IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE C.K.ABDUL REHIM

&

THE HONOURABLE MR. JUSTICE T.R.RAVI

TUESDAY, THE 28TH DAY OF APRIL 2020 / 8TH VAISAKHA, 1942

WA.No.73 OF 2020

AGAINST THE JUDGMENT IN WP(C)30645/2019(E) OF HIGH COURT OF KERALA

APPELLANT/PETITIONER:

FLEMINGO TRAVEL RETAIL LIMITED,

HAVING REGISTERED OFFICE AT NO.D 73/1,TTC,INDUSTRIAL AREA, TURBHE, MIDC, NAVI MUMBAI-400 705, REPRESENTED BY ITS AUTHORISED SIGNATORY SHRI.NIXON VARGHESE

BY ADVS.SRI.JOSEPH KODIANTHARA (SR.)

SRI.G.HARIKUMAR (GOPINATHAN NAIR)

SHRI.AKHIL SURESH

RESPONDENTS/RESPONDENTS:

1 **KANNUR INTERNATIONAL AIRPORT LIMITED,**

KARA PERAVOOR P.O.,MATTANNUR, KANNUR-670 702,

REPRESENTED BY ITS MANAGING DIRECTOR

2 **KPMG ADVISORY SERVICES PVT LTD.,**

BUILDING NO.104,4TH FLOOR, POWER C,

DLF CYBER CITY-PHASE-II, GURUGRAM-122002,REPRESENTED BY ITS DIRECTOR

3 GMR AIRPORTS,INDIRA GANDHI INTERNATIONAL AIRPORT,

NEW UDAAN BHAWAN, OPPOSITE TERMINAL 3, NEW DELHI-110 037, REPRESENTED BY ITS CHIEF EXECUTIVE OFFICER-BD

R1 BY SRI E.K.NANDAKUMAR,

ADV. SMT.NAYANAPALLY RAMOLA

R1 BY ADV. SRI.M.GOPIKRISHNAN NAMBIAR

R1 BY ADV. SRI.K.JOHN MATHAI

R1 BY ADV. SRI.JOSON MANAVALAN

R1 BY ADV. SRI.KURYAN THOMAS

R1 BY ADV. SRI.PAULOSE C. ABRAHAM

R1 BY ADV. SMT.NAYANPALLY RAMOLA

R2 BY ADV. SRI.P.RAVINDRAN (SR.)

R2 BY ADV. SRI ATUL N.

R2 BY ADV. SRI.ENOCH DAVID SIMON JOEL

R3 BY ADV. SRI S. RAMESH BABU

R3 BY ADV. SRI.S.ANANTHAKRISHNAN

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 18-03-2020, THE COURT ON 28-04-2020 DELIVERED THE FOLLOWING:

"CR"

C.K. ABDUL REHIM & T.R. RAVI, JJ.

W.A.No.73 OF 2020

Dated this the 28th day of April, 2020

JUDGMENT

T.R. RAVI, J.

The above Writ appeal has been filed by the appellant challenging the judgment dated 22.1.2019, of the Single Judge, in W.P.(C) No.30645 of 2019. The appellant, who was the petitioner in the Writ petition, is engaged in the business of operating duty free shops at various Airports. They filed the Writ petition challenging the award of the contract for operating the duty free shops in the Kannur International Airport (KIAL), to the 3rd respondent. The Kannur International Airport Ltd., who is the master of the contract, is the 1st respondent and the 2nd respondent is the Financial Consultant appointed by the 1st respondent for advising them in such matters.

2. The facts in chronology (most of which are admitted), which led to the dispute are as follows :-

The Managing Director of the 1st respondent had issued an Office Order on 5.2.2016, wherein it was stated that the 'e-tender procurement system', for the airport has been successfully established with the Kerala State IT mission under the "National Informatic Centre" and that the system is in place with effect from 28.1.2016. The order further says that all procurement action pertaining to KIAL has to be carried out strictly through e-procurement henceforth. It is further directed that all the tendering officers should avail the necessary training program organised by the Kerala State IT mission, as required for performing the e-tendering action smoothly. In 2017, the 1st respondent had floated a tender for developing, operating and maintaining duty-free outlets in KIAL. Writ Petition(C) No.3281 of 2018 was filed by M/s Plus Max Duty-free Private Ltd., challenging the action of the 1st respondent, on the ground that the eligibility criteria ought to have been in par with the Chennai Airport Duty free conditions prescribed by Airport Authority of India. Pending the above Writ petition, the 1st respondent modified the eligibility criteria, cancelled the tender floated in November 2017, and floated a fresh tender in February 2018. The above tender was also cancelled for want of sufficient

bidders. In June 2018, the 1st respondent began the process for appointment of a Financial Consultant.

3. After the initial efforts for floating the tender failed, the 1st respondent decided to carry out the work on joint venture participation. This resulted in issuance of Ext.P3 Request for Proposal (ROP in short) for selection of JV partner for developing, operating and maintaining the duty-free outlets at the Kannur International Airport, in December, 2018. However, in the absence of bidders, even the technical bid was not opened. On 9.12.2018, the Kannur International Airport was commissioned. Thereafter the technical committee of the Board of Directors of the 1st respondent met on 9.2.2019. The Managing Director appraised the committee about the various steps taken to identify an agency for developing, operating and maintaining duty-free outlets at the airport and stated that the tendering process was not successful so far, and that no agency could be selected. It was further stated that the appellant and M/s Dufry, have contacted the 1st respondent with proposals outside the tender and various business models are under discussion. The Chairman suggested that it would be better if KIAL could handle the duty-free business on its own. However, the committee after discussions, authorised the Managing Director to negotiate with

the parties (See Ext.R1(b) extract from the minutes). On 25.6.2019, the Board of Directors of the 1st respondent decided to select the 2nd respondent as the Financial Consultant of the company (See Ext.R1(c) extract from minutes Item No.7). On the same day, the Board of Directors also authorised the Managing Director to select the better agency for running the duty-free business at the airport, between the appellant and M/s Dufry, in consultation with the Financial Consultant. It can be seen from Ext.R1(d) minutes, that M/s Plus Max Private Ltd, who expressed their interest in running the duty-free shop, were informed that their proposal cannot be entertained in view of their involvement in a Customs case in Trivandrum airport and that the decision to authorise the Managing Director was taken since the Board felt that pendency of the Writ petition filed by the above agency need not hinder the procedure for the selection.

4. M/s Plus Max had challenged cancellation of the tender floated as per Ext.P3, in W.P. (C) No.16176 of 2019, which was dismissed by this Court as per judgment Ext.R1(a) dated 8.7.2019. In the said judgment, there is an observation by the Single Judge that the contract can be on the basis of negotiation also, since even after several attempts, the 1st

respondent could not procure sufficient bids. On 9.7.2019, as per Ext.P4, the 2nd respondent was appointed as the Financial Consultant, and one of the matters entrusted with them was locating of investors and getting them to sign the contracts with KIAL for the proposed development of non-aeronautical activities, which would include the developing, operating and maintaining of duty-free outlets.

5. Between July and October 2019, the 2nd respondent held negotiations with the appellant and M/s Dufry. This aspect is clear from the emails Exts.R2(e) dated 23.8.2019 and R2(f) dated 9.9.2019, which would show that the appellant was asked to submit a revised commercial offer by 30.8.2019, and also that the 2nd respondent informed the 1st respondent about proposed meetings with the appellant and M/s Dufry on 12th and 13th September, 2019. On 10.9.2019, the 1st respondent sent Ext.R2(g) email to the 2nd respondent stating that, since the 2nd respondent had been appointed as a Financial Consultant, it was only fair that they should look at the major business proposition before the contract is signed. The mail also says that, what is expected of the 2nd respondent is to try and to get a better deal than what the 1st respondent was able to negotiate, in terms of revenue share, security deposit, tenure of the concession,

ensuring that the Kannur duty-free becomes the best in that part of the world. It was further hoped that the 1st respondent will be able to get a trustworthy and capable partner and they will be able to run the business themselves at some point of time in future. On 11.9.2019, the CFO of the 1st respondent sent Ext.R2(i) email to the 2nd respondent regarding the terms of the commercial document wherein it was stated that the final terms and conditions can be decided later, depending upon the agency giving a better proposition than the earlier ones received. The 2nd respondent prepared the 'Heads of Terms' for duty-free contract, in connection with the negotiations, which gives a broad outline of the terms proposed between the 1st respondent and the bidders, and the same was issued to the appellant and M/s Dufry. The above document has been produced as Ext.P5 along with the Writ petition. The 1st and 2nd respondents had a meeting with the representatives of the appellant on 13.9.2019. Ext.P6 which is the minutes of the meeting would show that the negotiation was reaching the final stages. However, the points of discussion numbered 11, 12, 13 and 15, would show that further negotiations were contemplated. The Minutes will further show that the appellant was expected to share revised commercial proposal by 19.9.2019.

6. In an attempt to get the best deal, the 2nd respondent appears to have initiated a market sounding with other similar operators, who are the major duty-free operators in the Middle East, M/s DFS, M/s Aer Rianta International and M/s GMR (respondent No.3). Pursuant to this, on 24.9.2019, the 3rd respondent expressed their interest to participate and submitted their proposal vide email dated 24.9.2019. The above aspect can be seen from Ext.R2(a) email and its Annexures produced as Ext.R2(j). Thereafter, on 9.10.2019, the 2nd respondent forwarded a revised 'Commercial Heads of Terms' to the appellant, M/s Dufry and the 3rd respondent; and requested them to submit their best and final proposal by 15.10.19 (see Exts.P7, R2(b),(c) and (d)). On 11.10.2019, M/s Aer Rianta reached out to the 2nd respondent and the 'Heads of Terms', as shared with the appellant and others, was forwarded to M/s Aer Rianta also, as can be seen from Ext.R2(k). A similar mail was sent on 14.10.2019 to M/s DFS also, as can be seen from Ext.R2(l). On 15.10.2019, the appellant, M/s Dufry and the 3rd respondent submitted their final proposals (See Exts.P8 and R2(m)). The 2nd respondent evaluated the proposals submitted by the above three participants, and submitted their analysis to the 1st respondent on 19.10.2019. The analysis has been produced as

Ext.R1(e) along with the counter affidavit filed by the 1st respondent. It can be seen from Ext.R1(e) that the 3rd respondent came out with the highest score of 49.8, as against 40.7 scored by the appellant. Comparison of the revenue estimates of the appellant and the 3rd respondent have also been detailed in Ext.R1(e), which would show that, under the three criterions of low, medium and high passenger forecasts, the total revenue estimate from the 3rd respondent is much higher than that of the appellant. On 20.10.2019, the Board of Directors of the 1st respondent met and noted that the proposal of the 3rd respondent is more favourable. It can be seen from Ext.R1(f) minutes of the meeting, that one of the members had suggested that the minimum monthly guarantee offered by M/s GMR as Rs.162/- per arriving passenger could be bettered as Rs.162/- per arriving/departing passenger, whichever is higher. The Board of Directors authorised the Managing Director to negotiate with the 3rd respondent on the above aspect and authorised the Chairman to take a decision in the matter due to the time constraints. On 26.10.2019, the 1st respondent issued Ext.R1(g) 'Letter of Award' to the 3rd respondent, along with the completed 'Heads of Terms' arrived at after final negotiations. On 2.11.2019, the 1st respondent informed the appellant about the

rejection of their proposal. On the same day, the appellant sent Ext.P11 objection against awarding of the contract to the 3rd respondent. The Writ Petition was filed thereafter on 13.11.2019.

7. The appellant contended before the Single Judge that the 1st respondent should have finalised the contract only after resorting to tender process, that the private negotiation method that was followed by the 1st respondent is neither transparent nor did it allow a level playing field for the participants, that after recommending the appellant's offer as the best offer, the 3rd respondent ought not to have been permitted to participate in the negotiation process and that the award of the contract in favour of the 3rd respondent smacks of malafides.

8. By judgment dated 20.12.2019, the writ petition was dismissed by the Single Judge, rejecting all the contentions raised by the appellant. While dismissing the writ petition, the Singe Judge has elaborately considered the law laid down in the judgments of the Apex Court reported in ***Brij Bhushan and ors. v. State of Jammu and Kashmir and ors. [(1986) 2 SCC 354]***, ***Sachidanand Pandey and Anr. v. State of West Bengal and ors. [(1987) 2 SC 295]***, ***State of Bihar & anr. V. Shri P.P.Sharma and anr***. ***[AIR 1991 SC 1260], M.P.Oil Extraction and Anr. v. State of M.P. and ors. [(1997) 7 SCC***

592], ***Air India Ltd. v. Cochin International Airport Ltd. and ors [(2000) 2 SCC 617], Netai Bag and ors. v. State of W.B. and ors. [(2000) 8 SCC 262], Nagar Nigam, Meerut v. Al Faheem Meat Exports (P) Ltd. and ors [(2006) 13 SCC 382], Girias Investment Private Limited and anr. v. State of Karnataka and ors. [(2008) 7 SCC 53], Montecarlo Limited v. National Thermal Power Corporation Limited [(2016) 15 SCC 272], Reliance Telecom Limited and Anr. v. Union of India and anr. [(2017) 4 SCC 269],*** *and* ***CRRC Corporation Limited v. Metro Link Express for Gandhinagar and Ahmedabad (MEGA) Company Limited [(2017) 8 SCC 282]***. Aggrieved by the judgment of the Single Judge, the appellant who is the petitioner in the writ petition has preferred this appeal.

9. Heard; Senior Advocate Sri Joseph Kodianthara, instructed by Advocate Sri Harikumar G.Nair on behalf of the appellant, Senior Advocate Sri E.K.Nandakumar, instructed by Advocate Sri Remola for the 1st respondent, Senior Advocate Sri P.Raveendran, instructed by Advocate Sri Enoch David Simon Joel, for the 2nd respondent and Senior Advocate Sri S.Ramesh Babu, instructed by Advocate Sri Ananthakrishnan on behalf of the 3rd respondent. The learned Senior Advocates have taken us

through the Pleadings and documents on record in detail and addressed their arguments.

SUBMISSIONS ON BEHALF OF THE APPELLANT AND RESPONDENTS:-

10. The contentions on behalf of the appellant, advanced by Sri Joseph Kodianthara, Senior Advocate are as follows:-

(a) The 1st respondent should not have resorted to finalizing the contract on the basis of negotiation. In the light of Ext.P12 decision taken as early as in 2016, that all procurements will be through e-tender, the 1st respondent was duty bound to finalise the contract by inviting tenders. For laying emphasis on the said contention, it is submitted that, the 1st respondent had floated about 30 tenders earlier and it is also contended that the appellant was the only person who had been in the field right from 2017 onwards when the 1st respondent floated the 1st tender for running the duty-free shops.

(b) Even if the negotiation process was permissible, in the light of Ext.R1 (d) dated 25.6.2019, the only option available to the Managing Director was to select the better agency as between the appellant and M/s Dufry,

in consultation with the Financial Consultant and there was no question of including a third person for the purpose of negotiation. In short, according to counsel for the appellant, the 3rd respondent ought not to have even been invited for negotiation.

(c) The 1st respondent and the 2nd respondent were already having details of the proposals submitted by the appellant and M/s Dufry and inviting the 3rd respondent at that stage smacks of malafides. To justify the above contention, it was submitted that, three employees who were earlier working with the 3rd respondent had joined in high positions in the 1st respondent company and they have influenced in the grant of the contract in favour of the 3rd respondent substantially. According to counsel for the appellant, Exts.P6 and R1(f) would show that the 1st respondent had already selected the appellant as the better party, for the purpose of running the duty-free shops, based on the proposals received after conducting negotiation meetings with the appellant and M/s Dufry. The Counsel points out that the above said recommendation has not been placed before the Court and an adverse inference should be drawn against the 1st

and 2nd respondents, since according to him, after having recommended the appellant, it was not open to the respondents 1 and 2 to receive further proposals from persons who have not been part of the negotiation earlier. It is pointed out that, Sri Tariq Hussain Bhat, who was earlier an employee of the 3rd respondent and now an employee of the 1st respondent, is also a recipient of several mails, which would go to show that he was also having a role in finalisation of the contract in favour of the 3rd respondent. According to the Senior counsel, the appellant had no knowledge about the participation of the 3rd respondent in the negotiations, even when they were asked to submit their final proposal by 15.10.2019. According to the counsel, the circumstances would suggest that the proposals submitted by the appellant had been passed over to the 3rd respondent so that they could submit a better proposal and clinch the deal. The appellant contends that the entire process is not fair and that there was neither transparency nor a level playing field.

11. Senior Counsel for the appellant submits that, even though the above contentions were raised before the Single

Judge, the same were not correctly dealt with in the judgment of the Single Judge. According to the Counsel, the learned Judge, while holding that the master of the contract has got sufficient discretion and play in the joints and liberty in order to conclude the contract, has committed a fallacy in law. The counsel submits that, there cannot be any such variation after the entire process of evaluation, since this will amount to varying the condition to the advantage of the selected candidate. It is further contended that the observations of the learned Judge that the 'Heads of Terms' or letter of intent is only a broad outline given by the tenderer and that the same is not binding on the master of the contract is legally wrong.

12. In support of the contention that the contract should have been granted through public tender, the Senior Counsel referred to the decision of the Hon'ble Supreme Court in **Nova Ads v. Metropolitan Transport Corporation and others [(2015) 13 SCC 257].** Particular reference was made to paragraphs 56 and 57 of the judgment, which are extracted below:

> *"56. It is well settled in law that wherever a contract is to be awarded or a license is sought to be given, it is obligatory on the part of the public authority to adopt a transparent and fair method. It serves two purposes,*

namely, participation of all eligible competitors and giving a fair opportunity to them and also generating maximum revenue. In this context, we may profitably referred to a two-judge bench in Nagar Nigam, Meerut vs Al Faheem Meat Exports (P) Ltd, wherein it has been held as follows: (SCC p.395, para 16)

> *"16. The law is well settled that contracts by the State, its corporations, instrumentalities and agencies must be normally granted through public auction/public tender by inviting tenders from eligible persons and the notification of the public auction or inviting tenders should be advertised in well-known dailies having wide circulation in the locality with all relevant details such as date, time and place of auction, subject matter of auction, technical specifications, estimated cost, earnest money deposit, etc. The award of government contracts through public auction/public tender is to ensure transparency in the public procurement, to maximise economy and efficiency in government procurement, to promote healthy competition among the tenderers, to provide for fair and equitable treatment of all tenderers, and to eliminate irregularities, interference and corrupt practices by the authorities concerned. This is required by article 14 of the Constitution."*

57. Needless to say, there can be a situation, for good reasons the contract may be granted by private negotiation, but that has to be in a very exceptional circumstance, for in the absence of transparency and public confidence is not only shaken but shattered. In the case at hand, as the contract has been entered by way of some kind of understanding reason of which is quite unfathomable, such a contract has to be treated as vitiated, applying this principle also."

13. The Senior Counsel then referred us to paragraphs 54 and 55 of the judgment of the Single Judge, which are reproduced below:

"54. Having regard to the facts and circumstances and the law laid down by the apex court, I do not think petitioner has made out any case in the matter of private negotiation because petitioner was also a participant and would have been a beneficiary if the offer made by the petitioner was more competitive than the offer made by the 3rd Respondent. It is also pertinent to note that, public tenders were floated thrice, however, the 1st Respondent could not secure any feasible bid advantageous to it, and it was accordingly that decision was taken to go for negotiation, and later appointed the consultant to have negotiations with appropriate players in the field. Therefore, it is clear that there are compelling reasons for the 1st Respondent Airport to do so.

55. Yet another contention advanced by learned Senior Counsel for the petitioner is in respect of the deviation made by the 1st Respondent regarding Ext.P5 Heads of

> *Terms that was negotiated with the petitioner and Ext.R1(g) Heads of Terms with the 3rd Respondent. It is true, as per clause 19 of Ext.P5 Heads of Terms, under the heading, Setup and Commencement, it was stipulated that, the commencement date of operations of the Duty Free Retail Outlets shall be not later than 9th December, 2019. In the event the Concessionaire is unable to complete setup to the satisfaction of Kannur International Airport before the Commencement, the Concessionaire shall be required to pay Kannur International Airport, liquidated damages up to a maximum of 10% of the Security Deposit for each week or part thereof, for delay till the time the setup is completed to the satisfaction of Kannur International Airport."*

14. It was contended that the above findings cannot be justified on the basis of the law laid down by the Apex Court and that too when there is a mandate for resorting to tender process as can be seen from Ext.P12.

15. The counsel then relied on the judgment of this Court in **Sivakumar v. State of Kerala** reported in **[ILR 1999 (1) Kerala 438].** Particular reference was made to paragraphs 13 and 18 of the said judgment, which are extracted below :

> *"13. The argument of the learned counsel for the Corporation is that while awarding the contract, the Corporation had taken into account the antecedents of the concerned contractor. In so far as the petitioner is concerned, there is no written communication in*

response to Ext.P5 representation to the effect that his offer has not been accepted because of his antecedents till date. Therefore, it is clear that the reason now put forward in paragraph 9 of the counter to the effect that the representation is not liable to be considered can only be termed as an afterthought. In the counter, contrary to the argument, nowhere it is stated that the petitioner was disqualified from consideration. Nothing prevented the Corporation to respond to the offer by rejecting it before concluding the contract with third Respondent. It is settled law that the impugned decision cannot be supported by grounds other than stated thereunder and by counter affidavit. Learned counsel for the petitioner justified the petitioner's earlier withdrawal in reference to hoardings, viz., the inordinate delay in giving a letter of confirmation after 5 months of his offer. It is further stated on behalf of the petitioner that while the Corporation took 5 months to issue a confirmation letter in his case, in this case, the Corporation has shown undue haste in accepting the offer of the 3rd Respondent within few days of the decision and completed transaction on 31st March 1998. It is further alleged on behalf of the petitioner that the 3rd Respondent had influence over the 2nd Respondent and only because of the collusive nature, the contract was awarded and therefore it is malafide. In support of this allegation, it is stated specifically in paragraph 3 of the original petition that there are several allegations against the 3rd Respondent that he had collected exorbitant taxes than what is prescribed in Ext.P2 terms and conditions. Instead of collecting Rs.4.20 for board size 0.5 m² to 2.5 m², he is unlawfully charging Rs. 180

for 1 metre. The Corporation has chosen not to take any action for violation of the norms prescribed when complained. On the contrary, he was favoured with a further contract for one year by a mere enhancement of 10%. This specific allegation has not been denied by the Corporation in their counter. The allegation of mala fide and favouritism is established in this case for the following reasons:

1. The right is awarded by private negotiation, contrary to the practice of awarding by tender.

2. No reason for overruling the objection of the Secretary of the Corporation, who is competent authority under Section 276.

3. The enhancement of 10% is also contrary to earlier increase by 20%.

4. No opportunity was given to the petitioner, when he offered higher amount before finalisation in violation of the principles of natural justice and ex facie unequal treatment.

5. No reply given to the petitioner's offer and representation till date.

6. No counter denying the specific allegations of complaint against the 3rd Respondent in the performance of contract for the previous year.

7. Corporation has deliberately avoided taking a specific stand as to the reasons for not accepting petitioner's offer. In one place it is stated that due regard to the antecedents of the contractor was taken

> *note of and in another place it is stated that Ext.P5 is not liable to be considered. Whether the Corp considered Ext.P5 at all is not clear.*

xxxxxx xxxxxx xxxxxx

18. In M/s. Kasturilal vs State of Jammu and Kashmir, AIR 1980 SC 1992, the Supreme Court has held that the public authority cannot Act in a manner which would benefit a private party at the cost of the State in the absence of demonstrable considerations which justify such action on public interest. Unlike a private individual, the State cannot act as it pleases in the matter of giving largesse and it cannot choose to deal with any person it pleases in its absolute and unfettered discretion. There lordships observation is as follows:

> *"It must follow as a necessary corollary that the Government cannot act in a manner which would benefit a private party at the cost of the State. Such an action would be both unreasonable and contrary to public interest. The Government, therefore, cannot, for example give a contract or sell or lease out its property for a consideration less than the highest that can be obtained for it, unless of course there are other considerations which render it reasonable and in public interest to do so." (emphasis added)*

In M/s Dwarakdas Marfatia and Sons vs Bombay Port Trust, (1989) 3 SCC 293, the Supreme Court held that the actions of public authorities are amenable to judicial review only to the extent that the State must act validly

for a discernible reason not whimsically for any ulterior purpose. Where any special right or privilege is granted to any public or statutory body on the presumption that it must Act in certain manner such bodies must make good such presumption while acting by virtue of such privilege. Judicial review to oversee if such bodies are so acting is permissible. Their Lordships' further observation is relevant in this case, which reads as follows:

> *"Therefore, Mr. Chinai was right in contending that every action/activity of the Bombay Port Trust, which constituted 'State' within Article 12 of the Constitution in respect of any right conferred or privilege granted by any statute is subject to Article 14 and must be reasonable and taken only upon lawful and relevant grounds of public interest. Reliance may be placed on the observations of this Court in E.P.Royappa Vs. State of Tamil Nadu (1974) 4 SCC 3; Maneka Gandhi vs. Union of India (1978) 1 SCC 248; R.D.Shetty vs. International Airport Authority of India (1979) 3 SCC 489; Kasturi Lal Lekshmi Reddy vs. State of Jammu and Kashmir (1980) 4 SCC 1 and Ajay Hasia v. Khalid Mujeeb Sehravardi (1981) 1 SCC 722. Where there is arbitrariness in State action, Article 14 springs in and judicial review strikes such an action down. Every action of the executive authority must be subject to rule of law and must be*

> *informed by reason. So, whatever be the activity of the public authority, it should meet the test of Article 14."*

In M/s. Erusian Equipment and Chemicals Ltd vs. State of West Bengal AIR 1975 SC 266 it was held that even though there is no legal right to enter into contract, any discrimination between persons desiring to enter into contract is breach of fundamental right enshrined in Article 14 of the Constitution of India. It was further held that the State which has the right to trade has also the duty to observe equality. The government cannot exclude persons by discrimination. There lordships observed as follows:

> *"The State can enter into contract with any person it chooses. No person has a fundamental right to insist that the Government must enter into a contract with him. A citizen has a right to claim equal treatment to enter into a contract which may be proper, necessary and essential to his lawful calling. Where the blacklisting order involves civil consequences it casts a slur. It creates a barrier between the persons blacklisted and the Government in the matter of transactions. The blacklists are 'instruments of coercion'. Hence, a person must be given an opportunity of hearing before his name is put on the blacklist."*

The corporation's action in awarding the contract in question has clearly contravened the principles laid down by the Hon'ble Supreme Court."

16. Finally, the Senior Counsel referred us to the judgment of the Apex Court in **Dutta Associates Pvt. Ltd. v. Indo Merchantiles Pvt. Ltd. and others** reported in **[(1997) 1 SCC 53]**, to contend that finalisation of the contract in favour of the 3rd respondent was not fair since no opportunity was given to the appellant to make a counter offer, which was held to be a vitiating factor on the facts and circumstances of that case.

17. Sri E.K. Nandakumar, Senior Advocate, appearing for the 1st respondent, justified the decision to finalise the contract on private negotiation for the reason that tender process was initiated on three occasions, in November, 2017, February, 2018 and December, 2018, and all the three attempts failed for want of sufficient bidders. It is submitted that private negotiation was resorted to at this stage, and that too at the instance of the appellant themselves. The counsel further submits that the cancellation of the tender process initiated in December, 2018 was challenged before this Court in W.P.(C)No.16176 of 2019, which was dismissed by a Single Judge as per Ext.R1(a) judgment, finding that there is nothing illegal in resorting to negotiation, particularly in the light of the fact that attempts were made to invite tenders on three occasions and they failed for want of sufficient bidders. The learned counsel also

contended that, after having participated in the negotiation throughout, it was not open to the appellant to challenge the very process after having found that they did not succeed in getting the contract. The appellant cannot be allowed to approbate and reprobate. The Senior Counsel also points out that the contention of malafides cannot be entertained in the absence of persons on the party array and specific allegations against their actions, which according to the appellant amounts to malafides. Reliance is placed on the decision of the Hon'ble Supreme Court in **Ratnagiri Gas and Power Private Limited v. RDS Projects Limited and Others** reported in **[(2013) 1 SCC 524]**. The allegation that three employees of the 3rd respondent are at present working with the 1st respondent also does not in any way be an indication of malafides, as long as the appellant does not state the manner in which the above said persons have influenced the decision making process. The counsel submits that the entire evaluation process was independently done by the 2nd respondent and the final decision was taken by the Board of Directors of the 1st respondent and there is no allegation of malafides against the 2nd respondent or their officers or against any of the members of the Board of Directors of the 1st respondent.

18. Senior Advocate Sri P.Raveendran, appearing for the 2nd respondent, after narrating the facts, submitted that as Financial Consultants, it was their duty to find the best person suited to run the duty free shops, in the best interests of the 1st respondent. According to the counsel, it was with the above purpose in mind, that after the 2nd respondent was appointed as Financial Consultant, they reached out to all the players in the field. Apart from the appellant and M/s Dufry, the 3rd respondent and M/s Aer Rianta had expressed interest and the 'Heads of Terms' were thus forwarded to five competing players in the field. Out of the above five, three persons responded by submitting their best and final proposals, by 15.10.2019. On evaluating the three proposals, the 2nd respondent in their wisdom, were of the opinion that the proposal submitted by the 3rd respondent was the best proposal. The Counsel referred to Ext.R1(e) appraisal report in extenso, to justify the recommendation of the 2nd respondent. The counsel points out, referring to the prayers made in the writ petition, that the appellant has absolutely no better offer to make and the only contention is that the whole process should be cancelled and fresh tender process should be initiated. The Senior Counsel drew our attention to the decision of the Hon’ble Supreme Court

in **Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO) and another v. CSEPDI-TRISHE Consortium and another** reported in **[(2017) 4 SCC 318]**, to contend that the Court cannot substitute its view to that of the expert. In the above said case, the Hon'ble Supreme Court has observed that in a complex fiscal evaluation, the Court has to apply the doctrine of restraint and that the Court cannot enter into the realm of such evaluation, in exercise of the power of judicial review.

19. Senior Advocate Sri Ramesh Babu addressed arguments on behalf of the 3rd respondent, who has been awarded the work. The Counsel referred to the pleadings in the writ petition on the ground of malafides. On the contention that the 2nd respondent was brought in as Financial Consultant in the place of KITCO to favour the 3rd respondent, the counsel points out that, the process for appointment of the consultant began as early as in June 2018 and even thereafter, tender process was attempted by the 1st respondent. It was pointed out that, if the intention was to favour the 3rd respondent, there was no necessity of conducting negotiation with the appellant and M/s Dufry in the initial stage and for reaching out to M/s Aer Rianta and M/s DFS, even after 9.10.2019. Regarding the role of the ex-

employees of the 3rd respondent, who are employed in the 1st respondent, the Counsel refers to the counter affidavits, wherein it is pointed out that two of the employees referred to in the writ petition had left the 3rd respondent as early as in 2010 and 2011 and the 3rd employee referred had left the 3rd respondent in May, 2018. It is pointed out with reference to the decisions taken by the 1st respondent, that the above said employees had no role to play in the decision making process. The counsel submits that, contention of the appellant that the above said employees might have passed on information to the 3rd respondent is baseless, since the appellant, the 3rd respondent and M/s Dufry submitted their best and final proposal on 15.10.2019 and there was no occasion for any of the parties to know the proposal of each other. The counsel points out that, if such information was forthcoming, the 3rd respondent as a prudent business house, would never have quoted such high rates, much above the rates quoted by the appellant.

20. With regard to bias, the Senior Counsel referred to the decision of the Hon'ble Supreme Court in **Tata Cellular v. Union of India**, reported in [**(1994) 6 SCC 651]**, to contend that, even in a case where one of the recommending authority's son was an employee, in one of the shortlisted companies, the

Court held that, since the person against whom bias is alleged is not the decision maker, the question of bias does not arise.

21. On the question whether negotiation can be resorted to at all, learned Senior Counsel relied on the Constitution Bench decision of the Hon'ble Supreme Court in **Natural Resource Allocation : In re Special Reference No.1 of 2012,** reported in **[(2012) 10 SCC 1]**. One of the questions posed in the Presidential reference was "Whether the only permissible method for disposal of all natural resources across all sectors and in all circumstances is by the conduct of auction?" The reference was in the background of the licensing of 2G Spectrum. The Counsel for the 3rd respondent referred to paragraphs 78 and 79 of the judgment of the Hon'ble Supreme Court, referring the observations in the earlier judgment in **Centre for Public Interest Litigation and others v. Union of India and others,** reported in **[(2012) 3 SCC 1]**, which are extracted below:-

> *"78. Our reading of these paragraphs suggests that the Court was not considering the case of auction in general, but specifically evaluating the validity of those methods adopted in the distribution of spectrum from September 2007 to March 2008. It is also pertinent to note that reference to auction is made in the subsequent paragraph (96) with the rider 'perhaps'. It has been observed that "a duly publicised auction conducted fairly and impartially is perhaps the best method of discharging this burden."*

We are conscious that a judgment is not to be read as a statute, but at the same time, we cannot be oblivious to the fact that when it is argued with vehemence that the judgment lays down auction as a constitutional principle, the word 'perhaps' gains significance. This suggests that the recommendation of auction for alienation of natural resources was never intended to be taken as an absolute or blanket statement applicable across all natural resources, but simply a conclusion made at first blush over the attractiveness of a method like auction in disposal of natural resources. The choice of the word 'perhaps' suggests that the learned Judges considered situations requiring a method other than auction as conceivable and desirable.

79. Further, the final conclusions summarised in paragraph 102 of the judgment (SCC) make no mention about auction being the only permissible and intra vires method for disposal of natural resources; the findings are limited to the case of spectrum. In case the Court had actually enunciated, as a proposition of law, that auction is the only permissible method or mode for alienation/allotment of natural resources, the same would have found a mention in the summary at the end of the judgment."

Thereafter, in paragraph 106 of the judgment, the Hon'ble Supreme Court dealt with the question under reference as **"WHETHER 'AUCTION' A CONSTITUTIONAL MANDATE"** and goes on to consider the issue in detail. The Court finally concluded in paragraph 129 that it is manifest that there is no

constitutional mandate in favour of auction under Article 14. The Court found that mandatory auction can be contrary to economic logic. The conclusions on the question is in paragraphs 146 to 150 of the judgment [**(2012) 10 SCC 1]**, which are extracted below:-

> *"146. To summarise, in the context of the present Reference, it needs to be emphasised that this Court cannot conduct a comparative study of the various methods of distribution of natural resources and suggest the most efficacious mode, if there is one universal efficacious method in the first place. It respects the mandate and wisdom of the executive for such matters. The methodology pertaining to disposal of natural resources is clearly an economic policy. It entails intricate economic choices and the Court lacks the necessary expertise to make them. As has been repeatedly said, it cannot, and shall not, be the endeavour of this Court to evaluate the efficacy of auction vis a vis other methods of disposal of natural resources. The Court cannot mandate one method to be followed in all facts and circumstances. Therefore, auction, an economic choice of disposal of natural resources, is not a constitutional mandate. We may, however, hasten to add that the Court can test the legality and constitutionality of these methods. When questioned, the courts are entitled to analyse the legal validity of different means of distribution and give a constitutional answer as to which methods are ultra vires and intra vires the provisions of the Constitution. Nevertheless, it cannot and will not compare which policy*

is fairer than the other, but, if a policy of law is blatantly unfair to the extent that it falls foul of the fairness requirement of Article 14 of the Constitution, the Court would not hesitate in striking it down.

147. Finally, market price, in economics, is an index of the value that a market prescribes to a good. However, this valuation is a function of several dynamic variables; it is a science and not a law. Auction is just one of the several price discovery mechanisms. Since multiple variables are involved in such valuations, auction or any other form of competitive bidding, cannot constitute even an economic mandate, much less a constitutional mandate.

148. In our opinion, auction despite being a more preferable method of alienation/allotment of natural resources, cannot be held to be a constitutional requirement or limitation for alienation of all natural resources and therefore, every method other than auction cannot be struck down as ultra vires the constitutional mandate.

149. Regards being had to the aforesaid precepts, we have opined that auction as a mode cannot be conferred the status of a constitutional principle. Alienation of natural resources is a policy decision, and the means adopted for the same are thus, executive prerogatives. However, when such a policy decision is not backed by a social or welfare purpose, and precious and scarce natural resources are alienated for commercial pursuits of profit maximising private entrepreneurs, adoption of means other than those that are competitive and maximise revenue may be arbitrary and face the wrath of Article 14 of the Constitution. Hence, rather than

prescribing or proscribing a method, we believe, a judicial scrutiny of methods of disposal of natural resources should depend on the facts and circumstances of each case, in consonance with the principles which we have culled out above. Failing which, the Court, in exercise of power of judicial review, shall term the executive action as arbitrary, unfair, unreasonable and capricious due to its antimony with Article 14 of the Constitution.

150. In conclusion, our answer to the 1st set of 5 questions is that auction is not the only permissible method for disposal of all natural resources across all sectors and in all circumstances."

22. The learned Senior Counsel relied on the decision in **Brihan Mumbai Electric Supply and Transport Undertaking and another v. Laqshya Media Private Limited and others,** reported in [**(2010) 1 SCC 620]** for the proposition that one of the factors which can justify negotiation is the nature of the business and since the developing and maintenance of duty free outlets have only about 10 to 12 operators across the world, when three attempts to tender failed, the 1st respondent was justified in preferring negotiation. The Counsel also pointed out to the decisions in **Taj Hotels case** and **Cochin International Airport case**, where negotiation process was upheld by the Hon'ble Supreme Court.

23. In reply, Sri Joseph Kodianthara, Senior Advocate, submitted that Ext.P12 came to the knowledge of the appellant

only after filing of the writ petition, that KIAL is bound by its own decision, that from 2017 till 2019, the appellant alone was in the fray, that negotiations could not have been held in two stages, that in all decided cases, all the competitors were in the field at the time of negotiation, that there cannot be another negotiation after recommending the appellant, and that the varying of the terms of the contract by postponing the date of starting the duty free outlets from 9.12.2019 to a later date, virtually is altering the conditions to favour the 3rd respondent.

FINDINGS ON THE SUBMISSIONS:-

24. We are not persuaded to interfere with the judgment of the Single Judge on a consideration of the contentions raised by the Counsel for the appellant. The issues raised are answered as below:-

A. WHETHER THE 1ST RESPONDENT WAS BOUND BY EXT.P12 AND SHOULD HAVE FINALISED THE CONTRACT FOR RUNNING THE DUTY FREE SHOPS ONLY BY FLOATING TENDERS ?

25. The Constitution Bench decision of the Hon'ble Supreme Court in **Special Reference No.1 of 2012**, reported in **[*(2012) 10 SCC 1]***, the relevant portions of which have been extracted above, clearly lays down that there is no constitutional mandate in favour of auction under Article 14 of the Constitution

of India. From paragraph 121 of the judgment, the Hon'ble Supreme Court has catalogued several cases which were seen as legitimate deviations from "auction". The Apex Court has observed that auction is just one of the several price discovery mechanisms, that since multiple variables are involved in such valuations, auction or any other form of competitive bidding, cannot constitute even an economic mandate, much less a constitutional mandate. In the light of the above, negotiation can never be stated to be a legally impermissible method of finalization of a contract.

26. The decision in ***Nova Ads v. Metropolitan Transport Corporation and others [(2015) 13 SCC 257]***, relied on by the appellant, has absolutely no application to the facts of the case on hand. In the above referred case, the Hon'ble Supreme Court was dealing with a question whether the State Government had authority to permit the State Transport Authority to provide bus shelters for passengers and maintaining such bus shelters or whether the authority to deal with the streets vested in the local authority was with the Corporation. The High Court had held that the authority was with the Corporation. Pending the case, on the basis of settlements arrived at, without the Corporation as a party, the appellants

were permitted to put up bus shelters and maintain them. The Hon'ble Supreme Court confirmed the judgment of the High Court and held that the authority to deal with the streets was with the Corporation. While dealing with the question of equity of permitting the appellants to continue with the maintenance of bus shelters as per the settlement, the Apex Court held that the situation did not warrant any equity in favour of the appellants, since they were fully aware of the judgment of the High Court, which held that the Corporation alone had the authority to grant the contract. It was in the above background that the Apex Court had made the observations contained in paragraphs 56 and 57 referred above. Moreover, the Hon'ble Supreme Court in the above said judgment, has specifically stated that there can be a situation where a contract may be granted by private negotiation.

27. Similarly, ***Sivakumar v. State of Kerala [ILR 1999 (1) Kerala 438]***, was a case where the Corporation of Kochi, granted the right to collect tax on advertisement by private negotiation, by increasing the previous year's rate by 10%. On facts, the Court found that the contract was detrimental to the financial interests of the Corporation and that there was no explanation offered by the Corporation for resorting to private

negotiation instead of public auction. The court also held that the allegations of malafides and favouritism was established and there was exfacie unequal treatment.

28. In the case before us, instead of restricting the negotiation with two participants, the 2nd respondent who is the Financial Consultant of the 1st respondent, invited more players to participate, which resulted in the 3rd respondent also submitting proposals. It is significant that after the first stage of negotiation, wherein only the appellant and M/s Dufry participated, the appellant was found to have submitted the better proposal. When the 2nd respondent proposed to invite the best and final proposal as per Ext.R2(b) to (d), the appellant participated in the process of negotiation without any demur. It cannot hence be said that the appellant did not get enough opportunities to quote their best proposal. The appellant cannot be allowed to approbate and reprobate. After having participated in the entire process of negotiation, the appellant on becoming unsuccessful to clinch the deal, cannot be allowed to challenge the very process of negotiation. We find that the 1st respondent had sufficient justification for resorting to private negotiation, since three attempts to tender the work had failed. Apart from the above, there can be no contention that the 1st respondent

has in any way acted against their financial interests, since the offer made by the 3rd respondent was far superior to that offered by the appellant. We also take note of the fact that the appellant has not, at any point of time, offered any better proposal than the one offered by the 3rd respondent. We are of the opinion that there is no legal or constitutional bar for the State or its instrumentalities to resort to any other method, other than auction, for the purpose of entering into contracts. All that the law requires is that, the method that is adopted, should be fair, transparent, not affected by bias, favouritism or nepotism and not discriminatory, arbitrary or unreasonable. The action of the respondents 1 and 2 cannot be termed to be arbitrary in any manner. Even after the 3rd respondent expressed their interest to participate, the respondents 1 and 2 gave equal chances to all the three participants to submit their best and final bid. It was only thereafter, the 2nd respondent who has expertise in the field, submitted their detailed analysis, which recommended the 3rd respondent's proposal as the best suited for the 1st respondent, financially and otherwise. The actions of the respondents 1 and 2 thus satisfies all the requirements of law.

29. The contention that Ext.P12 is binding on the 1st respondent to the extent that it can only conclude its contracts

by following the tender process, is not legally convincing. Ext.P12 is only an Office Order issued by the Managing Director. The order is issued much before the commissioning of the Kannur Airport and on a reading of the order, it only deals with e-procurement and not with lease of space or utilization of space for non-aeronautical activities. Such an order can at best be considered as only a rule of administrative practice. Ext.P12 does not have any statutory force. It cannot be given the status of a rule framed in exercise of any rule making power. Such administrative rules can never be equated to a legislation or a subordinate legislation, so as to bind the maker itself. As such orders in the nature of Ext.P12 can be cancelled, modified or amended by the person who issued the same. When Ext.P12 can be amended by the Managing Director itself, it does not appeal to reason that the Board of Directors cannot do the same or ignore the same and take a different decision, when situation warrants. We find support for the above proposition in the decision of the Apex Court in **K.A.Nagamani v. Indian Airlines** reported in **[(2009) 5 SCC 515]**. Paragraphs 22 and 23 of the above decision are extracted below:

> *" 22. As noticed hereinabove, the Recruitment and Promotions Rules were framed in exercise of the powers conferred under the Regulations referred to*

hereinabove. Be it noted, there is no power vested in the Corporation to make any rules since Section 44 of the Air Corporations Act, 1953, confers power to make rules only in the Central Government and not in the Corporation. The Corporation is entitled to make only regulations which it did and published by way of Notification referred to hereinabove dated 6.4.1955. The Recruitment and Promotion Rules are not even notified in the gazette as it is not required whereas the Service Regulations referred to hereinabove have been gazetted.

23. The Indian Airlines Corporation Employees Service Regulations, 1955, which are made in the exercise of the powers conferred upon the Corporation by the Act are undoubtedly statutory in nature but the Recruitment and Promotions Rules are not statutory in their nature. These Rules are not framed in exercise of any rule-making power. Mere administrative rules are not legislation of any kind. They are in the nature of statements of policy and the practice of government departments, statutory authorities, whether published or otherwise. Statutory rules, which are made under the provisions of any enactment and regulations, subject to parliamentary approval, stand on entirely different footing. The administrative rules are always considered and have repeatedly been held to be rules of administrative practice merely, not rules of law and not delegated legislation and they have no statutory force. Mere description of such rules of administrative practice as "rules" does not make them to be statutory rules. Such administrative rules can be modified, amended or consolidated by the authorities without

> *following any particular procedure. There are no legal restrictions to do so as long as they do not offend the provisions of the Constitution or statutes or statutory rules as the case may be."*

The law being as above stated, an office order issued by the Managing Director of the 1st respondent regarding e-procurement, cannot be said to be in any better position than an administrative order and cannot bind the Board of Directors of the 1st respondent in any manner.

B. WHETHER THE ACTION OF RESPONDENTS 1 AND 2 IS MALAFIDE ?

30. Regarding the question of malafides, as held by the Single Judge, there are no specific allegations of malafides against any person in particular and no pleadings regarding the manner in which such persons have influenced the actions of the respondents 1 and 2. Nor have any such person been made a party in the writ petition, personally. We find considerable force in the submissions of the counsel for the respondents in this regard. Having regard to the law laid down by the Hon'ble Supreme Court in the decisions in ***State of Bihar & anr. V. Shri P.P.Sharma and anr. [AIR 1991 SC 1260]***, ***Girias Investment Private Limited and anr. v. State of Karnataka and ors. [(2008) 7 SCC 53]*** *and* ***Ratnagiri Gas and Power Private Limited v. RDS Projects Limited and others***

[(2013) 1 SCC 524], we have no hesitation in rejecting the contentions of the appellant regarding malafides in the award of the contract in favour of the 3rd respondent.

31. The contention that three ex-employees of the 3rd respondent, who are not employees of the 1st respondent, have influenced the award of the contract in favour of the 3rd respondent is without any factual basis. The facts brought out on record clearly show that two of such employees had left the 3rd respondent at least 8 years back. None of the three persons named in the writ petition are holding such high posts which can in any way influence the decision making process or the recommendation process. The recommendation is done by an independent agency and the decision is taken by the Board of Directors, which excludes any role for any of the three persons named in the writ petition. The further contention that such persons might have passed on information to the 3rd respondent, is also without any basis, since, admittedly, all the three participants had submitted their best and final bids on the same day, that is, 15.10.2019, thus ruling out any possibility of passing of information.

32. The judgment in **Dutta Associates Pvt.Ltd. v. Indo Merchantiles Pvt.Ltd and others**, wherein the vitiating

circumstance pointed out by the Court was that no opportunity was given to the competing tenderers to make a counter offer, also has no application to the facts of the case on hand.

A. WHETHER THE ACTION OF THE 1ST RESPONDENT IN INVITING THE 3RD RESPONDENT FOR NEGOTIATION, AFTER THE APPELLANT HAD ALREADY BEEN RECOMMENDED WAS JUSTIFIED IN LAW ?

33. The contention that the 2nd respondent had already recommended that the proposal submitted by the appellant is the better proposal and hence, there was no legal justification for bringing in a third party to participate in the negotiation, cannot be accepted. The inclusion of the 3rd respondent, according to us, is not in any way illegal or unreasonable or arbitrary or violative of any of the fundamental rights of the appellant. The appellant has no case that they had already been selected for the award of the contract, even before the 3rd respondent was included for negotiation. The appellant does not have any vested right on the basis of their proposal being found to be better than that of M/s Dufry. It is clear from Ext.P6 that even at that stage, there is no concluded decision in favour of the appellant, since it specifically contemplates the submission of a revised commercial proposal by the appellant and further negotiations. Ext.P6 cannot be in

any way construed as a promise to grant the contract to the appellant. So also, even when the appellant was asked as per Ext.P7, to submit their best and final offer on or before 15.10.2019, for the purposes of evaluation and selection and informing them that KIAL management will have the discretion to hold negotiations with the selected party on the detailed terms of the concession agreement, the appellant did not object and participated in the process by submitting their best and final offer by 15.10.2019. The appellant was thus very much aware that the selection has not been finalized even on 9.10.2019 and 15.10.2019. The attempt of the 1st and 2nd respondents has only been to get the best deal from the point of view of the interests of the 1st respondent is concerned. If the 1st and 2nd respondents, in their wisdom thought it fit to widen their scope of enquiry regarding persons interested in handling the maintenance of the Duty Free outlets, such a decision cannot be legally faulted. As long as all the operators are given equal opportunity to submit their best offers, nobody can have a grievance that there is lack of transparency or that the action is arbitrary and discriminatory. In the case on hand, the appellant, M/s Dufry and the 3rd respondent were requested to give their best and final proposal and all of them submitted their proposals

on the very same day. Such decisions, which are taken in the context of best economic interests of the Master of the Contract, are not liable to be subject matter of judicial review under Article 226 of the Constitution of India.

34. Two other contentions that have been raised by the Appellant are regarding the failure of the respondents to produce the document by which the appellant was allegedly recommended for the purpose of the award of concession and the variation brought to the conditions of contract, at the time of award of the contract to the 3rd respondent, regarding the date of commencement. We are of the opinion that neither of the above aspects can in any way affect the grant of the award in favour of the 3rd respondent. There had been no finalization of the decision to award the contract to the appellant at any stage. It is evident from the facts placed on record that after the meeting between the appellant and the respondents 1 and 2 on 13.9.2019 (See Ext.P6), the next communication to the appellant was on 9.10.2019 (Ext.P17) requesting them to submit their best and final proposal. Evidently, till 15.10.2019, there could not have been any finalised recommendation in favour of the appellant. The statement in Ext.R1(f) minutes dated 20.10.2019, which is five days after the submission of the best and final bid,

has to be read along with Ext.P6 and can only be understood to mean that as between the appellant and M/s Dufry, the proposal submitted by the appellant is better. Since the appellant participated in the negotiations which started as per Ext.P7, the mere absence to produce the recommendation if any, in favour of the appellant, has no relevance at all.

35. As regards the change in terms regarding the date of commencement, it is evident from Ext.R1(e) analysis that the evaluation of all the three proposals before the 2nd respondent had been made on the basis of the same Heads of Terms. It is only after selecting the best proposal on the basis of the said evaluation, some changes have been made in the final Heads of Terms, which became part of the contract with the 3rd respondent. As such, the change that has been made has not affected the evaluation in any manner. Moreover, in Ext.P7 the appellant has clearly been informed that the KIAL management will have the discretion to hold negotiations with the selected party on the detailed terms of the concession agreement. As such the appellant cannot have a grievance on that count also, since they entered into the negotiation process, knowing fully well of the above aspect. As held by the Single Judge, such play

in the joints should always be available to the master of the contract, after the selection process is over.

CONCLUSION:-

On the basis of the above discussions, we are of the informed opinion that the contentions put forward in the Writ Appeal against the judgment of the Single Judge are liable to be rejected and we do so. The appeal fails and is hence dismissed. In the circumstances of the case, there will be no order as to costs.

Sd/-

C.K. ABDUL REHIM, **JUDGE**

Sd/-

T.R. RAVI, JUDGE

dsn