

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

Hettigoda Industries (Pvt) Ltd.,
No.33/3,
Sri Dharmarama Road,
Ratmalana.
Petitioner

CASE NO: CA/WRIT/423/2017

Vs.

1. Airport and Aviation Services (Sri Lanka) Limited,
Bandaranaike International
Airport,
Katunayake.
2. S. S. Ediriweera,
Chairman,
Airport and Aviation Services (Sri Lanka) Limited & Chairman
Tender Board No.01,
Airport and Aviation Services (Sri Lanka) Limited,
Bandaranaike International
Airport,
Katunayake.

- 2A. Major General (Rtd.)
G. A. Chandrasiri,
Chairman,
Airport and Aviation Services (Sri Lanka) Limited & Chairman
Tender Board No.01,
Airport and Aviation Services (Sri Lanka) Limited,
Bandaranaike International
Airport,
Katunayake.
3. Geeth Karunarathne,
Head of Commercial & Properties,
Airport and Aviation Services (Sri Lanka) Limited,
Bandaranaike International
Airport,
Katunayake.
4. Member, Tender Board No.01,
Office of Supply Chain
Management,
Airport and Aviation Services (Sri Lanka) Limited,
Bandaranaike International
Airport,
Katunayake.
5. Member, Tender Board No.01,
Office of Supply Chain
Management,

Airport and Aviation Services (Sri Lanka) Limited,
Bandaranaike International
Airport,
Katunayake.

6. Chairman,
Technical Evaluation Committee
for the Operation of Ayurvedic
Medicinal Products shop in the
Departure/Transit Lounge,
Office of Supply Chain
Management,
Airport and Aviation Services (Sri Lanka) Limited,
Bandaranaike International
Airport,
Katunayake.

7. Member,
Technical Evaluation Committee
for the Operation of Ayurvedic
Medicinal Products shop in the
Departure/Transit Lounge,
Office of Supply Chain
Management,
Airport and Aviation Services (Sri Lanka) Limited,
Bandaranaike International
Airport, Katunayake.

8. Member,
Technical Evaluation Committee
for the Operation of Ayurvedic
Medicinal Products shop in the
Departure/Transit Lounge,
Office of Supply Chain
Management,
Airport and Aviation Services (Sri
Lanka) Limited,
Bandaranaike International
Airport, Katunayake.
9. Janet Lanka (Pvt) Limited,
No.15, Sinsapa Road,
Colombo 06.

Respondents

Before: Mahinda Samayawardhena, J.
Arjuna Obeyesekere, J.

Counsel: Sanjeewa Jayawardena, P.C., with Lakmini
Warusawithana for the Petitioner.
Vikum de Abrew, S.D.S.G., for the 1st-8th
Respondents.
Avindra Rodrigo, P.C., with Rozali Fernando
for the 9th Respondent.

Argued on: 09.07.2020

Decided on: 27.08.2020

Mahinda Samayawardhena, J.

The 1st Respondent, the Airport and Aviation Services (Sri Lanka) Ltd, is a fully government-owned company with statutory power to manage and develop civil airports in Sri Lanka including the Bandaranaike International Airport. The 2nd Respondent, its Chairman and also the Chairman of the Tender Board relevant to this dispute, published the Notice marked P16 inviting bids for the operation of an Ayurvedic Medicinal Products Shop in the departure/transit area of the Bandaranaike International Airport. The Petitioner, Hettigoda Industries (Private) Limited, and the 9th Respondent, Janet Lanka (Private) Limited, submitted bids therefor.

The Technical Evaluation Committee appointed for consideration of the bids made the following recommendation to the Tender Board by 1R2:

TEC [Technical Evaluation Committee] observed that both Bidders have fulfilled all eligibility requirements and qualifications as per the Bidding Document. Considering the clarifications and confirmations received from the Department of Ayurveda and the best interest of the Company, TEC recommends to award Space No. 47-D for the Operation of an Ayurvedic Medicinal Products Shop in Departure/Transit Area, BIA, Katunayake to the Highest Bidder, M/S. Janet Lanka (Pvt) Limited for a period of five years to the total Bid Value of Rs. 49,920,000.00 + VAT and a Premium of Rs. 3,000,000.00.

This means, both the Petitioner and the 9th Respondent were deemed equally qualified to be awarded the tender, but the 9th Respondent was selected because its bid price was higher than that of the Petitioner.

P16A sets out conditions/instructions to bidders.

The Petitioner says the 9th Respondent is disqualified from being awarded the tender on several grounds. However, there is no necessity to go into detail on each one of those grounds, as the Petitioner at the argument confined its challenge of the impugned decision to clause 7(iii) of P16A, which says bidders “*Who are existing operators having more than one shop in the Departure/Transit Area*” are disqualified from being awarded the tender.

The Petitioner says the 9th Respondent is disqualified under this clause, but the Technical Evaluation Committee failed to consider the same in recommending to the Tender Board that the tender be awarded to the 9th Respondent.

On this basis, the Petitioner seeks to quash by certiorari the recommendation/agreement made/signed between the 1st Respondent and the 9th Respondent awarding the tender to the latter, and to compel the Respondents by mandamus to award the tender to the Petitioner.

The Petitioner in paragraphs 57 and 58, under the subheading “*THE 9TH RESPONDENT IS DISQUALIFIED FROM TENDERING IN TERMS OF CLAUSE 7(iii) OF THE INSTRUCTIONS TO BIDDERS*”, states:

57. Furthermore, the Petitioner states there are at least 3 other shops with the name of 'Spa Ceylon Luxury Ayurveda' already in operation at the Transit Area of the Bandaranaike International Airport and therefore, there has been a clear violation of the disqualification set out in clause 7(iii) of the eligibility and qualification criteria provided for in the instructions to bidders.

58. The Petitioner further states that the 9th Respondent is attempting to circumvent the said prohibition, by submitting bids under the name of different entities. However, the Petitioner states that ultimately, it is the same product range offered, although the bidder appears to be a different entity on the face of the record. Therefore, in any event, the mischief that was expected to be prevented, by and through clause 7(iii) has been patently violated.

The 1st-7th Respondents in their statement of objections do not specifically deny or explain the above allegation/assertion, apart from the standard general denial in the first paragraph of all averments in the petition except those specifically admitted.

The 9th Respondent, in my view, ought to have answered paragraphs 57 and 58 of the petition by way of a separate averment in the statement of objections. Instead, the 9th Respondent, in paragraph 23 of the statement of objections, answers the said allegation/assertion together with several other paragraphs of the petition.

In paragraph 22 of the statement of objections, the 9th Respondent *inter alia* states:

22. The 9th Respondent...only admits that the shareholders of the 9th Respondent and the Spa Ceylon Ayurveda (Pvt) Ltd are the same and also admits the contents of the *www.spaceylon.com* website.

(i) The 9th Respondent acts as the manufacturing arm within the associate group of companies;

(ii) Products offered by any associate company within the Group are manufactured by the 9th Respondent who operates the manufacturing facility/plant.

(iii) Though the products may be under different 'brand-names' as elaborated hereinbelow and may be marketed by other associate companies within the Group such as Spa Ceylon Ayurveda (Private) Limited such products are manufactured by the 9th Respondent.

(iv) The 9th Respondent not only manufactures but also markets and operates several outlets, shops and boutiques and engages in the sale of products manufactured by the 9th Respondent under different brand-names.

In paragraph 23 of the statement of objections, the 9th Respondent *inter alia* states:

23(i) *Spa Ceylon Ayurveda (Pvt) Ltd is a separate entity from the 9th Respondent which is engaged in the marketing, promoting and branding of selected items manufactured by the 9th Respondent.*

(ii) The 9th Respondent apart from manufacturing cosmetics, soaps, spa products also manufactures Ayurvedic Products such as oils, balms, herbal compress, inhalers, ointments, serums, essential oils, health supplements, Ayurveda herbs, herbal infusions, natural coconut products.

(vi) The 9th Respondent was only operating one outlet at the Bandaranaike International Airport at the time of the bid, for a different product range, namely, Local Aroma Spa Products.

In paragraphs 31 and 32 of the statement of objections, the 9th Respondent states:

31. The 9th Respondent states that products manufactured by the 9th Respondent are widely marketed locally and internationally and further states that the range of products under the different brand names stated above are marketed as follows

(i) Products under the 'SPA CEYLON' are sold in over forty outlets (internationally and locally) including international airports including Sri Lanka, Chennai, Mumbai, Kuala Lumpur and Male, in up-market stores in Sri Lanka in boutiques operated by the 9th Respondent and/or boutiques and Spas operated by associate companies;

(ii) Products under the 'Luv Essence' brand are sold in boutiques operated by the 9th Respondent Company or sold by other companies or in other retail stores.

(iii) Products under the 'Janet' brand is sold in approximately 3,000 leading supermarkets, pharmacies and retail stores in Sri Lanka through a network of distributors with the assistance of associate companies of the 9th Respondent.

32. The 9th Respondent further states that around twelve Spa Ceylon boutiques market products manufactured by the 9th Respondent which are mostly products certified and registered under the Department of Ayurveda.

In my view, there is no straightforward and clear denial by the 9th Respondent of the Petitioner's allegation/assertion that *"there are at least 3 other shops with the name of 'Spa Ceylon Luxury Ayurveda' already in operation at the Transit Area of the Bandaranaike International Airport"*. Instead, the 9th Respondent accepts that the shareholders of the 9th Respondent and Spa Ceylon Ayurveda (Pvt) Ltd are the same and the said Spa Ceylon Ayurveda (Pvt) Ltd is one of the associate companies within the Group, selling Ayurvedic medicinal products manufactured by the 9th Respondent under different brand-names.

The 9th Respondent, in my view, prevaricates and responds to the Petitioner's above allegation in the most evasive if not illusive manner when it says *"The 9th Respondent was only operating one outlet at the Bandaranaike International Airport at the time of the bid, for a different product range, namely, Local Aroma Spa Products."*

This means, the 9th Respondent directly accepts it was operating one shop in the departure/transit area *"at the time of the bid"*,

but indirectly says the other three shops in the name of 'Spa Ceylon Luxury Ayurveda' came into existence after "*the time of the bid*". Photographs of these three shops under the name 'Spa Ceylon Luxury Ayurveda' have been compendiously marked CA1A and tendered with the counter affidavit of the Petitioner. Prior to the argument, the 9th Respondent did not tender any documents (with the permission of the Court) to say (a) the CA1A photographs are forgeries, and/or (b) the said three shops came into operation after "*the time of the bid*".

I cannot understand the exact meaning and significance of the phrase "*at the time of the bid*", as put forward by the 9th Respondent. It appears, what is meant by the 9th Respondent thereby is, at the time of submitting the bid, the 9th Respondent did not have more than one shop in the departure/transit area. But, according to clause 7(iii) of P16A, existing operators of more than one shop in the departure/transit area were not to be considered by the 1st Respondent for award of the tender. This means, at the time of the bid being accepted, the bidder should not have had more than one shop in operation. The 9th Respondent does not say the said three shops were not in operation at the time of acceptance of the bid, i.e. when the "*Decision of the Tender Board*" was made on 02.10.2017, as seen from 1R2.

It is submitted on behalf of the 1st, 2nd, 4th-7th Respondents that the burden is on the Petitioner to prove the 9th Respondent had more than one shop in operation at the relevant time. As I have already explained, the same has been proved by the Petitioner to the satisfaction of this Court. This is a writ Court, not a

criminal Court for charges to be proved beyond reasonable doubt.

As seen from 1R2, the main concern of the Technical Evaluation Committee was to award the tender to the highest bidder. The 1st, 2nd, 4th-7th Respondents say in the written submissions “*The grand total of the bid made by the 9th Respondent was Rs.52,920,000, which is Rs.18,240,000 higher than the grand total of the bid made by the Petitioner.*” If the grand total of the bid is the decisive factor, disqualifications need not be set out. Clauses such as 7(iii) of P16A are incorporated into tender documents to minimise monopoly and maximise consumer protection. After all, the 1st Respondent is not a private enterprise, but a fully government-owned company.

In the facts and circumstances of this case, it is clear the 9th Respondent is disqualified from being awarded the tender in view of clause 7(iii) of P16A, which the Technical Evaluation Committee failed to consider. Hence, I take the view it is wrong on the part of the 1st Respondent to have awarded the tender to the 9th Respondent instead of to the Petitioner.

When the Petitioner filed this application on 11.12.2017, the Petitioner was not aware that the Agreement 1R1 had been signed on or around 10.11.2017, awarding the tender to the 9th Respondent.

I quash the Agreement marked 1R1, tendered with the motion dated 24.06.2020, by certiorari and compel the 1st and the 2nd Respondents by mandamus to award the tender to the Petitioner for five years from the date of signing the Agreement.

I grant the Petitioner the reliefs as prayed for in paragraphs (B)-(L) and (W) of the prayer to the petition.

The application of the Petitioner is allowed with costs.

Judge of the Court of Appeal

Arjuna Obeyesekere, J.

I agree.

Judge of the Court of Appeal