitting that the mode of issuance of a licence for the Airport Zone was clearly mentioned in Clause 5.9 of the tender notice dated 28.06.2021, he contends that as the operation of the Airport is controlled and managed by agencies other than the respondent no.2, its stand regarding the mandatory requirement for obtaining a NOC from the Airport Authorities as a precondition for issuance of licence in favour of the successful bidder was made clear from the very outset. Mr. Mehra has also tried to explain the bidding process and the methodology to be adopted in case, for any reason, the H-1 bidder fails to obtain a NOC, in which situation the subsequent bidders (H-2, H-3, etc.) may be considered for grant of licence if they match the bid quoted by the H-1 bidder and are able to obtain a NOC from the airport authorities.

27. I have considered the submissions of learned senior counsel for the parties and with their assistance perused the record.

28. Before dealing with rival submissions of the parties, I may note the aspects on which the parties are *ad idem*. The first and foremost admitted position is that the petitioner has emerged as the highest bidder in the tender floated by respondent no.2 for running ten liquor vends in the Airport Zone.

It is also undisputed that under the new excise policy, no entity can run a liquor vend in Delhi unless it is granted a licence by respondent no.2 - which has the exclusive power to grant such licences under the Delhi Excise Act, 2009 and the Delhi Excise Rules, 2010. There is also no denial of the fact that respondent no.1, under the OMDA dated 04.04.2006 with respondent no.3, has been granted the exclusive rights to develop, operate, manage, and maintain the IGI Airport. Consequently, it is also undisputed that the respondent no.1 has the exclusive right to take decisions regarding entering into commercial contracts for allocation of space to third parties at the IGI Airport. However, while the petitioner would urge that such decisions taken by the respondent no.1 are subject to judicial review, the respondent no.1 would urge to the contrary. It is also an undisputed position that there are neither any designated liquor vends at the IGI airport, nor was there any such stipulation in the tender notice dated 28.06.2021. The parties are also *ad idem* that the respondent no.2 did not consult respondent no.1 before inviting bids for the Airport Zone; on the other hand, the tender notice dated 28.06.2021 itself made it clear that it will be necessary for the successful bidder of Airport Zone to obtain a NOC from respondent no.1 as a prerequisite for issuance of a licence. No such condition of obtaining a NOC was prescribed in respect of the other 31 zones in Delhi. It is also an admitted position that the conditions in the tender notice itself made it clear that in case the highest bidder is not able to obtain NOC within 30 days from the date of being declared as the H-1 bidder, the subsequent bidder would be considered for issuance of a licence by respondent no.2, subject to it producing a NOC obtained from respondent no.1 and matching the annual licence fee as offered by the H-1 bidder. It is also undisputed that in case

the petitioner is not issued a licence for any reason whatsoever, no loss will be caused to the public exchequer for this very condition.

29. I may also note that the parties are not at dispute as regards the fact that only an entity/person who holds a valid licence issued by respondent no.2 can run a liquor vend in the NCT of Delhi. It is also undisputed that the L-10 licences issued in favour of private entities under the erstwhile excise policy are no longer valid after 30.09.2021 and therefore, the existing operator who was running the liquor vends at the IGI airport under an arrangement with respondent no.1, is today without any valid licence.

30. In the light of this factual position, I may now proceed to deal with the rival submissions of the parties. The petitioner has vehemently urged that the respondent no.1 is discharging public functions and is, therefore, duty bound to act fairly and remain subject to judicial review by this Court under Article 226 of the Constitution of India. In order to appreciate this plea of the petitioner, it may be apposite to refer to the observations of the High Court of Bombay in *Flemingo Duty-Free Shop Pvt. Ltd. vs. Union of India* (2008 SCC OnLine Bom 508) wherein the Court was dealing with a dispute relating to the running of duty-free retail outlets at the International Airport in Mumbai i.e. Chhatrapati Shivaji Airport, managed and operated by Mumbai International Airport Limited. The Division Bench of the Bombay High Court, after considering the provisions of Section 12A of the AAI Act and a similar OMDA between the parties as in the present case, observed as under:

“55. Taking overall view of the matter, therefore, it can be safely said that in providing duty free shops at the International Airports, the respondent No. 3 is performing the public function in the public interest and therefore in

performance of those functions, it is obliged to act fairly and reasonably and justly, so that when it chooses to give a contract for any particular activity at the airports which is for the benefits of the public, it must choose a person by a open competition according to objects and clear norms and its action should be transparent. And this action can be examined by this Court in a petition filed under Article 226 of the Constitution of India. on the touch-stone of fairness and reasonableness. In our opinion, therefore, even assuming that the respondent No. 3 is not an instrumentality of the State, because the functions it performs are essentially the functions of the respondent No. 2, which are statutory, the respondent No. 3 while discharging those functions is amenable to the jurisdiction of this Court under Article 226 of the Constitution and in that petition this Court would be entitled to examine the action of the respondent No. 2 on the touchstone of reasonableness and fairness.

(emphasis supplied)

56. In our opinion, the question whether in discharging the functions conferred on it in terms of the lease executed under section 12-A of the Act and in exercising powers of the Airports authorities necessary for the discharge of those functions, the respondent No. 3 is bound by the provisions of Article 14 of the Constitution can be looked at from a slightly different angle also. The Airports Authority of India Act, has been enacted by the Parliament in exercise of the legislative powers conferred on it by the Constitution. Because of the provisions of Article 13(2) of the Constitution, the Parliament does not have powers to make any law which takes away or abridges the rights conferred by Part-III of the Constitution. By enacting section 12 of the Constitution the Parliament enumerated the functions that are to be performed by the airports authority. It is clear from the judgment of the Supreme Court in the case of Ramana Dayaram Shetty, referred to above that the airports authority was to perform those functions in consonance with the provisions of Part-III of the Constitution. It is in this background that the

Parliament in the year 2003 enacted section 12-A which permits the Airports authority to delegate or assign some of its functions to a third party. If section 12-A of the Act is so read to mean that the Parliament by enacting section 12-A relieves the third party from the obligations to comply with Part-III of the Constitution, then the exercise of the legislative power of the Parliament in enacting. Section 12-A will be hit by provisions of sub-article (2) of Article 13 of the Constitution. In our opinion, section 12-A cannot be read to mean that it was enacted to do away with the compliance of provisions of Part-III of the Constitution in performing the functions and in exercising the powers which till the date the lease deed is executed under 12-A in favour of a third party can be exercised only subject to the provisions of Part-III of the Constitution.

31. At this stage, it may also be apposite to refer to the decision of the High Court of Karnataka in ***Flemingo Dutyfree Shops Private Limited vs. Union of India*** 2008 SCC OnLine Kar 603 (DB), wherein the Court was dealing with a challenge to an invitation for expression of interest issued by the Bangalore International Airport Limited (BIAL), inviting bids for setting up retail shops within the Bangalore airport. The Court rejected BIAL's plea that it was not amenable to writ jurisdiction as it had been granted exclusive rights by the Union of India to carry out development, design, financing, construction, operation, and management of the said airport for a period of 30 years. Reference may be made to the observations of the Court in para 34 which read as under:

“34. It is further held by Mathew J., that:

“The State may aid a private operation in various ways other than by direct financial assistance. It may give the organisation the power of eminent domain, it may grant tax exemption, or it may give monopolistic status for

certain purposes. All these are relevant in making an assessment whether the operation is private or savours of State action. See generally: 'The meaning of State action', LX Columbia Law Rev 1083.

Institutions engaged in matters of high public interest or performing public functions are by virtue of the nature of the functions performed Government agencies. (See the decision in Terry v. Adams, (1926) 273 US 536 and Nixon v. Condon, (1931) 268 US 73). Activities which are too fundamental to the society are by definition too important not to be considered Government function”.

* * * * *

(xiv) From the aforementioned legal principles laid down by the Constitutional Benches of the Supreme Court and American Law, the doctrine of “State action” would with all fours applicable to the facts of the case to come to the conclusion that to provide duty-free shops in the BIAL as per the agreement referred to supra is necessary in the International Airport. The facilities provided therein are in the nature of statutory functions/public functions by BIAL for the convenience of travelling public. All the facilities provided by BIAL, be it a State, lessee or entity, performs statutory/public functions in the airport. This is expressly apparent from Clause 7.1 of Clause 7 of S.S.A. dated 20-1-2005. The relevant clause reads as hereunder:

“7.1 Airport operation and maintenance.—BIAL shall operate and maintain the airport in accordance with good industry practice. BIAL shall at all times comply with applicable laws in the operation and maintenance of the airport and shall maintain, keep in good operating repair and condition, the airport, in accordance with the operation and maintenance plan, an indicative outline of which is as set out in Schedule 6 attached hereto. BIAL shall submit the operation and maintenance plan to GOK

no later than one (1) year from financial close.

BIAL shall also renew, replace and upgrade to the extent reasonably necessary, the airport which for these purposes shall exclude any systems or equipment to be operated by AAI in accordance with the terms of the CNS/ATM agreement.

All operation, maintenance, repair and other works shall be carried out in such a way as to minimise inconvenience to users of the airport. If any operation, maintenance, repair or other works necessitate interrupting or suspending the landing or taking-off of any aircraft, or the closure of the airport, for any period of time, BIAL shall, except in case of an emergency, give to the DGCA and to all affected users of the airport such prior written notice thereof as the DGCA may from time to time reasonably require”.

(xv) Section 22-A of the A.A.I. Act empowers the 2nd respondent to levy and collect development fee from embarking passengers under clause (b) for establishment or development of a new airport in lieu of the airport referred in clause (a) or (c) for investment in the equity in respect of shares to be subscribed by the authority in companies engaged in establishing, owning, developing, operating or maintaining a private airport in lieu of the airport referred to in clause (a) or advancement of loans to such companies or other persons engaged in such activities.

* * * *

(xvii) The assistance provided by both the Union of India and State Government and other statutory authorities in permitting BIAL to establish and maintain BIAL at Devanahalli, without which the airport could not have been established, and Rs. 250 crores provided to BIAL by the Government of Karnataka under the State agreement and capital of BIAL partly owned by it, 26% share capital owned by 2nd respondent, 13% by BIAL, in pursuant to

the concessional agreement referred to supra, there is transfer of powers of respondents 2 to 3 in relation to air traffic services to be rendered to the public at large. The grant of monopoly status in the concession agreement given to the BIAL is State conferred or State protected as the concession agreement provides exclusivity of private concession to the existing airport and prohibits any airport being set-up within 150 kms from BIAL.

(xviii) Even if it is not an entity and 'State' under Article 12 of the Constitution of India, the actions of BIAL are subject to judicial review under Article 226 of the Constitution of India. In this regard, learned Senior Counsel for petitioner has rightly placed reliance upon the decisions in the case of Rohtas Industries Limited v. Rohtas Industries Staff Union [(1976) 2 SCC 82.] , (1991) 1 SCC 171 (sic), (1995) 1 SCC 1811 (sic), G. Bassi Reddy v. International Crops Research Institute [AIR 2003 SC 1764 : (2003) 4 SCC 225.] . The principles laid down in those decisions with all fours applicable to the case on hand and therefore BIAL is amenable to writ jurisdiction of this Court under Article 226 of the Constitution of India as it has been discharging statutory functions/duties in establishing International Airport at Devanahalli as it has undertaken to discharge the statutory functions of the Airport Authority in establishing private airport and its maintenance."

32. In the light of the aforesaid, when I examine the functions being discharged by the respondent no.1 under OMDA, I have no hesitation in agreeing with the petitioner that the respondent no.1, despite the exclusive rights given to it to develop, operate, manage, and maintain the IGI Airport, is basically performing the functions which the Airport Authority of India/ respondent no.3 is supposed to and authorised to perform under the AAI Act. The said functions are necessarily public functions which the

respondent no.3, by virtue of the OMDA, has authorised respondent no.1 to perform. Consequently, it is evident that the functions which the respondent no.1 is discharging under the OMDA are public functions. The respondent no.1 is, therefore, bound by the same obligations as cast on respondent no.3 and consequently, has a duty to act fairly and in consonance with Article 14 of the Constitution. Its actions would, therefore, necessarily be amenable to judicial review under Article 226 of the Constitution of India.

33. Now I come to the petitioner's plea that it was necessary for the respondent no.1 to provide reasons while rejecting the petitioner's request for grant of a NOC. While Mr. Tripathi is correct in urging that the respondent no.1 is not a quasi-judicial authority, but the fact remains that it is still performing an important public function. When dealing with the petitioner's application for grant of a NOC, the respondent no.1 was indeed taking a decision that would affect the rights of all concerned parties, including that of the petitioner, and would also have a vital bearing on the working of the respondent no.2's new excise policy. Hence, the importance of passing a reasoned order in such circumstances, where the decision of the respondent no.1 has a far-reaching effect, cannot be overemphasised. In this regard, reference may be made to the principles summarized by the Apex Court in Para 47 of its decision in **Kranti Associates (P.) Ltd. vs. Masood Ahmed Khan**, (2010) 9 SCC 496 which reads as under:

"47. Summarising the above discussion, this Court holds:

(a) In India the judicial trend has always been to record reasons, even in administrative decisions, if such decisions affect anyone prejudicially.

(b) A quasi-judicial authority must record reasons in support of its conclusions.

(c) Insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be done it must also appear to be done as well.

(d) Recording of reasons also operates as a valid restraint on any possible arbitrary exercise of judicial and quasi-judicial or administrative power. even

(e) Reasons reassure that discretion has been exercised by the decision-maker on relevant grounds and by disregarding extraneous considerations.

(f) Reasons have virtually become as indispensable a component of a decision-making process as observing principles of natural justice by judicial, quasi-judicial and even by administrative bodies.

(g) Reasons facilitate the process of judicial review by superior courts.

(h) The ongoing judicial trend in all countries committed to rule of law and constitutional governance is in favour of reasoned decisions based on relevant facts. This is virtually the lifeblood of judicial decision-making justifying the principle that reason is the soul of justice.

(i) Judicial or even quasi-judicial opinions these days can be as different as the judges and authorities who deliver them. All these decisions serve one common purpose which is to demonstrate by reason that the relevant factors have been objectively considered. This is important for sustaining the litigants' faith in the justice delivery system.

(j) Insistence on reason is a requirement for both judicial accountability and transparency.

(k) If a judge or a quasi-judicial authority is not candid enough about his/her decision-making process then it is impossible to know whether the person deciding is faithful to the doctrine of precedent or to principles of incrementalism.

(l) Reasons In support of decisions must be cogent, clear

and succinct. A pretence of reasons or "rubber-stamp reasons" is not to be equated with a valid decision-making process.

(m) It cannot be doubted that transparency is the sine qua non of restraint on abuse of judicial powers. Transparency in decision-making not only makes the judges and decision-makers less prone to errors but also makes them subject to broader scrutiny. (See David Shapiro in Defence of Judicial Candor³².)

(n) Since the requirement to record reasons emanates from the broad doctrine of fairness in decision-making, the said requirement is now virtually a component of human rights and was considered part of Strasbourg Jurisprudence. See Ruiz Torija v. Spain 33 EHRR, at 562 para 29 and Anya v. University of Oxford ³⁴, wherein the Court referred to Article 6 of the European Convention of Human Rights which requires,

"adequate and intelligent reasons must be given for judicial decisions".

(o) In all common law jurisdictions judgments play a vital role in setting up precedents for the future. Therefore, for development of law, requirement o giving reasons for the decision is of the essence and is virtually a part of "due process".

34. Having come to the conclusion that it was incumbent upon respondent no.1 to act fairly and provide reasons for rejecting the petitioner's request for grant of NOC, I may now turn to the factual matrix. After giving my thoughtful consideration to the rival pleas of the parties, especially in the light of the stand taken by respondent no.2, I am unable to agree with the petitioner that the action of respondent no.1 was either unfair or against public interest. Even though the petitioner is justified in urging that having emerged as the highest bidder, it had legitimate expectations of being

granted the licence, unfortunately for the petitioner, the said expectation was from respondent no.2 and not from respondent no.1. There was neither any assurance by respondent no.1 at any point of time, nor is there any obligation upon it under the new excise policy to issue a NOC in favour of the petitioner/H-1 bidder in the tender process. On the other hand, the very introduction of a mandatory condition for obtaining a NOC from respondent no.1 as a prerequisite for issuance of a licence in favour of the successful bidder in the Airport Zone - both in the excise policy for the year 2021-2022 and the tender notice dated 28.06.2021, clearly shows that there was never any obligation on the part of respondent no.1 to issue a NOC in favour of the highest bidder. It is not even the petitioner's case that it had received any assurance or clarification from the respondent no.1 before submitting its bid that in case, it were to emerge as H-1 bidder, it will be automatically allotted a space at the airport to run ten liquor vends by not only directing premature eviction of the existing operator which is currently running the seven liquor vends, but by also making available three additional vends to the petitioner.

35. No doubt the respondent no.1 has a duty to act fairly and in public interest, but what is to be considered is whether this would imply that it must necessarily grant a NOC to the petitioner, for which purpose, it has to enter into an agreement with the petitioner for leasing out space at the IGI Airport, when the admitted position of the parties is that there is a valid existing contract between the respondent no.1 and a third party, who emerged as the H-4 bidder. The petitioner has vehemently contended that once the L-10 licence in favour of the existing operator, with whom the respondent no.1 has entered into a contract for leasing out retail vends, stands lapsed by introduction of the new excise policy, the respondent no.1

is duty-bound to terminate the said contract which had lost its very purpose and enter into a fresh contract for leasing out the very same space. Though on the first blush, this argument appears to be attractive; closer scrutiny of the factual position shows that neither have the vends in question ever been earmarked as liquor vends, nor is the respondent no.1 precluded from permitting the use of the said space for any other purpose. Undoubtedly, the respondent no.1 cannot permit the continuance of the retail vends of liquor in these spaces unless its existing lessee is able to obtain a licence from respondent no.2, but that does not imply that the respondent no.1, which has the exclusive right under the OMDA to operate and *inter alia* lease space to operate the various stores at the IGI Airport, must terminate its existing contract with a third party and consequently, evict it from the Airport premises, when the said party has not even been impleaded in these proceedings and thereafter, necessarily enter into an agreement with the petitioner. It is an admitted position that the existing contracts which the respondent no.1 has with its existing operators are valid for about another three years and therefore, I am unable to agree with the petitioner that the respondent no.1 has acted arbitrarily or unfairly in refusing to terminate those existing contracts. Even though, in the bidding process conducted by respondent no.2, the petitioner has emerged as the highest bidder, the fact still remains that even if it is not granted the licence, public interest will not suffer as the subsequent bidders would then be entitled to grant of licence to run liquor vends at the IGI Airport, subject to their paying the same licence fee as offered by the petitioner and obtaining a NOC from the respondent no.1. In fact, there will be no loss to the petitioner either as, it would, in the said eventuality, be entitled to seek immediate refund of the earnest money

deposited by it. I am, therefore, unable to accept the petitioner's plea that the action of respondent no.1 was against public interest.

36. There is yet another reason as to why I am unable to accept the petitioner's prayer to direct the respondent no.1 to grant a NOC in its favour. The petitioner has not denied that it was well-aware of the fact that the grant of licence to run liquor vends at the Airport Zone would be subject to receiving a NOC from the respondent no.1, which was explicitly set out by way of a specific Clause 5.9 in the tender notice. There is absolutely no explanation by the petitioner as to why it did not seek any clarification regarding the condition for grant of a NOC, either from respondent no.1 or from respondent no.2 before submitting its bid. Though the petitioner may be reeling under a perception that it has been unfairly treated on account of non-grant of NOC by respondent no.1, the fact remains that not only the petitioner, but even the respondent no.2 failed to take any steps for seeking clarification from respondent no.1 in this regard before proceeding with the tender process. The petitioner, having knowingly participated in the tender with the knowledge that it would not be granted the liquor licence without the NOC from the respondent no.1, has only itself to blame for not having sought any clarifications from the respondent no.1 at the appropriate stage. The respondent no.1 which has, under the OMDA, been granted the right of overall management, responsibility, obligation, and liability in relation to the contracts for various services at the IGI Airport, cannot be faulted or said to have acted against public interest in refusing to terminate its valid contract with a third party prematurely and forcing the existing operator, which had been running the seven liquor vends, to evict the allotted space. Similarly, the respondent no.1 can also not be faulted for refusing to make available

three additional vends to the petitioner, who had emerged as the successful bidder in the tender floated by respondent no.2 for running ten liquor vends.

37. I have also considered the petitioner's plea that once Clause 8.5.7 of the OMDA makes it incumbent upon the respondent no.1 to resort to competitive bidding while awarding contracts valued at Rs. 50 crores and more and above and find that the same does not further the case of the petitioner. While dealing with grant of licences, all public authorities should endeavour to opt for competitive bidding and therefore, there is no doubt that the respondent no.1, while awarding any contract falling within Clause 8.5.7, should follow the process of competitive bidding; however, in the present case, the issue before the Court is not whether the respondent no.2 was justified in resorting to competitive bidding or whether the respondent no.1 ought to resort to competitive bidding, but as to whether the respondent no.2 can, without having taken any consent from respondent no.1, foist its choice on respondent no.1 or compel the respondent no.1 to accept the successful bidder declared by the respondent no.2 in its competitive bidding. The answer in this case, in my view, must be a clear 'No'. Once respondent no.2 itself had made it clear that in case the highest bidder is unable to obtain a NOC from respondent no.1, the respondent no.2 will consider issuing a licence in favour of the subsequent bidders, it is evident that the respondent no.2 was also always aware that it could not thrust its choice upon respondent no.1.

38. Before I conclude, I must also deal with the petitioner's plea that the respondent no.1 was obliged to give reasons while rejecting its request under the impugned letter as also the petitioner's plea that the respondent no.1 has now tried to give new reasons, including the alleged unsatisfactory financial

status of the petitioner. There can be no doubt that the respondent no.1 was required to provide reasons for rejecting the petitioner's request. However, I find that the impugned letter issued by respondent no.1 clearly sets out reasons for rejecting the petitioner's request. The respondent no.1 has specifically stated that it has subsisting contracts with a third party, and it has no additional space to accommodate the petitioner. It can, therefore, not be said that there are no reasons in the impugned letter. Merely because the petitioner perceives these reasons to be arbitrary, it cannot be said that the impugned letter is unreasoned. At this stage, I may also observe that though the respondent no.1 has, in its counter affidavit tried to give additional reasons for rejecting the petitioner's request, the same were neither pressed during submissions made by learned senior counsel for respondent no.1, nor are they germane for determining the validity of the impugned letter which, I find, cannot be said to be either arbitrary or vitiated on any account whatsoever.

39. For the aforesaid reasons, I find no merit in the writ petition, which alongwith the pending application is, accordingly, dismissed. Consequently, all interim orders stand vacated.

(REKHA PALLI)
JUDGE

OCTOBER 22, 2021/kk