

A.K. Garg and anr. Vs. Kailash Nath and Associates and ors.

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Court : Delhi

Decided On : Jan-07-2002

Reported in : 2002IIIAD(Delhi)905; 2002(62)DRJ12; [2002]256ITR662(Delhi)

Judge : Satya Brata Sinha, C.J. and; D.K. Jain, J.

Acts : Income-tax Rules, 1962 - Rule 48-L; Income-tax Act, 1961 - Sections 269-UD(1), 269UE(2), (3), (4), 269-UG, 269-UG(1), 269-UH and 269-UH(2)

Appeal No. : CMs 11681 and 12908/01 in CWP 3139/93

Appellant : A.K. Garg and anr.

Respondent : Kailash Nath and Associates and ors.

Advocate for Def. : R.S. Endlaw, ; R.D. Jolly and ; Ajay Jha, Advs.

Advocate for Pet/Ap. : S.K. Jain and; Jaya Tomar, Advs

Judgement :

D.K. Jain. J.

1. 1. Petitioner, State Bank of India, by this writ petition seeks a writ of certiorari for quashing respondent No. 1's Thomas Cook (India) Limited (for the facility of reference hereinafter referred to as Thomas Cook) and respondent No. 3, M/s. American Express Bank Limited (hereinafter referred to as AEB), in respect of money exchange counters to be allotted to them at Indira Gandhi International

Airport, New Delhi.

Petitioner also seeks a writ of mandamus, directing Airports Authority of India not to forcibly dispossess the petitioner from the counters held by it or from taking any coercive measures, including disconnection of electricity supply or blocking of access etc. Further, petitioner seeks a writ for quashing of the notice inviting tenders, assailing condition No. 4, as arbitrary, discriminatory and unconstitutional.

2. The facts, as relevant for disposal of the writ petition are:-

Respondent No. 1, Airports Authority of India, had published a notice inviting tenders on 12.8.1999, for the Money Exchange Counters to be opened at I.G.I. Airport. The tenders were to be initially opened on 31.8.1999, which date was extended to 15.9.1999.

3. Petitioner claims to have been operating the money exchange counters/bureaus since 1959. It may be noted, at this stage, that the bids were invited were for a total of 15 counters at the Indira Gandhi International and Domestic Airports.

4. The notice inviting tenders (NIT) had set out the area of the counters in Sq.meter as also their location and the earnest money deposit required. The period of license was to be for five years. The salient terms in Clauses 3, 4 and 5 of the notice inviting tender, are reproduced for facility of reference:-

3.(a) the prospective agencies/Banks should possess minimum experience of 5 years of operating Money Exchange Counter at ports/Railways/Airports and should possess valid license from Reserve Bank of India to conduct the Money Exchange business at the Airport.

b) The tenderer should possess minimum experience of 15 branches including branches in India and abroad.

c) The tenderer participating in the tenders for International Airports viz. IGI Airport should have minimum annual turnover of Rs. 50.00 crores and Rs. 10.00 crores for domestic Airports.

d) The tenders must submit the satisfactory documents in support of their claim of fulfilling requirement at para-2 to 3 above.

4. The Agencies/Banks shall be required to quote the percentage on the Gross Turn over of the Money Exchange business.

5. In addition, the licensee shall pay to AAI the space rental @ Rs. 6,000/- per sq.mt. per month for each Counter located at Indira Gandhi International Airport i.e. Terminal-II and @ Rs. 3,500/- per sq.mt. per month for each Counter located at Indira Gandhi Domestic Airport i.e. Terminal-I. The license fee shall be subject to 10% annual compound escalation for subsequent years of the license.

The bidders were required inter alias to furnish the latest Income Tax Clearance Certificate.

5. The petitioner's grievance in the present case is that Respondent-Airport Authority of India had unduly delayed the issuance of the tender forms to it on the ground of petitioner having not paid its dues. Respondent No. 1, Airports Authority of India had initially claimed that there were dues to the extent of 1.23 crores. The exchange bureau dues itself were stated to be 72.10 lacs from the petitioner. However, on reconciliation of accounts they were found to be 36.13 lacs. In the event, the tender forms were issued only on 13.9.1999. Unfortunately, petitioner states that his Income Tax Officer was on leave, being on deputation on Election Duty. Hence, Income Tax Clearance Certificate could not be filed along with the bid on 15.9.1999. However, it is claimed that the same was furnished before opening of financial bid on 17.9.1999.

Petitioner's grievance is the non-consideration of its bid. Apart from the Income Tax Clearance Certificate, having not been filed along with the bid, petitioner is found not to have complied with condition No. 4. It required the bidder agencies/banks to quote a percentage of Gross Turn over of the Money Exchange business, Clause 5, as noticed earlier, required the licensee to pay the space rental @ Rs. 6,000/- per sq.mt, as prescribed for the International Airport i.e. Terminal-II and Rs. 3,500/- per sq.mt. for the domestic Airport i.e. Terminal-I with stipulated escalation.

6. The petitioner had bid for 3 counters but quoted zero percentage of the Gross Turn over. Reference is invited to page 21 to 23 of the paper book. In the annexures, accompanying quotation, petitioner stated that they were doing this because, 'presently our operation at IGIA Exchange Bureaux are not viable: hence our inability to quote a percentage on turnover..... Lastly, given the time tested experience of working and as such, we are not in a position to quote any percentage on Gross Turnover as of now. We shall, however, be willing to discuss this poing any time.'

7. It is the petitioner's case that Airport Authority of India in view of the petitioner not having furnished the Income Tax Clearance Certificate along with the bid, and for not having quoted a percentage of the Gross Turn over, did not evaluate and consider the petitioner's bid and instead has awarded the counters to Thomas Cook and AEB. Petitioner assails this award of counter space to Thomas Cook and AEB, who according to the petitioner did not meet the eligibility condition of requisite experience of five years as illegal. Petitioner also assails condition No. 4, requiring the bidders to bid a percentage of the Gross Turn over as arbitrary, illegal and beyond the competence of the Airport Authority under the Airport Authority Act. The said condition is also assailed as arbitrary, discriminatory and having been introduced with a view to favor Thomas Cook and make out a monopoly in its favor.

8. Though the invitation of tender was issued in August, 1999, petitioner filed the present writ petition only in December, 2000. While issuing notice in the writ petition, it was directed that the tender may be processed and the award of the tender would be subject to the outcome of the writ petition. As an interim measure, respondent/Airports Authority of India was directed not to evict the petitioner from the three counters being operated by it. During the course of proceedings, petitioner was directed to hand over possession of three out of six counters, which it was holding. Petitioner also sought time to find an amicable resolution through the intervention of civil Aviation Ministry. Petitioner agreed to and was directed to pay same charges, as were being paid by successful bidders, to whom counters were allotted.

9. Respondent/Airport Authority of India, during the course of proceedings, also informed that they had identified and located three more counter spaces, for which fresh tenders were to be issues apart from the 15 counters, covered under the NIT. Respondent/Airports Authority of India offered that the petitioner along with the other eligible bidders could bid for the three counters newly identified. Petitioner, however, desired a direct allotment. Amicable resolution was not feasible. Hence, petitioner persisted with challenge to condition No. 4 of the tender. Counsel for the parties were thereafter heard and written submissions were also filed by the parties.

10. Learned senior counsel for the petition- er, Mr. Trivedi, submitted that petitioner/SBI had been operating Money Exchange Bureau since 1959. Petitioner had also been acting as bankers to the Custom Department for receiving of confiscated currency and transacting miscellaneous business. It was urged that petitioner had been rendering excellent services without profit motive in mind and has extended its network deploying requisite staff round the clock for, 365 days in a year at the Airport. Petitioner claims to have contributed to the growth of IGI Airport on account of the service being provided by it. Petitioner is now sought to be evicted from the Airport and its counters are sought to be given to Thomas Cook and AEB, who were not even eligible to bid for the tender.

11. As regards the non-furnishing of the Income Tax Clearance Certificate, Mr. Trivedi, urged that the initial date for receiving bids was up to 31.8.1999, which was extended up to 15.9.1999. The tender documents were not supplied to the petitioner on the plea that State Bank of India was a defaulter. petitioner deposited Rs. 16 lacs on 27.8.1999. It was as result of the efforts of the petitioner that account were reconciled and on receiving the reduced demand, petitioner cleared the dues. Learned senior counsel for the petitioner submits that considering the financial stability and availability of resources, the non- submission of the Income Tax Clearance Certificate along with the bid documents was not critical. In any case, in view of the long relations with the Authority and the statutory status of the Bank, there was substantial compliance as the Income Tax Clearance Certificate was submitted before the opening of the bid. Petitioner in this regard placed reliance on M/s. G.J. Fernandez v. State of Karnataka and Ors. : [1990]1SCR229 .

M/s. Poddar Steel Corporation v. M/s. Ganesh Engineering Works and Ors. : [1991]2SCR696 , Tata Cellular v. Union of India : AIR 1996 SC11 .

12. Counsel submitted that considering that the petitioner Bank had been operating the foreign exchange counters for over 40 years despite incurring losses due to its commitment to the growth of national economy, the bid of the petitioner ought not to be held non-responsive on a hyper technical view of non-submission of Income Tax Clearance Certificate along with the tender documents.

13. Learned counsel assailed Condition No. 4. which required a percentage of the Gross Turnover to be quoted as arbitrary and irrational. He submitted that the requirement to quote a mere percentage without estimated or actual turnover being given was illusory and vague. It could not form any rational basis for evaluation of the financial bid. By way of illustration, learned counsel submitted that even a higher percentage of turnover was quoted, yet with a low actual turnover, resulting net yield could be lower than a case, where a lower percentage was quoted but the actual turnover was higher. He submitted that it was not clear whether the collection by the petitioner on behalf of Custom Department was to be included in the turnover of foreign exchange business, since this resulted in a higher turnover for the petitioner bank. He submitted that Condition No. 4 had been drafted in a manner so as to give AED and Thomas Cook a distinct advantage and to the prejudice of the petitioner. It denied the petitioner a level playing field. Thus even with a lower percentage, it would result in a higher outflow from petitioner as against Thomas Cook and AEB, who could quote a higher percentage with a lower actual turnover.

14. Learned senior counsel for the petitioner next urged that Condition No. 4 of the tender which permitted respondent No. 1 to collect and recover a percentage of the Gross Turnover was illegal as respondent No. 1 did not have any statutory power under the Airports Authority of India Act to collect such amounts. In this connection, he relied on Clauses 'a' to 'd' of Sub-section 1 of Section 22 of the Airports Authority of India Act, which empowered the respondent No. 1 to charge fees and rent with previous approval of the Central Government in respect of various activities, services and the amenities to be provided for the Aircraft

passengers at the Airport. The reading of these provisions would show that respondent No. 1 had the power and authority to charge fee or rent from the persons, who were given by the said authority any facility for carrying out trade or business at the Airport. However, it did not authorise or empower the authority to seek or recover a percentage of the Gross Turnover of the money exchange business and there was no provision in the Act to enable it to do it. He submitted that on a reading of Condition No. 5, it was clear that the amount being charged by way of percentage on Gross Turnover was something over and above, the amount being charged by way of license fee. Hence, its character was not that of rent or fee. He referred to Condition No. 5, which in terms provided that, 'In addition to the amount being charged by way of license fee.....'

15. Learned counsel further submitted that Condition No. 4 was vocative of fundamental rights and Article 14 of the Constitution of India. Hence, waiver or estoppel or acquiescence would not come in play. Participation by the petitioner in the bid would not result in waiver or estoppel to come in the way so as to defeat constitutional and fundamental rights of the petitioner. He placed reliance on The Ahmedabad St.Xavier's College Society and Anr. v. State of Gujarat and Anr. : [1975]1SCR173 , Nar Singh Pal v. Union of India and Ors. : (2000)ILLJ 1388 SC . Learned counsel submitted that petitioner would be entitled to challenge such a condition as overriding public interest was involved. He also placed reliance on Basheshar Nath v. Commission or Income Tax. Delhi and Rajasthan and Anr. : [1959]35ITR190(SC) , Amrit Lal Berry v. Collector of Central Excise New Delhi and Ors. : (1975)ILLJ144SC . Mahindra and Mahindra Ltd. v. Union of India and Anr. : [1979]2SCR1038 . Shree Mahavir Oil Mills and Anr. v. State of J & K and Ors. : (1996)11SCC39 , Bagh Amberpet Welfare Society v. Tulsi Cooperative Housing Society and Ors. : [1990]3SCR782 . Learned counsel submitted that where the terms of the tender are wholly arbitrary these could be judicially reviewed and the Court could step in.

16. Mr. T.R. Andhiyarjuna, senior counsel for the respondent No. 2, opposed the writ petition on the ground that the party which participates in the tender and take its chance and then fails in the tender, cannot be permitted to challenge the terms and conditions of the tender. He submitted that petitioner could not approbate or

reprobate. The challenge to Condition No. 4 as being arbitrary was an after thought. The bidder, which participated in the tender was bound by the terms of the tender and the Court should not encourage a subsequent challenge on grounds of hardship in complying with a tender term. He placed reliance on *India Thermal Power Ltd. v. State of M.P. and Ors.* : [2000]1SCR925 .

Learned counsel also assailed the petitioner corporation as being highly belated. The tenders were invited in August, 1999 while the present writ petition had been filed in December, 2000. Learned senior counsel submitted that the submission of the learned counsel for the petitioner that SBI as a successor of the Imperial Bank of India and as general agent of RBI enjoy special status was devoid of any merit. The State Bank of India in the present economic scenario was not entitled to any special treatment and was squarely required to meet the tender conditions. The policy was to treat everybody equally and provide a level playing field for all. He next submitted that any challenge to the tender condition should have been done by the petitioner before participating and not after submission of bid. Learned counsel also refuted the argument that collection of custom duty put the State Bank of India on any disadvantage. The payment of customs duty by any foreigner would be in foreign exchange and by an Indian in rupees. These could be done at any counter. In any case, petitioner's reasons for not quoting the percentage of turnover was the non-viability of the operation and there running into losses, as stated by them in the bid and not the now alleged arbitrariness or irrationality of the provision, as is sought to be made out. Learned counsel also submitted that the submission with regard to the TCIL Cook not being eligible was wholly mis-placed and devoid of merit. He submitted that Clause 3(a) did not require experience of money exchange business in India. The reading of Clause 3(d) made it abundantly clear that experience was in respect of India and abroad. He submitted that TCIL had begun its operations in Delhi from 15.11.1994. TCIL this fully fulfilled the requirement of experience of five years by September, 1999, when the bids were to be opened. In any case, TCIL was a part of the Thomas groups of Companies and Thomas Cook Overseas had been operating in India for over a century. TCIL was incorporated pursuant to the requirement of dilution of equity. Thomas Group of Companies hold 40 per cent of equity in TCIL. Six out of 10 Directors in TCIL are nominated by Thomas Group of Companies. The

experience of Thomas Group of Companies at International Airport throughout the world was unparalleled having a network of 167 money exchange bureaus. The expertise and know-how of Thomas Group of Companies was admittedly available to TCIL. In these circumstances, it could not be said that TCIL was not eligible or lacked the experience, as required in terms of the tender condition.

17. Learned counsel also placed reliance in this regard on New Horizons Limited and Anr. v. Union of India and Ors. : (1995)1SCC478 . TCIL also has the requisite experience, turnover and was fully eligible. Learned counsel also submitted that the plea of Condition No. 4 not being valid due to lack of power and statutory authority to claim any amount by way of percentage of gross turnover was misconceived. Section 22 of the Airports Authority of India Act, did not come into play as what was being quoted was license fee and rent. The percentage of the gross turnover was a mere quantification of the same.

18. Mr. Lalit Bhasin, learned senior counsel for the respondent/AEB while reiterating the arguments in opposition to the writ petition, as done on behalf of M/s. TCIL added that significantly, petition was not praying for acceptance of its bid in the writ petition. The challenge was only to Condition No. 4 and the acceptance of the bid of respondent Nos. 2 and 3. It was thus obvious that petitioner simply wanted continuance of its license and occupation of the counters on existing terms, without any competitive bids. Petitioner had no rights to continue on the basis of past operation. He submitted that the arguments of the petitioner smacked of the imperial colonial tendency. It was fallacious on the part of the petitioner to contend that only SBI could provide the service for the benefit of the economy. He submitted that Airports Authority of India was perfectly justified in calling for tenders and awarding the contract to the most competitive bidders. The challenge to the tender condition is also misconceived. He submitted that AEB had the requisite experience of 75 years in India and abroad. He submitted that Condition No. 4 was in consonance with Section 11 of The Airports Authority of India Act, which enjoined upon the Authority to carry on its functions in accordance with business principles.

19. Mr. Y.K. Kapoor, appearing on behalf of the Airports Authority of India also adopted the submission made by Mr. T.R. Andhiyarjuna, senior advocate. In addition, he submitted that challenge to Condition No. 4 was wholly misconceived. Respondent/AAI was fully entitled to manage the airport, as required under Section 11. The management of airports required licensing of space and granting of franchise etc. He submitted that there was no vagueness or arbitrariness with regard to the percentage of gross turnover to be quoted. He explained that the location of each of the counters for which the bid was invited was known and identified. Based on the area and location of the counter, the flow of incoming and outgoing passengers, the volume of business could be reasonably estimated by those in the field. Hence, it could not be said that there was any arbitrariness or vagueness in the tender Condition No. 4. It provided a level playing field for all. He argued that petitioner/SBI while talking of the level playing field in fact is clamouring for a reservation or preferential treatment. He submitted that this was obvious by the SBI declining the offer to quote for three new counters, which were available. He submitted that the real reason for not responding to Condition No. 4 was disclosed by SBI in its bid i.e. of making losses. State Bank of India was willing to discuss the matter at any subsequent time, which would imply that at present they were not willing to bid but after discussion may bid. In fact this became apparent by the petitioner itself having quoted a percentage of the gross turnover for its tender in Chennai. He, therefore, prayed for dismissal of the writ petition.

20. Having heard learned counsel of the parties and noted and recorded their respective submissions and the authorities relied on by them, I am not persuaded to accept the submission of the learned counsel for the petitioner and the reasons for this are briefly given below:-

The respondent/AAI has not considered the petitioner's bid as responsive. Firstly, due to its failure to submit the requisite Income Tax Clearance Certificate along with bid documents. Here the justification given by the petitioner for not filing the Income Tax Clearance Certificate was that the issuance of tender documents was delayed due to respondent/AAI claiming that there were over dues to be cleared by petitioner. Taking the petitioner's own case, the payments were made by it after

re-conciliation of accounts and after some delay the tender document was issued. In such circumstances, the respondent/AAI cannot be faulted with for insisting on compliance with the terms and conditions of the tender conditions. It was for the petitioner to have cleared up its dues on time. However, this aspect need not detain us. This is because even if the delayed submission of the Income Tax Clearance Certificate was to be condoned or overlooked, the bid as submitted by the petitioner was otherwise not in compliance with the tender' terms and conditions.

This is on account of non-compliance with the essential terms and conditions of the tender, namely Condition No. 4. Condition No. 4 required the bidder to quote a percentage of the gross turnover. It would be relevant to reproduce the response of the petitioner to this condition.

'A Presently our operations at IGIA Ex- change bureaux are not viable; hence our inability to quote a percentage on turnover.

B. Unlike other Full Fledged Money Chang- ers/Authorised Dealers, we are the largest Bank in the country, both in terms of network in and outside India and the Balance Sheet strength. A Bank whose guarantee and finan- cial strength has been well respected/accept- ed and perhaps the only one in India, which has been rated by International rating by agencies, like Moodys and Standard & Poor. As other financial institution on the same lines. Further, we have been maintaining longest relationship with your organisation not only at Delhi Airport, but also else- where, including for your projects abroad. It is our firm belief that this relationship should be allowed to be further built on for the mutual business growth in the future.

Lastly, given the time tested experience of working at the Airport, we have been making losses and as such, we are not in a position to quote any percentage on GOT as of now. We shall, however, be willing to discuss this point any time.....'

21. From the foregoing, it would be seen that the petitioner had declined to quote based on its financial strength and standing and relation- ship with the respondent organisation. The specif- ic reason given was that it had been making losses at the

airport and it was not in a position to quote any percentage on the gross turnover as of now and that it shall be willing to discuss the said point at any time.

22. I find considerable merit in the submission of the senior counsel, Mr. T.R. Andhiyarjuna that petitioner, who declined to abide by the tender terms and quoted zero percentage of the gross turnover, was clearly an unsuccessful bidder. Further questions need not arise as SBI could not claim any right for its quotation to be accepted. Petitioner had simply failed to comply with Condition of the tender and was thus ineligible. Petitioner could not be permitted to plead any special hardship or equities. Reference is invited to *India Thermal Power Ltd. v. State of M.P. and Ors.* (Supra). para 17. There is also considerable merit in the submission of the respondent that petitioner, who failed to bid in a responsive manner but took its chance, cannot be subsequently permitted to challenge belatedly, nearly after a period of one year and four months, the conditions of tender. I am of the view that although the writ petition is liable to be dismissed on the short ground of delay and laches on the part of the petitioner as well as petitioner having given a non-responsive bid since the parties were heard on the challenge to Condition No. 4 of the Notice inviting tender, I am adverting to the same briefly.

23. The challenge by the petitioner, as noted earlier, is on the ground that the said condition was arbitrary and vague. The plea was that without estimated or actual turnover being indicated, the percentage being quoted was illusory. This argument does not appear to be tenable in the present facts and circumstances. The location and size of each of the counter had been identified. The bidders were expected to and specially the petitioner, who had been operating at the airport would certainly have an idea of inflow and outflow of the passengers and the volume of transactions that may be expected from a counter at a particular location. It is also pertinent to notice that other bidders also have quoted a percentage after estimating what they expected to be the turnover or yield from a particular counter. It is also significant that the petitioner itself has quoted a percentage of turnover for its tender at Chennai. But in the present tender he quoted a zero percentage. In these circumstances, petitioner's case that the condition was arbitrary and irrational has to fail. This is especially so when the real

reason for the petitioner for not quoting was the financial losses and its request for special treatment and status in its dealing with respondent No. 1. Petitioner has knowingly participated in the process of bidding and after becoming unsuccessful, in my view, is precluded even on equitable consideration from making a challenge to the notice inviting tender. A party cannot be permitted to approbate or reprobate. Reference in this connection may be invited to *Nagubai Ammal and Ors. v. B. Shama Rao and Ors.* : [1956]1SCR451 and *M/s. New Bihar Biri Leaves Co. and Ors. v. State of Bihar and Ors.* : [1981]2SCR417 , where the Court approved the following principle:-

'A person cannot say at one time that a transaction is valid and thereby obtain some advantage to which only he be entitled on the footing i.e. valid and then turn around say it is void for the purpose of securing some other advantage i.e. to approbate or repro- bate the transaction.'

24. There is also no merit in the contention of the petitioner that since there cannot be waiver or estoppel against enforcement of funda- mental rights. Petitioner is entitled to challenge the said condition. In *New Bihari Bididi Company (supra)*, the Supreme Court held that while it was true that a person cannot be debarred from enforc- ing his fundamental rights on the ground of estop- pel or waiver but the aforesaid principles which prohibits a party to a transaction from approbat- ing a part of its condition and reprobating the rest is different from the doctrine of estoppel or waiver. In the present facts and circumstances, as noted above, in my view, firstly, Condition No. 4 prima facie, does not suffer from any arbitrari- ness or irrationality, though it could have been happily worded and made more precise.

25. The petitioner having failed to chal- lenge it before bidding and thereforee for a considerable period of time having itself accepted the same condition in another tender, cannot be now permitted to assail the same. The submission of the petitioner that AAI cannot recover any amount other than by way of license fee and hence Condition No. 4 requiring a bidder to pay a per- contagia of gross turnover contravenes the provi- sions of The Airports Authority of India Act is again without merit. As noticed earlier, Section 11 enjoins upon the authority to act on business principles. Section 22 of the Airports Authority of India Act, is an enabling

Section, which allows the authority and confers the power to charge rent and fee for the facility in the airport i.e. landing, housing parking, traffic services et. Section 22 cannot curtail or interfere with the right of the Authority to invite complement bids to allot space. Moreover, the charging of a license fee having a fixed element computed on the basis of per sq.foot as well as a variable element computed on the basis of turnover, will not make change the character of the license fee or the consideration payable for the counters to be allotted.

26. I also find that the submission of the petitioner regarding the respondents being ineligible devoid of merit. There was no requirement in the tender for experience in India. The experience abroad could also be reckoned. Moreover, as far as M/s. TCIL is concerned, the Thomas Group of Companies had 40 per cent equity in M/s. TCIL with six out of ten Directors being engaged by the Thomas Group of Companies. Applying the case of M/s. New Horizons Ltd.-(supra) , the experience and expertise of Thomas Group of Companies, which are a part of M/s. TCIL, has also to be reckoned as experience of M/s. TCIL. Similarly, there is also no merit in the contention of AEB not being eligible. In the result, the writ petition fails and is dismissed.

1. Respondents No. 1 and 4 in the titled writ petition, in their respective applications, being CM Nos. 11681/01 and 12908/01 seek modification of the order, dated 5 October 2001, passed by this Court, while disposing of petitioners' application (CM 9134/01). Since the modification/directions sought for in the applications are in substance similar, both the applications are being disposed of by this common order.

2. To understand and appreciate the controversy raised in the applications, it would be necessary to note a few background facts.

(sic)Respondent No. 1, a builder (hereinafter referred to as the vendor) had entered into an agreement dated 25 June 1991 with the petitioners (hereinafter referred to the vendees) for the sale of residential flat No. 2 on the 4th Floor of the multistoreyed building known as Neelgiri Apartments, situated at 9, Barakhamba Road, New Delhi. The vendor and the vendees filed a statement in form No. 37-I prescribed under Rule 48-L of the Income-tax Rules, 1962 and as required under

Chapter XX-C of the Income-tax Act, 1961 (for short 'the Act'). The Appropriate Authority under the Act, respondent No. 4 herein, vide order dated 28 May 1993, decided to purchase the said flat and, thus, passed the order under Section 269-UD(1) of the Act. The vendees challenged the said order by filing the present writ petition, inter alia, assailing the order on the plea of non-compliance with the provisions of Section 269-UG of the Act. The writ petition was finally disposed on 17 December 1997 [Since reported as Kailash Suneja and Ors. v. Union of India and Ors. : [1998]231ITR318(Delhi)], wherein the order passed by the Appropriate Authority was quashed. While holding so, K. Ramamoorthy, J. did not go into the question of alleged non-compliance with the provisions of Section 269UG of the Act but Y.K.Sabharwal, J. (as his Lordship then was) accepted the plea and held that the balance sale consideration was tendered by the Central Government to the vendor on 6 September 1993, which was beyond the stipulated period under Section 269-UG(1), thereby attracting the rigours of Section 269-UH, resulting in the abrogation of the purchase order. The Appropriate Authority unsuccessfully challenged the said order in the Supreme Court in its appeal (Civil Appeal No. 6048/98) which was dismissed on 4 May 2001, upholding the view taken by Y.K. Sabharwal, J.

3. According to the vendees, on the dismissal of the said appeal by the Supreme Court, they wrote to the Appropriate Authority to deliver to them possession of the Property but having failed to get any response thereto they filed an application (CM 9134/2001), seeking a direction to the Appropriate Authority to accept Rs. 23.10 lakhs, the amount paid by it to the vendor and to hand over physical possession of the property to them. The application was disposed of by this Court on 5 October 2001 with the following order:

Heard. On payment of the balance apartment consideration to the authorities within two weeks from today, possession of the property in question shall be handed over to the vendee, petitioner in the writ petition. If the Department has any claim regarding interest so far as the vendor is concerned, it is open to it to take action as is available in law. Though a stand was taken by learned counsel for the respondent that physical possession was not handed over, we find this stand to be clearly untenable in view of what has been stated in order dated 16th

March, 1994. If any other amount is payable by the vendee to the vendor, that is a question with which we are not presently concerned. Application stands disposed of.

4. As noted above, the present applications have been filed for modification of the said order. The vendor in its application seeks clarification to the effect that : (1) the claim, if any, of the Appropriate Authority towards interest on the amount paid is against the vendees only and not against the vendor and (2) that nothing contained in order dated 5 October 2001 entitled the petitioner to receive possession of the flat from the vendor without paying the dues thereof. The Appropriate Authority, on the other hand, in their application seek a direction to the vendee and/or the vendor to pay interest @ 18% per annum on Rs. 23,13,994/-, the amount paid to the vendor by the Central Government for the period from 1 September 1993 till the date of realisation of the amount.

5. Having heard learned counsel for the parties, we are of the opinion that the afore-extracted order requires a little modification/clarification, more so to shorten the litigation between the parties.

6. From a reading of the aforenoted order of the Supreme Court made in Appropriate Authority's appeal, it would appear that the only issue urged and decided by the Apex Court was with regard to the applicability of Section 269-UH on the facts in hand and the Court held that the Section was clearly attracted. thereforee, the said order hardly leaves any room for doubt that on account of failure on the part of the Central Government to tender/pay a part of the consideration, required to be tendered/paid to the vendor within the specified period, the purchase order stood abrogated and the property in question re-vested in the vendor. In the event of such a situation, Sub-section(2) of Section 269-UH provides that the Appropriate Authority is to make, soon thereafter, a declaration to that effect and serve a copy of such declaration on the owner-transferor and deliver or cause to be delivered possession of the property to the transferor or to the person(s) from whom possession was obtained by it. These are mandatory statutory requirements and the Appropriate Authority is bound to comply with the same. The stand of the Appropriate Authority that it was not in possession of the

property is untenable, particularly in view of the observations made in the order dated 5 October 2001 and the fact that the Central Government had even issued an advertisement for auction of the property in question. It was only on a motion by the vendees that the auction was stayed vide order dated 16 March 1994. It is difficult to comprehend that without taking over possession, symbolic or otherwise, the Central Government would ever put the property to auction.

7. The question which now remains to be considered is as to whether the Appropriate Authority is entitled to claim interest on a part of the consideration paid by it to the vendor, either from the vendor or the vendees, for the period the amount remained with the vendor and whether the Appropriate Authority could be held responsible for the delay in delivery of possession of the property, as alleged by the vendees.

8. Having given our thoughtful consideration to the rival submission, we are of the view that it would not be fair and proper to lay any fault on either of the three parties. So far as the Appropriate Authority is concerned, we have no reason to doubt its bonafides. It was acting in the discharge of its statutory duties and could not be blamed for passing order for pre-emptive purchase of the property by the Central Government. Merely because its order was ultimately set aside, it cannot be said that its action was malafide. So far as the vendor is concerned, it again cannot be held liable for payment of any interest to the Appropriate Authority inasmuch as it had to receive total consideration for the property in terms of the agreement to sell dated 25 June 1991. Since as per Sub-section(2) of Section 269-UE, the Vendor had to surrender or deliver possession of the property to the Appropriate Authority and no complaint in this respect was made by the Appropriate Authority warranting coercive action in terms of Sub-section(3) and (4) thereof, there was no reason why the vendor should not have received the balance sale consideration. Furthermore, if the vendor is now called upon to pay interest as demanded by the Appropriate Authority, for no fault of theirs, a substantial part of the sale consideration would be lost to the vendor. Similarly, in our view, the vendees cannot be blamed for protecting their interest in the property by taking recourse to their legal right to challenge the order of pre-emptive purchase by the Central Government. In fact they ultimately succeeded in getting

the order quashed. Indeed, but for their action in getting the auction stayed, the property would have gone out of their hands, or in any case third party rights would have emerged. At best, the vendees could, perhaps, have derived some benefit in the bargain for not parting with the balance sale consideration which remained with them and presumably they could have earned some interest on it. We feel that the deprivation of the use and fruits of the property to vendees was greater loss to them as compared to the amount of interest which they could have earned. As observed by the Apex Court in *Rajalakshmi Narayan v. Margaret Kathleen Gandhi and Ors.* : [1993]201ITR681(SC) the question of grant of interest has to be decided on the facts and circumstances of a particular case, considering the equities of the matter. In our view, on the facts in hand, equity does not warrant to call upon the vendees to pay interest to the Appropriate Authority. Under the circumstances, we are of the opinion that the prayer of the Appropriate Authority (CM 12908/01) for direction to the vendor or the vendees to pay interest cannot be granted.

9. As regards the apprehension of the vendors that the vendees are trying to take possession of the property in question without paying the dues, we do not consider it necessary to deal with the same inasmuch as the order passed under Section 269-UD(1) having been declared as abrogated and the property having re-vested in the vendor, in terms of Section 269-UH of the Act, there is no impediment left in now giving full effect to the agreement to sell dated 25 June 1991. However, to avoid any further dispute it may be clarified that since the vendors had received the balance sale consideration from the Appropriate Authority, they will not be entitled to charge any interest on the said amount for the period the order passed by the Appropriate Authority under Section 269UD(1) remained subjudice either before this Court or the Supreme Court. The order of pre-emptive purchase made under Section 269UD(1) of the Act having been abrogated, all restrictions imposed by Chapter XX-C of the Act disappear and the rights and liabilities of the vendor and the vendees shall obviously be governed by the agreement of sale entered into by them.

10. Both the applications stand disposed of. Order dated 5 October 2001 is modified to the extent that the Appropriate Authority shall issue the requisite

declaration under Section 269-UH(2) of the Act and deliver or cause to be delivered possession of the property in question to the vendor within eight weeks from date of this order. On the Appropriate Authority complying with these directions, the vendor will take appropriate steps to deliver physical possession of the immovable property to the vendees in terms of the said agreement to sell.

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