Airport Authority Of India vs Centre For Aviation Policy, Safety And ... on 30 September, 2022

Author: M.R. Shah

Bench: Krishna Murari, M.R. Shah

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NOS. 6615-6616 OF 2022

Airport Authority of India …Appellant

Versus

Centre for Aviation Policy, Safety & Research
(CAPSR) & Others …Respondents

JUDGMENT

M.R. SHAH, J.

1. Feeling aggrieved and dissatisfied with the impugned judgment and order dated 14.07.2021 passed by the High Court of Delhi at New Delhi in Writ Petition (Civil) No. 5722 of 2020, by which the High Court, in exercise of its powers under Article 226 of the Constitution of India, has allowed the said writ petition and has struck down the decision to carry out region-wise sub-categorisation of the 49 airports falling under SNEHA Group D-1; the stipulation that only previous work experience in respect of providing GHS to scheduled aircrafts shall be considered acceptable for the purpose of the impugned tender/RFP and the revised minimum Annual Turnover criteria of INR 18 crores as discriminatory and arbitrary, the Airport Authority of India (for short, 'AAI') has preferred Civil Appeal No. 6615/2022. The subsequent order dated 24.09.2021 rejecting the review application being Review Petition No. 150/2021 to review and recall the final judgment and order passed in Writ Petition No. 5722/2020 is also the subject matter of Civil Appeal No. 6616/2022.

2. The facts leading to the present appeals in a nutshell are as under:

> The appellant herein – AAI floated a Request for Proposal (for short, 'RFP')/tender for concession of ground handling services at Group 'A', 'B' and 'C' airports owned by it on 01.05.2018. The appellant herein – AAI also floated a RFP/tender for

concession of ground handling services at Group 'D' airports owned by it on 02.05.2018. That the RFP for Group 'D' airports was modified multiple times and finally republished as Corrigendum No. 21. However, subsequently, vide letter dated 10.06.2019, AAI cancelled the tender earlier floated for Group 'D' airports. That thereafter, the AAI published a fresh RFP on 28.07.2020 for Group 'D1' airports. The respective RFPs contained the eligibility criteria which include the technical and financial qualifications. 2.1 Respondent No.1 herein – Centre for Aviation Policy, Safety & Research (CAPSR) filed a writ petition before the High Court challenging the eligibility criteria and the respective RFPs with respect to Group 'C', 'D1' and 'D2' airports on the ground that the eligibility criteria contained in the RFPs are not only a radical departure from the past, but also stipulate onerous technical and financial qualifications, thereby rendering most of the extant Ground Handling Agencies (for short, 'GHAs') ineligible to participate in the tender process, especially those which have been providing Ground Handling Services (for short, 'GHS') at the smaller airports of the country, that fall under the categories of Groups 'C', 'D1' and 'D2' airports, for the last many years. It was also the case on behalf of the original writ petitioner that the prescribed technical and financial qualifications have no corelation with the GHS that the service providers are expected to provide at the Groups 'C', 'D1' and 'D2' airports and that the same have been arbitrarily and whimsically tailored with a view to oust the existing GHS providers, who have been providing these services for years, without any complaint.

2.2 The writ petition was opposed by the AAI by filing a counter affidavit. It was the case on behalf of the AAI that the objective of the tenders for Group 'C', 'D1' and 'D2' airports was not to oust small players but sought to exclude GHAs, which lack expertise and infrastructure and used casual and unskilled labour in workforce which allowed them to offer better rates as compared to other GHAs. It was also the case on behalf of the AAI that considering the importance of experience in GHS for scheduled aircrafts given the nature of work involved in scheduled flights are wider than non-scheduled flights. Thus, 36 months of experience in past 7 years of handling ground handling services for scheduled flights was reasonable. It was also submitted on behalf of the AAI that the earnest money deposit, Annual Turnover criterion and qualifying experience criterion is not arbitrary, irrational and discriminatory. It was also pointed out that the amount of earnest money deposit required in the tender for Group 'D1' airports has been reduced from Rs. 35 Lakhs per region to Rs. 15 Lakhs per region. AAI also tried to justify the Annual Turnover criterion of Rs. 30 crores for Group 'D1' airports. At this stage, it is required to be noted that pursuant to the directions of the High Court, the AAI agreed to reduce the requirement of Annual Turnover criterion to Rs. 18 crores for Group 'D1' airports. The AAI also challenged the locus of respondent No. 1 – original writ petitioner.

2.3 By the impugned judgment and order, the High Court has set aside the respective RFPs and has set aside the decision to carry out region-

wise sub-categorisation of the 49 airports falling under Group D-1. The High Court has also set aside the stipulation in the RFPs that only previous work experience in respect of providing GHS to scheduled aircrafts shall be considered acceptable for the purpose of the impugned tender/RFP and the revised minimum Annual Turnover criteria of INR 18 crores observing the same as discriminatory and arbitrary. 2.4 Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the High Court, as also the order passed in the review application, the original respondent – AAI has preferred the present appeals.

3. Shri K.M. Nataraj, learned Additional Solicitor General of India appearing for AAI has assailed the impugned judgment and order passed by the High Court, inter alia, on the following grounds:

> i) that the original writ petitioner before the High Court has no locus standi to maintain the writ petition;
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> ii) that the terms and conditions invitation to tender, being in the realm of contract, are not open to judicial scrutiny; and
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> iii) MSME order of 2012 and MSME order of 2018 are not applicable in the facts of the present case 3.1 Elaborating the aforesaid grounds, it is vehemently submitted by Shri K.M. Nataraj, learned ASG that the original writ petitioner claims to be a non-profit organisation carrying out independent research, advisory and advocacy in the field of civil aviation. It is submitted that as per the settled position, NGOs have no locus standi to maintain a writ petition challenging the tender conditions especially when the same is not in the nature of a Public Interest Litigation. It is submitted that an NGO has no business to enter into tender disputes as the same falls in the realm of contract. It is submitted that the original writ petitioner cannot be said to be an affected and/or aggrieved party and therefore at the instance of the original writ petitioner, a writ petition was not maintainable assailing the tender process. Reliance is placed upon the decision of this Court in the case of Anand Sharadchandra Oka v. University of Mumbai, (2008) 5 SCC 217 (para 12).

3.2 It is submitted by the learned ASG that the original writ petitioner mainly challenged three terms/conditions of the tender in question, namely, I. Clustering of 49 Airports into 4 Region-wise sub- categories/Clusters;

II. Criteria for Evaluation – Clause 3.2.1 – 36 Months Experience in past 7 years in providing 3 out of 7 Core GHS; and III. Financial capacity – Clause 3.2.2 – Annual turnover of 30 Cr. In any one of last 3 Financial Years It is submitted that all the aforesaid criterions have sound rationale and therefore the same could not have been the subject matter of a writ petition before the High Court under Article 226 of the Constitution of India. It is submitted that so far as the clustering of 49 airports into 4 Region-wise sub-categories/clusters is concerned, the clustering was done with the aim of promoting regional connectivity and avoiding the cumbersome administrative task of inviting and dealing with separate tenders for each of the 49 airports under Group ‘D1’ category. 3.3 It is submitted that so far as the criteria for evaluation - 36 months experience in past 7 years in

providing 3 out of 7 Core GHS is concerned, the purpose of stipulating past experience of handling scheduled airlines was that such airlines operate larger aircrafts and the number of flights, passengers and amount of cargo would increase in future with the opening up of the aviation sector.

3.4 Now so far as providing and/or insistence of the financial capacity – Annual Turnover of Rs. 30 crores in any one of last three financial years is concerned, it is submitted that as such the same was scaled down to Rs. 18 crores. It is submitted that even otherwise the said criterion was set in view of the nature of the tender and the consequential financial strength which would be required in order to fulfil the obligations.

3.5 It is submitted that the aforesaid conditions have been incorporated keeping in mind the commercial considerations and commercial expediency and the tender making authority is well within its rights to formulate conditions based on its commercial wisdom. 3.6 It is submitted that as per the settled position of law, setting of terms and conditions of invitation to tender are within the ambit of the administration/policy decision of the tender making authority and as such are not open to judicial scrutiny unless they are arbitrary, discriminatory or mala fides. Reliance is placed on the decisions of this Court in the case of Maa Binda Express Carrier v. North-East Frontier Railway, (2014) 3 SCC 760 (para 8); Directorate of Education v. Educomp Datamatics Limited, (2004) 4 SCC 19 (para 12); Meerut Development Authority v. Assn. of Management Studies, (2009) 6 SCC 171 (paras 26 & 27); and Michigan Rubber (India) Limited v. State of Karnataka, (2012) 8 SCC 216 (paras 23 & 35).

3.7 Making the above submissions and relying upon the aforesaid decisions, it is vehemently submitted that in the present case, the High Court has erred in interfering with the administration/policy decision of the tender making authority in exercise of powers under Article 226 of the Constitution of India.

3.8 Now so far as the reliance placed upon MSME orders of 2012 and 2018 by the High Court is concerned, it is submitted that the reliance placed by respondent No.1 on the aforesaid orders is misplaced as the tenders in question have been issued with the purpose of selecting GHS for providing GHS, which service is in fact akin to grant of a license to the GHA, as opposed to procurement of any goooods and services that form the crux of the MSME orders.

3.9 It is submitted that even otherwise it is evident from sub-clause (1) of clause 3 of the MSME order of 2012, the minimum threshold prescribed is the annual goal for overall procurement and cannot be made applicable to each tender individually. It is further submitted that a reading of sub-clause (4) of clause 3 of MSME order of 2012 would show that the mandate of the order is not absolute. It provides that in the even of any Ministry, Department or PSU failing to meet the objective, they shall substantiate the same with reasons, which means that the departure from the requirement under the order has been envisaged as long as the same is substantiated with reasons. 3.10 Making the above submissions and relying upon the aforesaid decisions, it is prayed to allow the present appeals and quash and set aside the impugned judgment and order passed by the High Court.

4. The present appeal is vehemently opposed by Shri Umakant Mishra, learned counsel appearing on behalf of respondent No.1 – original writ petitioner.

4.1 It is vehemently submitted by the learned counsel appearing on behalf of respondent No.1 that all the members of respondent No.1 are GHAs and were to participate in the tender. It is submitted that after the authorities did not respond to the representations of the individual GHA members of respondent No.1, only thereafter a writ petition was preferred before the High Court challenging the illegal policy changes made in the tender. It is submitted that therefore it cannot be said that respondent No.1 – original writ petitioner had no locus standi to file the writ petition challenging the most arbitrary and illegal tender conditions. 4.2 It is then submitted that since the tender conditions No. 2.2.1(a) allowed three entities to form a consortium to bid, the respondent could have been a potential bidder as part of a consortium with two of its member GHAs who as MSME could have a maximum turnover of Rs. 5 crore each. It is submitted that however since the turnover criteria to be eligible to bid was arbitrarily fixed as Rs. 30 crores, even as a consortium with two of its member GHAs, the said eligibility has impaired the fundamental rights of the respondent and its members who are MSMEs. It is submitted that there also respondent No.1 has locus to file the writ petition.

4.3 It is then submitted that in the present case the AAI earlier had disregarded the provisions of Section 12(5) of the AAI Act, 1994 r/w the provisions of the MSME Act and MSME Order of 2012 and the statutory Public Procurement Policy of the Government wherein it is mandated that the AAI must procure 25% of services from MSME sector along with giving other benefits such as free of cost tender and exemptions to be granted from payment of Earnest Money Deposit (EMD) to register small and medium enterprises. It is submitted that in the present case the AAI artificially introduced differentiation in technical eligibility criteria, specifying experience in providing GHS to scheduled airlines flights only even there is no differentiation between GHS provided to non-scheduled or scheduled airlines in the AAI (GHS) Regulations, 2018. 4.4 It is further submitted that as rightly observed and held by the High Court the terms and conditions set forth in the tenders are discriminatory, restrictive, and exclusionary. It is submitted that clustering of small airports of different sizes, different capacity to handle aircrafts, different financial viabilities, different locations into regions etc. is not based on intelligible differentia nor does it have any rational nexus to the avowed objective of the respondent of security. It is submitted that as the relevant eligibility criteria and the conditions mentioned in the respective tenders were found to be discriminatory and arbitrary and no nexus with the object of providing such eligibility criteria, the High Court has not committed any error in striking down the decision to carry out region- wise sub-categorisation of the 49 airports falling under Group D-1; the stipulation that only previous work experience in respect of providing GHS to scheduled aircrafts shall be considered acceptable for the purpose of the impugned tender/RFP and the revised minimum Annual Turnover criteria of INR 18 crores as discriminatory and arbitrary. 4.5 Making the above submissions, it is prayed to dismiss the present appeals.

5. We have heard learned counsel for the respective parties at length.

At the outset, it is required to be noted that respondent No.1 claiming to be a non-profit organisation carrying out research, advisory and advocacy in the field of civil aviation had filed a writ petition challenging the tender conditions in the respective RFPs. It is required to be noted that none of the GHAs who participated in the tender process and/or could have participated in the tender process have challenged the tender conditions. It is required to be noted that the writ petition before the High Court was not in the nature of Public Interest Litigation. In that view of the matter, it is not appreciable how respondent No.1 – original writ petitioner being an NGO would have any locus standi to maintain the writ petition challenging the tender conditions in the respective RFPs. Respondent No.1 cannot be said to be an" aggrieved party". Therefore, in the present case, the High Court has erred in entertaining the writ petition at the instance of respondent No.1, challenging the eligibility criteria/tender conditions mentioned in the respective RFPs. The High Court ought to have dismissed the writ petition on the ground of locus standi of respondent No.1 – original writ petitioner to maintain the writ petition.

6. Even otherwise, even on merits also, the High Court has erred in quashing and setting aside the eligibility criteria/tender conditions mentioned in the respective RFPs, while exercising the powers under Article 226 of the Constitution of India. As per the settled position of law, the terms and conditions of the Invitation to Tender are within the domain of the tenderer/tender making authority and are not open to judicial scrutiny, unless they are arbitrary, discriminatory or mala fide. As per the settled position of law, the terms of the Invitation to Tender are not open to judicial scrutiny, the same being in the realm of contract. The Government/tenderer/tender making authority must have a free hand in setting the terms of the tender.

7. While considering the scope and ambit of the High Court under Article 226 of the Constitution of India with respect to judicial scrutiny of the eligibility criteria/tender conditions, few decisions of this Court are required to be referred to, which are as under:

> In the case of Maa Binda Express Carrier (supra), in paragraph 8, this Court observed and held as under:
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> "8. The scope of judicial review in matters relating to award of contracts by the State and its instrumentalities is settled by a long line of decisions of this Court. While these decisions clearly recognise that power exercised by the Government and its instrumentalities in regard to allotment of contract is subject to judicial review at the instance of an aggrieved party, submission of a tender in response to a notice inviting such tenders is no more than making an offer which the State or its agencies are under no obligation to accept. The bidders participating in the tender process cannot, therefore, insist that their tenders should be accepted simply because a given tender is the highest or lowest depending upon whether the contract is for sale of public property or for execution of works on behalf of the Government. All that participating bidders are entitled to is a fair, equal and non-discriminatory treatment in the matter of evaluation of their tenders. It is also fairly well settled that award of a contract is essentially a commercial transaction which must be determined on the basis of consideration that are relevant to such commercial decision. This implies that terms

subject to which tenders are invited are not open to the judicial scrutiny unless it is found that the same have been tailor-made to benefit any particular tenderer or class of tenderers. So also, the authority inviting tenders can enter into negotiations or grant relaxation for bona fide and cogent reasons provided such relaxation is permissible under the terms governing the tender process." In the case of Michigan Rubber (India) Ltd. (supra), after considering the law on the judicial scrutiny with respect to tender conditions, ultimately it is concluded in paragraph 23 as under:

"23. From the above decisions, the following principles emerge:

(a) The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) Fixation of a value of the tender is entirely within the purview of the executive and the courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of the tendering authority is found to be malicious and a misuse of its statutory powers, interference by courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by court is very restrictive since no person can claim a fundamental right to carry on business with the Government." In the aforesaid decision, it is further observed that the Government and their undertakings must have a free hand in setting terms of the tender and only if it is arbitrary, discriminatory, mala fide or actuated by bias, the courts would interfere. It is further observed that the courts cannot interfere with the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical.

Similar views have been expressed in the case of Educomp Datamatics Ltd. (supra) and Meerut Development Authority (supra).

8. In the present case, the AAI explained before the High Court the rationale behind the respective conditions, namely, clustering of 49 airports into 4 region-wise sub-categories/clusters; criteria for evaluation

- 36 months experience in past 7 years in providing 3 out of 7 Core GHS and the financial capacity – Annual Turnover of Rs. 30 crores (modified as Rs. 18 crores) in any one of last three financial years.

9. Having gone through the respective clauses/conditions which are held to be arbitrary and illegal by the High Court, we are of the opinion that the same cannot be said to be arbitrary and/or mala fide and/or actuated by bias. It was for the AAI to decide its own terms and fix the eligibility criteria.

10. Applying the law laid down by this Court in the aforesaid decisions, we are of the opinion that the High Court has committed a serious error in first of all entertaining the writ petition at the instance of respondent No.1 – original writ petitioner, an NGO and also holding the relevant eligibility criteria/conditions mentioned in the tender documents as illegal.

11. Now so far as the submission on behalf of the original writ petitioner on MSME orders of 2012 and 2018 is concerned, the same can always be subject to the fulfilment of other conditions of the tender documents. Even otherwise, selecting GHS for providing GHS cannot be equated with the procurement of any goods and services that form the crux of the MSME orders. In any case, as observed hereinabove, at the instance of respondent No.1, the High Court ought not to have entertained the writ petition challenging the terms and conditions of the tender documents and as observed hereinabove, none of the tender conditions/eligibility criteria can be said to be arbitrary and/or mala fide and/or actuated by bias.

12. In view of the above and for the reasons stated above, the impugned judgment and order(s) passed by the High Court are unsustainable and the same deserve to be quashed and set aside and are accordingly hereby quashed and set aside. Consequently, the writ petition filed before the High Court at the instance of respondent No.1 – original writ petitioner stands dismissed.

13. The instant appeals are accordingly allowed. However, in the facts and circumstances of the case, there shall be no order as to costs.

……..J.
[M.R. SHAH]

NEW DELHI; ……..J.
SEPTEMBER 30, 2022. [KRISHNA MURARI]