

**1 IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC
OF SRI LANKA**

**In the matter of an Application for mandates in the
nature of Writ of *Certiorari and Mandamus* under and
in terms of Article 140 of the Constitution of The
Democratic Socialist Republic of Sri Lanka**

1. Dani Aviation Service (private) Limited,
S-16 Siddharth, 15th Main Road,
Thiru Vi Ka Industrial Estate,
Guindy,
Chennai 600 031,
India.

2. Sivakumar Eliyathamby Sinnarajah,
75/3, Barnes Place,
Colombo 07.

And
9749 SW 111 TERR,
Miami, Florida,
331762865 USA.

Petitioners

CA/ WRIT/228/2016

Vs,

1. Sri Lankan Air Lines Ltd,
Level 22, East Tower,
World Trade Centre,
Echelon Square,
Colombo 01.

2. Ajith N. Dias,
Chairman, Sri Lankan Air Lines Ltd,
Level 22, East Tower,
World Trade Centre,
Echelon Square,
Colombo 01.

3. Rakitha Jayawardena

4. Sunil Peris

5. Joseph M.S. Brito

6. Mahinda Haradasa

7. R. Chanaka de Silva

8. Niranjan de Silva Deva Aditya

9. Harendra K. Balapatabendi

3rd to 9th Respondents

Directors,

Sri Lankan Air Lines Ltd,

Level 22, East Tower,

World Trade Centre,

Echelon Square,

Colombo 01.

10. Suren Ratwatte,
Chief Executive Officer,
Sri Lankan Air Lines Ltd,
Level 22, East Tower,
World Trade Centre,
Echelon Square,
Colombo 01.

11. Kabir Hashim,
Minister of Public Enterprise Development,
Level 13 and 37, West Tower,
World Trade Centre,
Echelon Square,
Colombo 01.

12. Ravindra Hewavitharana,
Secretary,
Ministry of Public Enterprise Development,
Level 13 and 37, West Tower,
World Trade Centre,

Echelon Square,
Colombo 01.

13. Bhadra International India (Pvt) Ltd,
42, Rani Jhansi Road,
New Delhi,
New Delhi, 110055,
India.

14. Air India Air Transport Services Limited,
Airlines House,
113 Gurudwara Rakabganj Road,
New Delhi, 110001,
India.

15. Cambata Aviation (Pvt) Ltd,
No 3A, Hangar, Juhu Aerodrome,
Vile Parle West,
Mumbai,
Maharashtra 400054,
India.

Respondents

Before : **Vijith K. Malalgoda PC J (P/CA) &**
P. Padman Surasena J

Counsel : faiz Muasthapha PC for the Petitioner

S.A. Parathalingam PC with Nishkan Parathalingam for the 1st to 10th Respondents

L.M.K. Arulanathan PC for the 13th Respondent

Supported On: 27.07.2016

Order On: 28.07.2016

Order

Vijith K. Malalgoda PC J (P/CA)

Heard the Learned President's Counsel representing the Petitioners and the Learned President's Counsel representing the 1st to 10th Respondents and the 13th Respondent.

The 1st Petitioner before this court is an unsuccessful bidder for the ground handling work carried out at Chennai Air Port for the 1st Respondent Sri Lankan Air Lines Limited.

As revealed before this court, the 1st Petitioner was selected to attend to ground handling work at the Chennai Air Port by the 1st Respondent in the year 2007 and continued to be handling ground handling until 31st March 2016. However due to excessive cost incurred at the said Air Port in ground handling, the 1st Respondent had decided to call for tenders to select a suitable person to handle the said work.

By P-7 the 1st Respondent had informed the Petitioners that "the proposal did not meet our required reduction in cost therefore the Board of Directors has decided not to renew your contract after 31st July 2016."

Whilst moving to quash the said decision to terminate the service of the 1st Petitioner Company by way of a *Writ of Certiorari* Petitioners have challenged the selection process of the 13th Respondent as the successful bidder on the ground that a proper evaluation process has not been followed by the 1st Respondent.

In this regard the Petitioners have mainly relied on the document produced marked P-10. As observed by this court P-10 is a special review carried out by Sri Lankan Air Lines, Group Assurance and Advisory Services to inquire into, whether proper procedure had been adopted in accordance to the Company's procurement manual and selection of the bidder for ground handling at Chennai Air Port.

The said document is an unsigned, confidential document said to be an internal document of the 1st Respondent but, the 1st Respondent did not challenge the authenticity of the said document.

According to item 6 “Evaluation of Bids,” following are the requirements under the Procurement Manual of the Company;

- 6.1 The procurement Authority, and where deemed relevant, User Department, or the Evaluation Committee as applicable, shall evaluate the bids received in a systematic, transparent and logical manner. Any member who is likely to add value in terms of product knowledge may be included.
- 6.2 All members of the Evaluation committees are required to sign a declaration as per attached Template K, at the first meeting of the Evaluation Committee Technical or Financial affirming their respect for the commercial confidentiality of the proceedings of the committee, their impartiality, probity and absence of personal interest.
- 6.4 The Evaluation Committee Report shall give detailed reasons for recommendation of a bid as well as reasons for rejection of the bids, including reasons for not selecting the lowest bid, if applicable.
- 6.5 Signatures of the procurement Authority, User Department and any other relevant Department shall be placed on the Evaluation Committee Report.

The Petitioners argument before this court was that according to the findings of the said Report with regard to the evaluation of bids, the Evaluation Committee has failed to submit a formal report which was signed by all the members and the said failure amounts to an illegality and therefore the recommendations of the said Evaluation Committee cannot be accepted.

Under item 6.4 and 6.5 the following observations had been made by the makers of the said document (P-10),

- 6.4 It was noted that no formal Evaluation Committee Report was prepared with the sign off of all members. However, as stated previously, the Evaluation Committee members gave their

evaluations through email communications to Air Port Services and Contracts Executive which was reported in the Board Paper seeking approval for the recommended party.

The Board Paper, which was signed by CEO, GM Air Port and Grounds Services, did give full particulars for the reasons of recommendation of a bid as well as reasons for rejection of other bids. The lowest bid party was selected.

6.5 As stated previously, it was noted that no formal Evaluation Committee Report was prepared with the sign off of all members. However, attachments to the Board Paper included signatures of the Manager Management Accounting, Air Port Services and Cargo Contracts Executive and Senior Manager Commercial Procurement. Further, Senior Manager Commercial Procurement had stated 'Procurement process described herewith is in order against his name.

However as observed by this court, according to the said document (P-10) no formal Evaluation Committee Report was prepared with the signoff of all the members, the evaluations of the Committee Members have been received through email and the Board Paper submitted through proper channels possess full particulars for reasons of recommendation of a bid as well as reasons for rejection of other bids and the lowest bid party was selected.

As revealed before this court, the Evaluation Report is one requirement among several and the final decision of the awarding of the tender was taken by the Board of Directors of the 1st Respondent.

However with regard to the recommendations of the Evaluation Committee the Petitioner's position before this court was that, there was no collective decision taken by the members of the Evaluation Committee and there was no valid evaluation before the Board of Directors of the 1st Respondent to reach any decision with regard to awarding of the tender to any party.

In this regard the Petitioner relied on the decision by the Supreme Court in the case of *Jayasinghe and Others Vs. R.S. Jayarathne Secretary of Ministry of Public Administration and Others (99) 2 Sri LR 385*.

As observed by this court, the observations made by the Supreme Court in the said case with regard to a collective decision of the Human Rights Commission has no relevance to the present case, since the collective decision referred to above was with regard to a statutory function of the commission under the provisions of the relevant legislation.

As observed above, the maker of P-10 had specifically said that, even though there was no “formal report” signed by all members of the committee, the members have given their evaluation through email communication and there is no complaint made by the Petitioners that, the board decision had been reached without considering the evaluations of the members of the evaluation board.

Even though the Board Paper referred to above is not before this court, it is revealed under item 6.5 that full particulars for the reasons of recommendation of bids as well as reasons for rejection of other bids had been given in the said Board Paper, which was approved and implemented by the Board of Directors of the 1st Respondent.

Writ jurisdiction of this court is discretionary. In this instances, in order to decide whether this is a fit case for this court to exercise its said discretion it would be relevant to weigh the intention of the petitioner, as against the alleged illegality complained by him. As observed by this court, the Petitioner, in addition to the notices, is seeking the following three interim reliefs as well;

- 1) Restraining any other party being appointed to handle ground handling at Chennai Air Port
- 2) Permitting the Petitioner to handled ground handling at Chennai Air Port
- 3) Maintain the status quo until the conclusion of the present case.

As observed in this order, the main reason for termination of the service contract with the 1st Petitioner is his failure “to meet the required reduction in cost of the ground handling at Chennai Air Port”. It is clear from the above interim reliefs that the expectation and the intentions of the Petitioner from this application is to continue to provide the said costly service on a lapsed contract at the cost of causing further losses to the 1st Respondent. As pointed out by the learned President’s Counsel for the 1st Respondent, the Petitioner has requested further 06 months extension as per P-12 (a). Thus it could be seen that the Petitioner has taken steps to file this application upon refusal [as per P 12 (b)] of that application for extension.

Learned President’s Counsel for the 1st Respondent submitted that if this court grants the above interim reliefs the 1st Respondent will not be able to operate the flights to Chennai and that approximately 28 flights that are currently being operated for a week would be affected as the impugned contract to be awarded is for the ground handling operations for the 1st Respondent at the Chennai Air port.

Learned President’s Counsel for the 1st Respondent also submitted that it is open for the Petitioner to claim damages if he claims that he should have been the successful bidder if not for the procedure he complains is flawed and that therefore there exists an alternative remedy for the Petitioner.

In these circumstances we are of the view that this is not a fit case in which the Writ Jurisdiction of this court must be exercised. Hence we refuse to issue notices on the Respondents. This application must therefore stand dismissed.

PRESIDENT OF THE COURT OF APPEAL

P. Padman Surasena J

JUDGE OF THE COURT OF APPEL