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

Date of decision: 25th AUGUST, 2022

IN THE MATTER OF:

\+ **W.P.(C) 12824/2021 & CM APPL. 40398/2021**

SAPTAGIRI RESTAURANT PVT. LTD. ..... Petitioner

Through: Mr. Sandeep Sethi, Senior Advocate with Mr. Neeraj Yadav, Mr. Himanshu Sethi, Mr. Sandeep Sethi, Mr. Pavan Narang and Ms. Aishwarya Chhabra, Advocates.

versus

AIRPORT AUTHORITY OF INDIA & ANR. ..... Respondents

Through: Mr. Digvijay Rai, Mr. Archit Mishra, Mr. Aman Yadav, Advocates for the Respondent No.1/AAI

Mr. Chetan Sharma, Additional Solicitor General, Mr. Ajay Digpaul, CGSC with Mr. Amit Gupta, Mr. Rishav Dubey, Mr. Kamal Digpaul, Mr. Saurabh Tirpathi, Mr. Sahag Garg, Advocates for the UoI.
Ms. Anjana Gosain, Sr. Panel Counsel with Ms. Shalini Nair, Ms. Ritika Kranjawal, Advocates & Mr. R. M. Tripathi, Government Pleader.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

SUBRAMONIUM PRASAD, J

1. The instant Writ Petition has been filed by the Petitioner under Articles 226 and 227 of the Constitution of India praying for an appropriate writ, order or direction for quashing/setting aside the Letter bearing Ref. No. AAI/RC/CML/M&C/F&B/544-45 dated 27.10.2021 issued by Respondent No. 1 and the decision of the competent authority terminating the tender for "Concession to Design, Fit-Out, Finance, Develop, Market, Operate, Maintain And Manage the Food & Beverage Outlets at NITB, Birsa Munda Airport Ranchi" awarded to the Petitioner vide Letter of Intent to Award (LOIA) dated 29.07.2021. The Petitioner has also prayed for a direction to Respondent No. 1 to execute the Concession Agreement in terms of the Request for Proposal (*hereinafter referred to as 'the RFP'*) with the Petitioner and hand over the possession of the space allotted and earmarked for food and beverage outlet in terms of the Request for Proposal to the Petitioner in furtherance of Letter bearing Ref No. AAI/RC/CML/M&C/F&B/362-71 dated 29.07.2021 and for a direction to restrain the Respondent No. 1 from taking any coercive steps against the Petitioner by invoking/ en-cashing the Bank Guarantee bearing No. 76931GP002053121 dated 10.08.2021 for a sum of Rs.1,52,44,440/- (Rs. One Crore Fifty-Two Lakh Forty Four Thousand Four Hundred and Forty Only) issued by Bank of Baroda, Mahipalpur Branch, New Delhi submitted by the Petitioner to the Respondent No. 1 in terms of the LOIA dated 29.07.2021.

2. The facts leading to the instant Writ Petition are that the Airports Authority of India/Respondent No. 1, floated a Request for Proposal (*hereinafter referred to as "the RFP"*) for a tender to Design, Fit Out,

Finance, Develop, Market, Operate, Maintain and Manage the Food and Beverage Outlets at NITB, Birsa Munda Airport Ranchi on 13.01.2021. The Petitioner submitted his bid application on the day of extended deadline, i.e., on 15.02.2021.

3. The Petitioner was declared to be technically compliant and emerged as the highest bidder, subsequently being awarded the tender *vide* Letter of Intent to Award (*hereinafter referred to as "the* LOIA") dated 29.07.2021. The competent authority of Respondent No. 1 awarded a Non-Exclusive Concession subject to fulfillment of certain conditions.

4. The Respondents in a communication letter dated 29.04.2021 informed the Petitioner company of certain shortfalls in submitting bid documents online, and the Petitioner company complied with the aforesaid direction, rectifying the said shortfalls on 04.05.2021. The same was communicated in a letter to Respondent No. 1 *via* email.

5. That as per terms of the RFP, the Petitioner company was required to furnish a Bank Guarantee and settle advance license fee and both the requirements were duly complied with. License agreement on a stamp paper was sent to the Respondent No. 1 for execution on a letter dated 05.08.2021. Subsequently, the Petitioner company in compliance with terms laid down in the LOIA, furnished a bank guarantee (clause 4.1 of the LOIA) to the tune of INR 1,52,44,440/- on 11.08.2021, and in addition thereto, a sum of INR 19,05,555/- was transferred to Respondent No. 1 in lieu of an advance license fee payment.

6. On 23.08.2021, the Petitioner in a letter to Respondent No. 1 requested for possession of floor area allotted as per the contract. Meanwhile, the Vigilance Directorate conducted a surprise inspection at the

Ranchi Airport and directed the airport authorities to place the contract on hold pending the final outcome of investigation.

7. On 24.09.2021, the Competent Authorities of Respondent No.1 decided to terminate the tender awarded to the Petitioner.

8. Subsequently, the Directorate informed Respondent No. 1 of irregularities in as much that the Petitioner had not submitted certain documents as was required in terms of the RFP. The Directorate arrived at a conclusion that the award of contract in favour of the Petitioner company was wrongful on account of the latter not adhering to submitting mandatory documents. The Vigilance Directorate *vide* letter dated 25.08.2021 pointed out deficiencies in that the Petitioner had failed to submit, *inter-alia*, certain documents and the Petitioner erred in failing to declare that an ongoing criminal investigation was in progress against the Director which was to be done in terms of the clauses in the Tender Document.

9. The competent authority of Respondent No. 1 sent an email to the Petitioner seeking information pertaining to an ongoing investigation against the Petitioner's CEO, Directors, Managers and Employees. The said investigation was initiated through an FIR dated 30.03.2021, which relates to an inter-se dispute between the current and erstwhile directors of the company.

10. The Tender Agreement was cancelled by the competent authority of the Respondent No. 1 *vide* letter dated 27.10.2021. The cancellation under challenge here is premised on clause 2.8.4, Chapter 2 and clause 8.1.2, Chapter 8 respectively of the RFP. The said clauses are reproduced as under:

> *"**2.8.4** In case it is found during the evaluation or at any time before signing of the Concession Agreement or after its execution and during the period of*

subsistence thereof, that one or more of the eligibility conditions have not been met by the Bidder, or the ***Bidder has made material misrepresentation or has given any materially incorrect or false information, the Bidder shall be disqualified forthwith if not yet appointed as the Concessionaire either by issue of the LOIA or entering into of the Concession Agreement, and if the Selected Bidder has already been issued the LOIA or has entered into the Concession Agreement, as the case may be, the same shall, notwithstanding anything to the contrary contained therein or in this RFP, be liable to be terminated, by a communication in writing by Authority to the Selected Bidder.*** *In such an event, Authority shall be entitled to forfeit and appropriate the Earnest Money Deposit or terminate the Concession Agreement as the case may be, as damages, without prejudice to any other right or remedy that may be available to Authority under RFP, the Bidding Documents, and/ or the draft Concession Agreement or under applicable law."*

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*"**8.1.2** The Authority, in its sole discretion and without incurring any obligation or liability, reserves the right at any time to:*
(a) Suspend and/ or cancel the Bidding Process and/ or amend and/ or supplement the Bidding Process or modify the dates or other terms and conditions relating thereto;

(b) Consult with any Bidder in order to receive clarification or further information;
(c) Shortlist or not to shortlist any Bidder and/ or to consult with any Bidder in order to receive clarification or further information;

(d) Retain any information and/ or evidence submitted to the Authority by, on behalf of, and/ or in relation to any Bidder; and/ or

> *(e) Independently verify, disqualify, reject and/ or accept any/ all submissions or other information and/ or evidence submitted by or on behalf of any Bidder."*
>
> (emphasis supplied)

11. Aggrieved by the said order of cancellation of award of tender, the Petitioner approached this Court for remedies. Consequent thereto, in this Petition, the same bench of this Hon'ble Court had *vide* an Order dated 15.11.2021 stayed the impugned order dated 29.10.2021, in the following terms:

> *"**6**. Though the impugned cancellation of the LOIA is cryptic inasmuch as it does not describe as to what is the exact act/ omission attributed to the petitioner, it appears that the same is premised on registration of one FIR against the petitioner after the submission of the bid. The said FIR has been registered on account of an inter se dispute between the Directors of the petitioner Company.*
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> ***7**. Prima-facie, that could not have been the reason for cancellation of the LOIA. We may note that the stand of the respondent is that the registration of the FIR is not the basis of the said cancellation. If that is so then the cancellation, appears to be completely cryptic and without any reason. We, therefore, stay the operation of the impugned cancellation order till the next date."*

12. The learned Senior Counsel appearing for the Petitioner submits that the Petitioner company has complied with the terms stated in the LOIA by furnishing a bank guarantee and has also sent a duly signed, duplicate copy of the LOIA in lieu of its acceptance *vide* email dated 02.08.2021 to

Respondent No. 1. Learned Senior Counsel argues that on 23.08.2021, the Petitioner company informed Respondent No. 1 that they had duly complied with contractual formalities in terms of the LOIA and consequent thereto, sought for handover of possession of space earmarked for setting up of food and beverage stalls at the Birsa Munda Airport, Ranchi.

13. It is submitted by learned Senior Counsel for the Petitioner company that Respondent No. 1 in a communication dated 08.09.2021 to the Petitioner company, sought for information pertaining to ongoing investigations against the Petitioner company. In their reply to the said communication dated 8.09.2021, the Petitioner company stated that the FIR against them was registered on 30.03.2021, which does not hold them responsible for incorrect declaration in terms of Technical Form 16 of the RFP, since the Delhi Police is a Law Enforcement Agency and not a Regulatory Body. It is further submitted that the registration of FIR dated 30.03.2021 against the Petitioner company by the Delhi Police was done only after the last date of submission of bid documents, which was on 15.02.2021. Clause 9 of Technical Form 16 of the RFP is reproduced herein below:

> *"We further certify that no investigation by a regulatory authority is pending either against us/any Member of the Consortium or against our/ its Affiliates or against our CEO or any of our directors/ managers/ employees."*

It is stated that in terms of Clause 9 of the bid document, the Petitioner had fulfilled all the necessary requirements.

14. The learned Senior Counsel for the Petitioner submits that in their aforementioned reply dated 10.09.2021, Respondent No. 1 was once again

reminded to hand over physical possession of the space allotted for outlets, so as to let the Petitioner company to commence fabrication work. Learned Senior Counsel draws the attention of this Court towards paragraph 6 of the Order dated 15.11.2021, quoted above, to advance his argument that the impugned order dated 27.10.2021, terminating the tender seems to be premised on the basis of the FIR dated 20.03.2021, which was filed only after the Petitioner company had successfully submitted their bid application, i.e. on 15.02.2021.

15. Mr. Sethi contends that the impugned order of cancellation does not set out any reasons as to why the Respondent believed there was any fraud, concealment or misrepresentation in terms of clause 2.8.4 of the RFP. Further, he contends that no show cause notice was issued to the Petitioner. Mr. Sethi contends that in any event the FIR arose due to an inter-se family dispute between the Director of the Petitioner company and his Brother-in-law and is in no way connected with the affairs of the Petitioner company or any act of the Petitioner company which would have disentitled the Petitioner company from participating in a tender.

16. Further the learned Senior Counsel submits that the Petitioner company has complied with the requirement of submitting the requisite tender documents. Another submission of his is that the Petitioner company being the highest bidder is awarded the contract and has duly complied with the terms contained therein, and the said award of tender contract vests a right in the Petitioner to operate food and beverage stalls as per terms of the RFP. The act of the competent authorities of Respondent No. 1 pursuant to the direction of Vigilance Directorate in cancelling the tender on the basis of the ongoing investigation is violative of the principles of natural justice, inasmuch a fair opportunity of hearing was denied, especially in light of the

fact that the impugned letter of cancellation of award does not delve into the reasons justifying the apprehension extant in the opinion of the Vigilance Directorate. In support of his argument with respect to principals of natural justice, the learned Senior Counsel refers to the position of law with respect to applicability of principles of natural justice in public tenders, which is reiterated in the decision of the Hon'ble Supreme Court in State of U.P. v. Sudhir Kumar Singh**, 2020 SCC OnLine SC 847**, which reads as under:

> *"**70.7**. Writ can be issued where there is executive action unsupported by law or even in respect of a corporation there is denial of equality before law or equal protection of law or **if it can be shown that action of the public authorities was without giving any hearing and violation of principles of natural justice after holding that action could not have been taken without observing principles of natural justice.**"*
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> *"33(6) While applying the rule of audi alteram partem (the primary principle of natural justice) the Court/Tribunal/Authority must always bear in mind the ultimate and overriding objective underlying the said rule, viz., **to ensure a fair hearing and to ensure that there is no failure of justice.** It is this objective which should guide them in applying the rule to varying situations that arise before them."*
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> (emphasis supplied)

17. Furthermore, the learned Senior Counsel for the Petitioner submits that the Petitioner company paid the advance license fee towards fulfilment of contractual conditions in terms of the LOIA, and the Expression of Interest to enter into the contract is implicit in the Petitioner company duly submitting the Bank Guarantee. It is his submission that their compliance in terms of the RFP has vested in them contractual rights.

18. Learned Counsel for Respondent No. 1 places the argument that the Letter of Intent to Award does not in itself confer any right upon the Petitioner so as to claim that the Concession Agreement is to be executed. To buttress the stand taken hereinabove, the learned Counsel relies on an observation made by the judgment of the Apex Court delivered in PSA Mumbai Investments Pvt. Ltd. v. Board of Trustees of the Jawaharlal Nehru Port Trust and Anr**., (2018) 10 SCC 525**.The relevant portion from the judgment is reproduced as under:

> *"Under Section 7 of the Contract Act, 1872* ***in order to convert a proposal into a promise, the acceptance must be absolute and unqualified****. It is clear on the facts of this case that there is no absolute and unqualified acceptance by the letter of award – two or three very important steps have to be undergone before there could be said to be an agreement which would be enforceable in law as a contract between the parties."*
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> (emphasis supplied)

19. The learned Counsel for Respondent No. 1 states that the bank guarantee executed by the Petitioner was not taken on record, rendering its submission practically ineffective, and therefore, no interest vests in the Petitioner in terms of the tender contract.

20. Further reliance has been placed on the decision of the Hon'ble Supreme Court in AFCONS Infrastructure Ltd. v. Nagpur Metro Rail Corporation Ltd. And Anr, **(2016) 16 SCC 818**, which sheds proper light on the scope of interference of courts to be exercised while examining the decision making process in tender matters. The relevant paragraph is as follows:

> *"13. In other words, 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 malafides, 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."***

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"15. We may add that the ***owner or the employer of a project, having authored the tender documents, is the best person to understand 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."* (emphasis supplied)

21. To support the decision of competent authorities of Respondent No. 1 in rejecting the Concession Agreement without assigning any reasons, learned Counsel for Respondent No. 1 places reliance on the judgment delivered by the Hon'ble Supreme Court in <u>Silppi Constructions Contractors v. Union of India and Anr</u>., **(2020) 16 SCC 489,** which has held as under:

*"**25**...We must remember that we are dealing with purely administrative decisions. These are in the realm of contract.* ***While rejecting the tender the person or authority inviting the tenders is not required to give reasons even if it be a State within the meaning of Article 12 of the Constitution. These decisions are neither judicial nor quasi-judicial. If reasons are to be given at every stage, then the commercial activities of the State would come to a grinding halt.*** *The State*

must be given sufficient leeway in this regard."

(emphasis supplied)

22. The learned Counsel for the Respondent furthers their argument by placing reliance on a judgment delivered by this Court in S.B. Movers and Lifters Pvt. Ltd. v. Steel Authority of India Ltd. and Ors., **W.P. (C) No. 8914/2006 and CM Nos. 6529 and 7392-94/06.** The relevant portion of the said judgment has been reproduced as under:

> *"**21**.In the case at hand, the respondent has not taken recourse to the clause empowering it to reject all or any of the tenders without assigning any reason to place a mala fide, arbitrary, whimsical or otherwise untenable decision beyond the purview of any challenge. Here, the discretion has been properly exercised keeping in view the interests of the Authority. This is evident from the records placed before the court including the report of the Vigilance Committee.* ***Simply because all the reasons and the background facts that led to the taking of this decision were not disclosed by the respondent to the petitioner in its reply to the petitioner's notice whereby the petitioner was informed of the authority's decision to reject all tenders would not, in our view, invalidate the same, especially when the same exist on record.*** *It is well within the power of the respondents, who fall within the purview of 'state' to try and ensure, in a bona fide manner, that it secures the best possible rates and for that purpose to create conditions that are conducive to attracting the maximum number of bids. Furthermore, in view of the fact that it was open to the petitioner to participate in the fresh tender enquiry floated thereafter by the respondent Corporation for the same work, it cannot also be said that the petitioner has in any way been discriminated against or shut out from tendering for the work in question. On the facts before*

> *us, we, therefore, see no ground to conclude that the decision is not bona fide, or that the petitioners have been put to any major disadvantage, merely because this tender has been cancelled."* (emphasis supplied)

23. Heard Mr. Sandeep Sethi, learned Senior Advocate for the Petitioner, Mr. Digvijay Rai, learned Counsel for Respondent No.1/AAI, Mr. Chetan Sharma, learned ASG for Union of India, and perused the material on record.

24. At this juncture, it is pertinent to mention that the Petitioner company was initially a sole proprietorship under one Pradeep Kumar who is the Brother-in-law of Bikram Singh, the Director and majority shareholder of the Petitioner company. The said Pradeep Kumar has filed FIR No.149/2021 dated 30.03.2021 registered at Police Station Vasant Kunj for offences under Sections 406/420/467/468/471/120B/34 IPC against Bikram Singh (Director and majority shareholder of the Petitioner company), his wife and the Petitioner company stating that the accused persons have fabricated, forged and executed a fraudulent Gift cum Assignment Deed dated 01.04.2020 regarding the ownership and properties of the Petitioner company. The FIR thus is the result of a family dispute between the Director of the Petitioner company and his Brother-in-law, Pradeep Kumar, who in the FIR states was once upon a time the sole proprietor of the Petitioner company. A family dispute between the Director of the Petitioner company and his Brother-in-law cannot attract disqualification on the ground of concealment of facts posited in terms of Clause 2.8.4. This FIR has nothing to do with the affairs of the Petitioner company and in any event the FIR was registered subsequent to the last date of the submission of the bid.

25. It is well settled that the Courts, while exercising jurisdiction under Article 226 of the Constitution of India in tender matters, do not sit as an

Appellate Authority over the decisions of the Government. The Courts have to only examine as to whether decision making process adopted by the Government is just, fair and reasonable and is not tainted by mala fides or that the conclusion is so irrational that no prudent man would have come to such a conclusion. However, in the facts of the present case, the only ground on which the Tender was cancelled was on account of non-disclosure of an FIR registered against Petitioner/Company. The said FIR was registered due to a family dispute and was completely unconnected with the affairs of the Petitioner. The decision of the Respondent, therefore, can be said to be one without any application of mind.

26. The Apex Court in M/s N.G. Projects Ltd. v. M/s Vinod Kumar Jain and Ors, **CA No. 1846 of 2022**, has observed as under:

> *"**23**..the Writ Court should refrain itself from imposing its decision over the decision of the employer as to whether or not to accept the bid of a tenderer. The Court does not have the expertise to examine the terms and conditions of present-day economic activities of the State and this limitation should be kept in view. Courts should be even more reluctant in interfering with contracts involving technical issues as there is a requirement of the necessary expertise to adjudicate upon such issues.* ***The approach of the Court should be not to find fault with magnifying glass in its hands, rather the Court should examine as to whether the decision-making process is after complying with the procedure contemplated by the tender conditions. If the Court finds that there is total arbitrariness or that the tender has been granted in a malafide manner, still the Court should refrain from interfering in the grant of tender but instead relegate the parties to seek damages for the wrongful exclusion rather than to injunct the execution of the contract.*** *The injunction or interference in the tender leads to additional costs on the State and is also against public interest.*

> *Therefore, the State and its citizens suffer twice, firstly by paying escalation costs and secondly, by being deprived of the infrastructure for which the present-day Governments are expected to work."*

(emphasis supplied)

27. The acceptance of the Bank Guarantee and advance license fee by Respondent No. 1 indicates that a contract has been entered into, which creates a semblance of rights in the Petitioner's favour. At the cost of repetition, it is stated that upon receiving the LOIA *vide* letter dated 29.07.2021, the Petitioner company duly complied with terms and conditions of the RFP and the LOIA. The intent to enter into a contract can be gauged from execution of the Concession Agreement in terms of the RFP.

28. Reference may also be made to the order dated 15.11.2021 of this Court whereby it is noted that the Respondent No. 1 has terminated the contract on account of FIR being registered against the Petitioner company and its Director. This Court accepts the argument of the learned Senior Counsel for the Petitioner company that the decision to terminate the contract only on the basis of an FIR which has been registered by the Brother-in-law of the Director of the Petitioner company is violative of the principals of natural justice and further, the Respondent No. 1 has done so without assigning any reasons. The FIR in question, which is the sole basis on which contract has been terminated is in no way connected with the business of the Petitioner company and arises out of a dispute between the Director and majority shareholder of the Petitioner company, and his Brother-in-law.

29. In light of the arguments placed before this Court, we are inclined to direct that the impugned letter of cancellation of award, dated 27.10.2021, be set aside. As regards the issue of handing over physical possession of space for operating stalls at the Birsa Munda Airport, Ranchi, we further direct the competent authorities of Respondent No. 1 to grant the Petitioner company fair opportunity of hearing, in accordance with the principles of natural justice. In the interim, the Respondent No. 1 is directed to not encash the Bank Guarantee submitted by the Petitioner company.

30. Accordingly, the instant petition is disposed of, along with the pending application(s), if any.

SATISH CHANDRA SHARMA, C.J.

SUBRAMONIUM PRASAD, J

AUGUST 25, 2022
Rahul