



2024:DHC:9528



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

Date of decision: 4th DECEMBER, 2024

IN THE MATTER OF:

+ **O.M.P.(I) (COMM.) 385/2024 & I.A. 45364/2024**

LAS GROUND FORCE PRIVATE LIMITED & ANR.

.....Petitioners

Through: Mr. Dayan Krishnan, Sr. Advocate
with Mr. Dhruv Gandhi, Mr. Sahil
Raveen, Mr. Shreedhar Kale, Mr.
Aalok Kumar, Advocates.

versus

GOLDAIR HANDLING SA

.....Respondent

Through: Mr. Saurabh Kripal, Sr. Advocate
with Ms. Amrita Narayan, Ms.
Monali Dutta, Mr. Manan Shukla,
Ms. Faranaaz Karbhari, Mr. Ashwin
Rakesh and Mr. Madhav Sharma,
Advocates.

+ **O.M.P.(I) (COMM.) 386/2024**

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CORAM:

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD



JUDGMENT (ORAL)

1. The present applications under Section 9 of the Arbitration and Conciliation Act, 1996 has been filed seeking directions to restrain the Respondent from participating in the tender process for Ranchi and Vijayawada Airports initiated by Airport Authority of India (“AAI”) vide Notification dated 22.10.2024 and 23.10.2024 and for restraining the Respondent from participating in any tender process for Ground Handling Services at any Airport managed by the AAI.
2. Since the reliefs sought for in both the Petitions are common and the counsels appearing for the parties are the same, both the Petitions are being heard together with the consent of the parties.
3. Arguments have been primarily addressed in O.M.P.(I) (COMM.) 385/2024. The facts, in brief, leading to the filing of O.M.P.(I) (COMM.) 385/2024 are as under:-
 - a. It is stated that in 2018-2019, the Petitioner No.1 and the Respondent decided to collaborate for providing Ground Handling Services at various airports across India. It is stated that a tender was issued by the AAI for submission of bid regarding providing of Ground Handling Services for Bagdogra Airport. It is stated that the Petitioner No.1 and Respondent submitted a bid and succeeded in in the tender for providing Ground Handling Services at the Chennai Airport, Goa Airport, Bagdogra Airport, Udaipur Airport and Jodhpur Airport.
 - b. It is stated that a Shareholders’ Agreement dated June 2021 was entered into between Petitioner No.1 and the Respondent for creation of a Special Purpose Vehicle which is the Petitioner No.2 herein for providing the Ground Handling Services at Bagdogra Airport.
 - c. The salient Clauses of the Shareholders’ Agreement entered into



between Petitioner No.1, Petitioner No.2 and the Respondent which is a tripartite agreement, reads as under:-

“WHEREAS:

- A. LAS is engaged in providing ground handling services, passenger handling, ramp handling, cargo handling and aircraft cleaning services for domestic and international flights to various airlines since the past 25 years having its operations at 5 major airports in India.*
- B. Goldair has been providing ground handling services, passenger handling, airport lounge services, ramp handling, aircraft cleaning services, de-icing services and execution aviation handling for domestic and international flights to airlines for the past 25 years having its operations in Greece, Bulgaria and Cyprus.*
- C. The Airport Authority of India ("AAI") vide its invitation to bid/tender (bearing e-bid invitation no: 2020_AAI_ 43720_1) dated 30th, March 2020 had invited potential bidders to submit their bid to carry out ground handling services at the Bagdogra Airport at Bagdogra, India ("Airport")*

F. In accordance with the provisions of the Bid Documents (as defined below), LAS and Goldair established the Company in Bagdogra, India to provide the Services (defined below) at the Airport.

*“Airport” means the **Bagdogra** Airport at Bagdogra India;*



“Business” means the business of providing Services at the Airport;

“Services” means the services that have been set out in the Bid Documents including ramp handling services (aircraft handling, aircraft services, aircraft cleaning, loading, unloading, cargo handling services at air site and support services) and traffic handling services (terminal services, flight operations, surface transport and representation services).

3.3.2 Nothing in this Agreement restricts the right of any Shareholder to conduct its own business activities in any way it sees fit. The Shareholders undertake not to compete with each other and the Company in the provision of Services at the Airport.

Non-Compete and Exclusivity

LAS and Goldair hereby agree and undertake that during the time such Party (i.e. LAS or Goldair) hold any Equity Shares in the Company and for a period of 3 (three) years thereafter, it shall not directly or indirectly, or through its Affiliates, whether by themselves, or through, or together with, or on behalf of/ for, or through any Person, solely or jointly participate (whether as a partner, shareholder, lender, principal, agent or consultant) in any business similar to the Business of the Company anywhere in India. Provided that this Clause 14 will not be applicable with respect to (i) Indian companies where LAS and Goldair are together conducting business similar to the Business or (ii) any airports in India which are managed by private players and not the



AAI or (iii) any airports where either LAS or Goldair do not qualify the eligibility criteria set out by the issuing authority or (iv) where either Party wishes to bid for or negotiate a Tender/Contract and the other Party, for any reason whatsoever, refuses to participate in the said Tender/Contract relating to any Business referred to hereinabove.”

(emphasis supplied)

- d. It is stated that along with the Shareholders' Agreement in which the Petitioner No.2 is a party, Petitioner No.2 and AAI also entered into an Agreement dated 08.11.2021 in connection with providing Ground Handling Services at Bagdogra Airport. It is stated that an Exclusivity Agreement dated 16.09.2022 was also executed between the Petitioner No.1 and the Respondent for exclusive arrangement and refraining from competing with each other in any other similar business without mutual consent. A Collaboration Agreement dated 16.09.2022 was also entered into by the Petitioner No.1 and the Respondent in order to jointly undertake projects, enter into consortium/partnership and for bidding for future tenders, incorporating the SPVs for providing services at a particular Airport.
4. This Court is not bringing out the facts in O.M.P.(I) (COMM.) 386/2024 since similar Shareholders' Agreement dated 15.02.2022, Exclusivity Agreement dated 16.09.2022 and a Collaboration Agreement dated 16.09.2022 has been entered into between the parties for the Udaipur Airport. It is also pertinent to mention that the said Agreements contain Clauses which are also similar. It is pertinent to mention that, there is Clause 3 of the Exclusivity Agreement dated 16.09.2022 which provides obligations to its exclusivity and the same reads as under:-



“3. PARTIES’ OBLIGATIONS TOWARDS EXCLUSIVITY

3.1 Each Party shall, during the Exclusivity Period, notify the other Party in writing regarding any bid, tender, discussion, opportunity, negotiation, meeting, contract pertaining to the provision of ground handling services within 7 days of such Party’s receipt of information or awareness thereof and shall provide:

- (a) Its understanding of how and why such bid, tender, discussion, opportunity, negotiation, meeting is in relation to the Scope; and*
- (b) the terms and conditions (including timelines and information required) of such bid, tender, discussion, opportunity, negotiation, meeting in writing.*

3.2 Upon receipt of information by a Party in accordance with Clause 3.1, the Parties shall enter into discussion in order to ascertain whether the concerned opportunity is pertaining to the Scope.

3.3 Each Party shall make available such information as it considers appropriate and as necessary for the purpose of submission of bids, proposals, offers, undertaking negotiations/discussions, entering into contracts for the provision of ground handling services at the Airports.

3.4 LAS or Goldair, as the case may be, shall not submit any such bid, proposals, offers, documents, clarifications or other commitments in relation to the Scope to any persons including Government authorities before securing the written consent of the Party.

3.5 The Parties undertake to fully abide by all the technical, commercial and legal provisions of the tenders or any other



instruction/clarification/documents provided with respect to the Scope, and cooperate for providing all technical financial and contractual clarifications to the concerned persons in a timely manner to ensure the success of the tender/ project.

3.6 Each Party shall not exhibit, advertise, promote, attend events, in relation to the tenders for the provision of ground handling services at the Airports, except upon prior written consent of the other Party.

5. It is also pertinent to mention that there are Arbitration Clauses in each of the Agreements. The seat and venue of arbitration, as specified in Clause 28.15.4 of the Shareholders' Agreement is New Delhi, India. The Arbitration Clause in the Exclusivity Agreement provides for seat at Bombay and Delhi and in the Concession Agreement, Arbitration Clause provides for seat of arbitration shall be at the city of the Airport, i.e., Siliguri, West Bengal and in the Collaboration Agreement, the seat is in Mumbai, India.

6. Material on record discloses that like Bagdogra and Udaipur Airport, the Petitioner No.1 also entered into similar Agreement for the purposes of Nagpur Airport wherein disputes arose between the parties. Petitioner No.1 filed a petition being Commercial Arbitration Petition (St.) No.24155 of 2023 in the Bombay High Court, seeking interim relief which were not granted. It is also pertinent to mention that disputes have arisen between the parties in terms under the Exclusivity and Collaboration Agreements also. Since the Respondent is a Company incorporated outside India, Petitioner No.1 approached the Apex Court under the terms of the Exclusivity and Collaboration Agreements for appointment of Arbitrator and the Apex Court vide Order dated 15.07.2024 in Arbitration Petition No.26/2024 disposed of



the Petition by nominating Arbitrators for both parties and instructed them to complete the constitution of the Arbitral Tribunal. It is stated by learned Counsel for the Parties that the Arbitral Tribunal has now been constituted.

7. The AAI has issued a tender notice for Ground Handling Services at Ranchi Airport and Vijaywada Airport and it is stated that the Respondent would make its bid for the said tender which would cause irreparable loss to the Petitioners. Therefore, Petitioners No.1 and 2 have approached this Court in both the petitions for the interim reliefs, as indicated above.

8. In proceedings dated 19.12.2024, it was stated by the learned Counsel for the Respondent that the Respondent would not be making a bid for the Ranchi Airport and therefore no interim orders were passed.

9. The matter was listed for final disposal on 25.11.2024. Arguments were heard on that day.

10. Learned Senior Counsel appearing for the Petitioners contends that the Shareholders' Agreement contains a non-compete clause and the Shareholders' Agreement is still subsisting. He states that till the Shareholders' Agreement is subsisting, the Respondent cannot be permitted to make a bid in any of the Airports in view of the non-compete clause in the Shareholders' Agreement. Learned Senior Counsel for the Petitioners draws attention of this Court to Paragraph No.3.3.2 and Clause 14 of the Shareholders' Agreement. He lays emphasis on Clause 14 of the Shareholders' Agreement to contend that under the said clause, the Petitioners and the Respondent cannot directly or indirectly, or through its affiliates, whether by themselves, or through, or together with, or on behalf of/for, or through any person, solely or jointly participate (whether as a partner, shareholder, lender, principal, agent or consultant) in any business similar to the Business of the SPV anywhere in India. Learned Senior



Counsel for the Petitioners further draws the attention of this Court to the word “Business” as defined in the SHA to state that it has been defined as the provision of “Services” at the ‘Airport’ and the word “Services” has been defined as *inter alia* including ramp handling services (aircraft handling, aircraft services, aircraft cleaning, loading, unloading, cargo handling services at air site and support services) and traffic handling services (terminal services, flight operations, surface transport and representation services). It is stated by the learned Senior Counsel for the Petitioner that in view of Clause 14 of the Shareholders’ Agreement, the Respondent is precluded from participating in any business which is similar to the business of Petitioner No.2 in O.M.P.(I) (COMM.) 385/2024 and O.M.P.(I) (COMM.) 386/2024 anywhere in India. He states that the proviso to Clause 14 will not be applicable in the present case.

11. *Per contra*, learned Senior Counsel appearing for the Respondent draws the attention of this Court to the recitals to contend that the Shareholders’ Agreement was executed only for the purposes of conducting business at Bagdogra Airport. He draws the attention of this Court to the definition of “Airport” and various recitals which restricts the operation to Bagdogra Airport. The definition of the word “Business” which is also restricted to the Airport being the Bagdogra Airport. Clause 3.3.2 of the Shareholders’ Agreement again restricts the conduct of any business at Bagdogra Airport. He also draws attention to the Exclusivity Clause under the Exclusivity Agreement dated 16.09.2022 and more particularly to Clause 3 of the Shareholders’ Agreement and also to the definition of Airports under the Exclusivity Agreement dated 16.09.2022. The definition of “Airport” reads as under:-

*“Airport” means the **Bagdogra** Airport at Bagdogra*



India;

He also draws the attention of this Court to the Schedule A of the Exclusivity Agreement of Airports which includes the Ranchi and Vijaywada Airport. Learned Senior Counsel for the Respondent contends that if Clause 14 of the Shareholders' Agreement would apply across all the Airports then there was no necessity to enter into the Exclusivity Agreement separately which has already been terminated. He further contends that the Petitioner No.2 cannot bid for the Ranchi and Vijaywada Airport as its business was only to provide for services at Bagdogra Airport and if Clause 14 of the Shareholders' Agreement is to be construed in the manner the Petitioners contends, and then Clause 14 of the Shareholders' Agreement would be hit by Section 27 of the Contract Act.

12. Learned Senior Counsel for the Respondent contends that on a conjoint reading of the Clauses of the Shareholders' Agreement it is made out that, the business activity of the SPV. i.e. Petitioner No.2 is restricted only to a particular airport, i.e. either Bagdogra Airport or the Udaipur Airport respectively. He further contends that the Concession Agreement also restricts the operations of the Petitioner No.2/SPV to Bagdogra Airport. He contends that the provisions of the Concession Agreement provide a circumspect/restricted definition of the Services and Business which can be provided through Bagdogra Shareholders' Agreement by the Parties i.e. Petitioner No.1 and Respondent including Petitioner No.2. Out of abundant caution, the allowed services and business are restricted only to the Bagdogra Airport and does not include any other airport.

13. He further contends that had the Bagdogra Shareholders' Agreement contemplated other airports as well, then the Petitioner No.1 and Respondent while signing the Udaipur Shareholders' Agreement would not have retained



Clause 14 in the Udaipur Shareholders' Agreement as well. This would necessarily entail that the Shareholders' Agreement, including the business activities of the SPV, were restricted to a particular airport for which it was being signed. It is stated that a bare reading of recital C and D of the Exclusivity Agreement shows that the Petitioner No.1 and Respondent have clearly stated that parties have entered into and are proposing to enter into a consortium/partnership for projects across various airports in India and are desirous of having exclusivity in so far as their consortium/partnerships for various projects is concerned.

14. He further contends that under Recital C and E of the Collaboration Agreement, the Petitioner No.1 and the Respondent have clearly intended to incorporate separate SPVs for future tenders as it has been done for Udaipur and Bagdogra and the rights and obligations arising pursuant to the SPV formation for these tenders have been agreed upon in this Collaboration Agreement. He contends that had the Petitioner No.1 and Respondent envisaged that the Shareholders' Agreement would have covered other airports as well, then they would not have entered into the Exclusivity Agreement and the Collaboration Agreement after considerable time from signing of the Shareholders' Agreement. He contends that the Petitioners have submitted that if the definition of Business is not extended to other Airports, then the 'Non-compete' provisions in the Bagdogra Shareholders' Agreement becomes otiose.

15. The Ld. Senior Counsel draws attention of this Court to Clause 2.4 of the Concession Agreement which clearly stipulates that the Concession is granted on a 'Non-Exclusive' basis. The said clause permits AAI to potentially enter into a contract with the Respondent for services in the Bagdogra/Udaipur Airport. He contends that Clause 14 of the Shareholders'



Agreement was specifically inserted as a direct result of Clause 2.4 of the Concession Agreement to protect the interest of the Petitioner No.2/SPV should another tender be floated by AAI for the Bagdogra/Udaipur Airport as well as to restrict the Petitioner No.1 and the Respondent from being part of a subsidiary or joint venture of AAI in case Clause 2.4.2 is exercised by AAI. He therefore contends that the assertions made by the learned Counsel for the Petitioners are wholly unfounded and unsustainable and deserves to be rejected.

16. Learned Senior Counsel for the Respondent states that the correct course of action of the Petitioners would have been to approach the Apex Court to appoint Arbitral Tribunal and then request the Apex Court to direct the Tribunal to conduct an emergency arbitration and decide the issue under Section 17 of the Arbitration and Conciliation Act. He also states that the Petitioner No.1, in the case of Nagpur Airport, had filed a Commercial Arbitration Petition (St.) No.24155/2023 before the Bombay High Court but failed to obtain the interim relief by invoking the exclusivity clause.

17. In rejoinder, the learned Senior Counsel for the Petitioners contends that the Petitioner No.1 approached the Bombay High Court under the Exclusivity Agreement only because Nagpur Airport is not an Airport run by the AAI and therefore is not covered under the proviso to Clause 14 of the Shareholders' Agreement. He contends that Clauses 14 and 3.3.2 of the Shareholders' Agreement are Non-compete Clauses for Bagdogra Airport and Clause 14 extends to all the Airports. He also states that it is now a settled position in law as also held by the Hon'ble Supreme Court in Radha Sundar Dutta v. Mohd. Jahudar Rahim and Ors., **AIR 1959 SC 24**, that every clause in a contract has to be given its full meaning, and that various clauses (which may appear to be in conflict with one another) have to be



construed harmoniously. He states that Clause 3.3.2 and 14 of the Shareholders' Agreement can readily be interpreted harmoniously. He states that key to such a harmonious interpretation lies in the proviso to Clause 14 of the Shareholders' Agreement.

18. He contends that the proviso to Clause 14 of the Shareholders' Agreement categorically states that the embargo contained therein will not apply to any airport which is not managed by the AAI. This includes several airports such as Chattrapati Shivaji Maharaj International Airport, the Kempegowda International Airport, the Cochin International Airport, the Navi Mumbai International Airport and the like. He, therefore, contends that under the Shareholders' Agreement (upon a harmonious construction of Clauses 3.3.2 and 14 of the Shareholders' Agreement) Petitioner No.1 and the Respondent are at liberty to conduct their business as they deemed fit at any one or more of these airports.

19. He further contends that the argument of the Respondent that since the Petitioner No.2 cannot participate in Ranchi and Vijaywada Airport Clause 14 will not be applicable and the same will be violative of Section 27 of the Contract Act. He further contends that till the subsistence of the Shareholders' Agreement, Clause 14 of the Shareholders' Agreement is a complete embargo on any of the parties to the Shareholders' Agreement to participate in any competing business in the Airports which are covered under the ambit of Clause 14 of the Shareholders' Agreement.

20. Learned Senior Counsel for the Petitioner places reliance on the judgment of the Apex Court in Niranjan Shankar Golikari v. Century Spinning and Manufacturing Ltd., 1967 SCC OnLine SC 72, Gujarat Bottling Co. Ltd., v. Coca Cola Co. & Ors., 1955 5 SCC 545, Percept D' Mark (India) (P) Ltd., v. Zaheer Khan and Another, (2006) 4 SCC 227 and



Radha Sundar Dutta v. Mohd. Jahudar Rahim and Ors (supra) to contend that a negative covenant which seeks to restrain trade during the subsistence of the contract is not in breach of Section 27 of the Indian Contract Act. It is also stated that the negative covenant need not be limited to the subject matter of the contract itself, but can extend to all dealings outside of the contract as well, so long as the businesses/dealings restrained are similar to the subject matter of the contract. The reasonableness of the negative covenant flows from the fact that it is applicable during the subsistence of the contract and applies to businesses of a similar nature only.

21. Learned Senior Counsel for the Petitioners further states that the fact that the Exclusivity Agreement dated 16.09.2022 has been terminated, the same would not be a bar for the Petitioners to approach this Court by relying on Clause 14 of the Shareholders' Agreement to approach this Court under Section 9 of the Arbitration and Conciliation Act, 1996.

22. Heard learned Counsel for the parties and perused the material on record.

23. The dispute in the present case is as to whether the Respondent can be permitted to participate in the tender issued by the Airport Authority of India so as to offer its services for providing ground handling services at an Airport in view of the Clause 14 of the Shareholders' Agreement dated June 2021 for Bagdogra Airport and Shareholders' Agreement dated 15.02.2022 for Udaipur Airport. The Shareholders' Agreement dated June 2021 for Bagdogra Airport and the Shareholders' Agreement dated 15.02.2022 for Udaipur Airport are signed between three parties one being Indian company and the other one being foreign company and the third one being Las Goldair Handling Udaipur/Bagdogra Private Limited was entered into for providing ground handling services at the two airports. Apart from these two



agreements, an Exclusivity Agreement dated 16.09.2022 has also been entered into between the Petitioner No.1 and the Respondent wherein both the parties have decided not to compete with each other in the matter of ground handling services at any of the airports in India. The Exclusivity Agreement has been terminated. The Petitioners have approached this Court contending that since Shareholders' Agreements dated June 2021 and 15.02.2022 are still subsisting, Clause 14 of which prevents the Petitioners and the Respondent from competing with each other in any business similar to the business of Petitioner No.2 in O.M.P.(I) (COMM.) 385/2024 and O.M.P.(I) (COMM.) 386/2024. The arbitration is yet to be invoked for the Shareholders' Agreements.

24. The question that arises for consideration is whether the Respondent can be precluded from participating in any tender till the issue is decided in arbitration or not.

25. In the opinion of this Court, if the Respondent is denied and ultimately, in the arbitration proceedings and then in the award, it is held that the claim of the Petitioner is to be rejected, then irreparable loss will be caused to the Respondent as the Respondent would have been precluded from participating in the tender, whereas in case the claim is allowed, the Petitioner can be compensated by damages and the Respondent can be asked to render accounts. In the opinion of this Court, the test of balance of convenience and irreparable loss lies in favour of the Respondent and not in favour of the Petitioner.

26. This Court now would proceed to consider the test of *prima facie* case in favour of the Petitioner. Admittedly, apart from the Shareholders' Agreement, the parties have entered into an Exclusivity Agreement as well. Clause 3 of the Exclusivity Agreement for which Petitioner No.1 and



Respondent are parties provides that parties shall not submit bid proposal, offers or documents without taking the consent of the other party. The said agreement already stands terminated and an Arbitral Tribunal has already been constituted for adjudicating the disputes which has arisen between the parties. Viewed in this light, this Court would have to consider the conduct of the parties. The Petitioner No.1 and the Respondent entered into an Exclusivity Agreement after the Shareholders' Agreement was executed. It cannot be said that the Exclusivity Agreement has been entered into in futility. This Court cannot lose sight of the fact that the recitals of the Shareholders' Agreements state that the said agreement in which Petitioner No.2 is also a party has been entered into between the parties only for the purposes of submitting their bid to carry out ground handling services at Bagdogra Airport or the Udaipur Airport.

27. The purport of the clauses in both the agreements indicates that the purpose of the Shareholders' Agreement was to create Petitioner No.2 in both cases, for making the bid to provide ground handling services only at Bagdogra Airport or Udaipur Airport. Petitioner No.2 in O.M.P.(I) (COMM.) 385/2024 and Petitioner No.2 in O.M.P.(I) (COMM.) 386/2024 which have been created for specifically for providing services at Bagdogra Airport and Udaipur Airport cannot make their bid at Vijaywada Airport or Ranchi Airport since no Special Purpose Vehicle (SPV) has been created for providing services at Vijaywada Airport or Ranchi Airport. The Shareholders' Agreement in O.M.P.(I) (COMM.) 385/2024 in which Petitioner No.2 is a signatory is only for the Bagdogra Airport and the Shareholders' Agreement in O.M.P.(I) (COMM.) 386/2024 is only for providing ground handling services at Udaipur Airport. Since the Petitioner No.2 in O.M.P.(I) (COMM.) 385/2024 and Petitioner No.2 in O.M.P.(I)



(COMM.) 386/2024 cannot participate in a tender for any other Airport and that the Petitioner No.1 and the Respondent have entered into a separate exclusivity agreement for all airports in India which has been terminated, the issue to be decided is that whether Clause 14 of the Shareholders' Agreement will go beyond the purpose for which the Shareholders' Agreement was executed and as to why at all the parties entered into Exclusivity Agreement etc. In the opinion of this Court, the issues will be decided only in the arbitration proceedings. The conduct of the parties entering into a separate Exclusivity Agreement does indicate that parties wanted to enter into a specific agreement for this purpose. Viewed in this light, no *prima facie* case is created in favour of the Petitioners for the purposes of granting any stay pending arbitration.

28. There is some weight in the argument of the Respondent that it was for the Petitioner to approach the Apex Court under Section 11 of the Arbitration & Conciliation Act and get the Arbitrator appointed and ask for an emergency arbitration and could have obtained orders rather than approaching this Court or approach the Tribunal which has already been constituted under the Exclusivity Agreement and obtain orders under Section 17 of the Arbitration & Conciliation Act since the Petitioner and Respondent are parties to such agreement and a Tribunal having already constituted for adjudicating the disputes which have arisen under the Exclusivity Agreement.

29. Admittedly, a Concession Agreement has been entered into between the Airport Authority of India and Petitioner No.2 for Bagdogra Airport. Similarly, Concession Agreement entered into between the Airport Authority of India and Petitioner No.2 for Udaipur Airport. Clause 2.4 of the said agreement provides for Non-Exclusivity Clause. Clause 2.4 of the said



agreement is extracted as below:-

“2.4 Non-exclusivity

2.4.1 The grant of Concession under this Agreement shall be on a non-exclusive basis. The Authority reserves the right to grant the Concession for the provision of Ground Handling Services to a new ground handling agency on such terms and conditions as the Authority may deem fit and appropriate, at any time including on occurrence but not limited to one or more of the following:

- i. the Concessionaire fails to either procure or maintain the Applicable Permits during the Term of this Agreement as set out in Clause 10.4 and fails to cure such breach within a period of 45 (Forty Five)days; or*
- ii. at any time, upon issuance of Termination Notice under this Agreement.*
- iii. Failure of Concessionaire to maintain Minimum Quality Standards.*
- iv. Any notification/policy by GoI.*

2.4.2 Notwithstanding anything contained herein, the Parties further agree and acknowledge that the Authority shall have the right at all times to perform the services in relation to ground handling activities, either itself or through its subsidiaries or joint venture. No rebate shall be allowed to the Concessionaire on account of the rights of the Authority under this clause 2.4.2.”

30. A perusal of the said agreement would show that the Airport Authority of India has the right at all times in case of breach, if not cured, can perform the services in relation to ground handling activities either itself or through its subsidiaries or joint venture. Viewed in this light, Clause 3.3.2



and Clause 14 of the Shareholders' Agreement prevents any of the parties to the agreement to compete with each other at the Bagdogra Airport or Udaipur Airport only.

31. Extensive arguments have been advanced by both sides as to whether Clause 14 of the Shareholders' Agreement would be hit by Section 27 of the Contract Act.

32. The Petitioner has placed reliance on the judgment passed by the Apex Court in Niranjan Shankar (supra) and Gujarat Bottling Company (supra). The Apex Court in Gujarat Bottling Company (supra) where the dispute was in relation to a Franchisee Agreements which is not in the present case has held that an agreement restraining a franchisee to deal with competing good cannot be said to be in restraint of trade. This Court is not dealing with a non-compete clause in an employer-employee contract wherein the employee is restrained from taking into a business which can be in competition with the employer or a franchisee-franchiser Agreement wherein franchisee can be bound by the franchiser not to deal with other person or goods. In the present case, there are two entities, i.e., the Petitioner No.1 and Respondent and both deal in providing ground handling services. Petitioner No.1 and the Respondent had come together to collaborate for providing ground handling services for particular individual airports. They had also entered into an agreement restraining each other from competing for providing services at other airports. The Exclusivity Agreement entered into between the Petitioner and Respondent have been terminated. Looking at the conduct of the parties and the fact that the parties have entered into a separate exclusive agreement. This Court is of the opinion that there is no *prima facie* case in favour of the Petitioner. This Court is not going into the nuances of Section 27 of the Contract Act as this would be the exact



question that would be posed to the Arbitrator while adjudicating the dispute for which the arbitral tribunal would be constituted and if this issue is decided in these petitions, then there would be no other question left in the arbitration to be decided.

33. As stated earlier, the SPV i.e., Petitioner No.2 cannot have any business interest in any airport in the country other than the Bagdogra and Udaipur Airports and the other two players in the field, Petitioner No.1 and Respondent have entered into an Exclusivity Agreement for not competing with each other for other airports. In any event, whether Clause 14 of the SHA is in violation of Section 27 of the Contract Act or not would be finally decided in the arbitration proceedings and cannot be decided in the present petitions especially when this Court is of the opinion that a *prima facie* case has not been brought out and as pointed out earlier, the balance of convenience and the irreparable loss would rather be caused to the Respondent if the Respondent is not permitted to participate in the bid as it would lose an opportunity to participate in the bid and in case the Petitioner succeeds, the Petitioner can be compensated by damages and the Respondent can be asked to render accounts for calculating damages.

34. This Court is of the opinion that restraining the Respondent from participating in the bid will actually thwart competition as argued by the learned Counsel for the Respondent and therefore the balance of convenience also lies in permitting the Respondent to participate in the contract as this Court is of the opinion that Clause 14 *prima facie* cannot be extended to other airports more particularly when the Exclusivity Agreement already stands terminated and Petitioner No.2 in both the Petitions cannot compete in the tender process in the Vijaywada and the Ranchi Airports. This Court is therefore not inclined to grant the reliefs as prayed for in the



2024:DHC:9528



instant petitions.

35. The petitions are dismissed along with pending application(s), if any.

SUBRAMONIUM PRASAD, J

DECEMBER 04, 2024

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