

(2002) 09 DEL CK 0155

In the Delhi High Court

Case No : C.W.P. No's. 95 and 496 of 2002

Bharat Catering Corporation and Another and Vardan
Restaurant and Caterers and Another

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 26-09-2002

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Citation : (2002) 100 DLT 640

Hon'ble Judges : S.B. Sinha, C.J;A.K. Sikri, J

Bench : Division Bench

Advocate : P.P. Malhotra and H.K. Puri, for the Appellant; E.X. Joseph Abhay N. Das and Arati Mahajan for R-1 to 3, V.K. Makhija and Akshay Makhija, for R-4, for the Respondent

Final Decision : Disposed Off

Judgement

S.B. Sinha, C.J.—These two writ petitions involving common questions of law and fact were taken up for hearing together and are being disposed of by this common judgment.

2. The basic fact of the matter, however, is being noticed from C.W.P. No. 95 of 2002.

The petitioner, which is a partnership firm, is engaged in the business of catering since 1988. It is admitted that the Railways provide catering services classified in major and minor services. Catering services in passenger trains constitute major services.

Allegedly according to the policy framed by respondent No. 1 herein, i.e., "New Catering Policy, 1992", license was to be given to private caterers for five years with provision for renewal and extension thereof for a further period of five years subject to satisfactory performance of the licensee during the period of agreement.

The respondent No. 3 acting for and on behalf of the respondent No. 1 issued advertisement in the "Hindustan Patna" on 13.11.1996 inviting one common tender for providing catering services in Gorakhpur-Cochin Express now known as Gorakhpur-Trivandrum Express; Barauni-Cochin Express; Gorakhpur-Hyderabad Express; and Gorakhpur-Bangalore City Express up to 27.11.1996. The petitioner allegedly submitted tender for the aforesaid four integrated train services. The Railways allegedly vide letter dated 27.01.1997 allotted the pantry car contract to the petitioner. On or about 29.01.1997 an agreement in respect thereof was also entered into between the petitioner and the Union of India. The tenure of said agreement admittedly was for a period of five years, i.e., from 11.02.1997 to 10.02.2002.

In pursuance of the Cabinet decision dated 23.03.1999, the Indian Railway Catering and Tourism Corporation Ltd., (in short, "IRCTC") was incorporated as a Government company on 27.09.1999 in order to upgrade, run and manage the catering and hospitality services at stations, on trains and on other establishments of the Indian Railways in addition to manage and undertake the marketing of existing railway hotels, rail yatri niwas, retiring rooms, etc. In order to achieve and aforesaid purpose, IRCTC entered into a Memorandum of Understanding with the Ministry of Railways on or about 12.04.2001.

Allegedly in order to fulfill the mandate given by the Cabinet, Ministry of Railways, the Railway Board took a policy decision that in future the matter of grant of licenses of major catering/vending units including the existing contracts (after expiry of the present term) would be proceeded and awarded by IRCTC. The said decision was circulated to all the General Managers of Indian Railways and the Managing Director of IRCTC vide letters dated 24.07.2001 and 22.10.2001.

3. The aforesaid decision causing change in the catering Policy, 2000 has been challenged by the petitioners in these writ petitions.

4. We may notice that although there did not exist any clause for renewal of license in the terms and conditions of the license, such a provision existed even under the old policy, which reads thus:-

"14.6.1 The tenure of license for major units will be five (5) years. There should not be an automatic renewal. However, railways reserve the right for renewal of license only once for a second term of five (5) years in the case of satisfactory performance."

5. The Cabinet held its meeting in the month of March, 1999 and arrived at a decision having regard to the position as it was obtaining then, namely, the decision of the Apex Court in K.J. John, Assistant Public Prosecutor, Grade-I, Palai Vs. The State of Kerala and others,

However, the Note prepared for consideration of the Cabinet dated 01.03.1999 has not been produced before us, which could have thrown much light on the

subject.

The said decision would clearly show that therein the Cabinet was considering cases where the catering activities of the Railways were being run departmentally or franchised. The petitioners had been given a contract. They were not providing any departmental catering service nor were they franchised. Their existence was absolutely separate and distinct from the Railway Administration.

Despite the fact that the fourth respondent herein has come into being as a public sector undertaking under the Ministry of Railways and its Memorandum and Articles of Association as well as Memorandum of Understanding between the Ministry of Railways and the fourth respondent having been formulated, a new policy decision had been taken; the relevant provisions whereof are:-

"14.2 Tendering System:-

It has been decided that catering licenses of major catering units will be awarded through open tender under a two-pocket system. Tenders will be invited by giving suitable notification in national and local newspapers. Pocket-A will contain technical offer and Pocket-B will contain the financial bid.

Award of license in case of major units will be done at the level of zonal railway Headquarters."

"14.10. Application of new policy to exist licenses.

New Catering Policy will take effect from the date of issue of this policy in case of all new catering/vending licenses. This will also apply in case of award of fresh license in the event of termination, non-renewal, vacation etc. of the existing licenses. However, in the case of existing licenses, which continue to provide satisfactory services, the licensees will be allowed to complete their present term subject to application of all other policy directives issued from time to time. Thereafter licenses of such existing licensees shall be renewable for such periods so that the total period of operation from the date of issue of New Catering Policy is five years on uniform basis. For instance in case of an existing license which is expiring, say in October, 2001, the license shall be renewable for a further period of 4 years beyond October, 2001 i.e. up to October, 2005. If a license is expiring, say in October, 2003, the same shall be renewable for a further period of 2 years i.e. up to October 2005. However such renewals should not be automatic and railways will ensure continuous monitoring of performance as per provisions contained in para 14.6.2 and para 14.6.4. All existing licensees may be advised in this regard."

The validity or otherwise of the said policy decision was the subject matter of a writ petition before the Kerala High Court, wherein the respondents stated as under:-

"12. The allegations and averments contained in Ground E of the O.P. are

unsustainable and baseless. The contention raised in the name of employees, is without any bona fides. As already stated herein above and as could be seen from Ex. P.1, the tender system is being adopted only in respect of the "major units". Thus in effect, vast majority of the catering units are left untouched as far as this aspect is concerned for the time being. Even in the major units, the existing licenses can continue for about 5 years more, in case their performance is satisfactory. [See Clause 14.10 in ex. P.1]. Under such circumstances, the existing licenses [who performance is satisfactory] are not under threat of any displacement in the near future. The baseless of the plea in the name of employees will be self evidence from what is stated above. "

6. The respondents, however, in their counter affidavit stated:-

"iv) That on the bare reading of order dated 24th July 2001 along with subsequent order dated 22nd / 23rd October, 2001 it is clear that instead of Railways, the management of Catering Units for awarding contract and supervision has to be taken by Indian Railway Catering and Tourism Corporation Ltd."

The stand taken by the respondent would further appear from the following circular letter:-

"GOVERNMENT OF INDIA

MINISTRY OF RAILWAYS

(RAILWAY BOARD)

No. 2001/TG.II/600/5

New Delhi, Dt. 24.7.2001.

General Manager

All Indian Railways.

Sub: Management of catering service by IRCTC Ltd.

As you are aware, Indian Railway Catering & Tourism Corporation Ltd. (IRCTC) has been set up to professionalize and upgrade catering services on Indian Railways. It has now been decided by board that in future all new licenses of major catering / vending units, as defined in the New Catering Policy, will be processed and award by IRCTC Ltd. However, zonal railways should finalize the allotment of catering / vending licenses wherever tenders have already been invited through newspaper and selection is under process.

Zonal railways should identify major catering/vending units, which will require allotment of fresh license and furnish a list of such units to MD / IRCTC with a copy of Tourism & Catering Directorate, Railway Board.

Please ensure compliance.

Sd/-

(P.N. SHUKLA)

Exe. Dir. (Tourism & Catering)

Railway Board."

The expression "new" and "fresh" employed in the policy decision are significant. The policy decision, Therefore, was required to be applied only in case of "new" and/or "fresh" licenses. The said terms have to be understood having regard to the expression used "existing licenses".

The statements, as noticed hereinbefore, would also demonstrate, as to how the Railway Administration understood the policy decision issued in October, 2000.

7. It is also relevant to notice that the High Court of Kerala while disposing of the said OMP observed:-

"44. The "tenure assurance" spoken to by Clause 14.6 and the application of new policy to the existing licenses, as pointed out by the Railway Administration is sufficient to cast away any apprehensions as regards members of the petitioner association who are already in the business. Clause 14.10 could be relevant to be specially highlighted which reads as following:-

"New Catering Policy will take effect from the date of all new catering / vending licenses. This will also apply in case of award of fresh license in the event of termination, non-renewal, vacation etc. of the existing licenses. However, in the case of existing licenses, which continue to provide satisfactory services, the licensees will be allowed to complete their present term subject to application of all other policy directives issued from time to time. Thereafter licenses of such existing licenses shall be renewable for such periods so that the total period of operation from the date of issue of New Catering Policy is five years on uniform basis. For instance in case of an existing license which is expiring, say in October, 2001, the license shall be renewable for a further period of 4 years beyond October 2001 i.e. up to October, 2005. If a license is expiring, say in October 2003, the same shall be renewable for a further period of 2 years i.e. up to October 2005. However, such renewals should not be automatic and railways will ensure continuous monitoring of performance as per provisions contained in para 14.6.2 and para 14.6.4. All existing licensees may be advised in this regard."

Thus practically the existing contractors also get an opportunity to continue up to October, 2005, and the period for revamping and equipping themselves have been adequately provided. We, Therefore, find that challenge on those lines are not impressive."

8. It is, Therefore, evident that had the aforementioned stand been not taken, the Kerala High Court could have gone into the question as regard validity and/or legality of the said policy decisions inasmuch as therein the provisions of paras 14.4 and 14.5 of the 2000 policy whereby and whereunder the license fee was

sought to be enhanced was questioned.

9. The aforementioned letter dated 22/23.10.2001 reads thus:-

"GOVERNMENT OF INDIA / BHARAT SARKAR MINISTRY OF RAILWAYS / RAIL
MANTRALAYA (RAILWAY BOARD)

No. 97 / TG--III / 600 / 12

New Delhi, 22/23.10.01

The General Manager,

All Indian Railways.

Sub: Management of catering services in all majors units by IRCTC Ltd.

In continuation to Board's letter of even number dated 24.07.2001 , Ministry of Railways has further decided that management of catering licenses of all major units such as all mobile units, restaurants / refreshment rooms at "A" Class stations, multi outlet food plazas and single outlet fast food centres will be taken over by IRCTC after the expiry of present term of the licenses of all such units. IRCTC will award fresh catering licenses of such units.

Zonal Railways should identify all such major Catering Units and draw out a list of such Units jointly by CCM (Catering) and Regional Manager, IRCTC or nominee of M.D. / IRCTC for taking over such units by IRCTC. Railways should also update their records to facilitate transfer of such units to the Corporation. licensees may also be advised accordingly.

This issues with the approval of Legal Directorate of Railway Board.

The instructions will come into force with immediate effect.

Kindly acknowledge the receipt of this letter.

(P.N. SHUKLA)

Executive Director

(Tourism & Catering)

Railway Board."

From the aforementioned letter dated 22/23.10.2001, it would, thus, appear that thereby the management of catering services was given to the fourth respondent. By reason of the said circular letter, the Railway Administration only decided to take over the management of catering services after expiry of the present term of the license. Under the old policy, the matter relating to renewal of the contract was to be dealt with by the Railway Department. Even, thus, the cases of renewals were also required to be dealt with by the fourth respondent.

Para 14.10 of the said policy, Therefore, cannot be said to be inconsistent with

the other paragraphs thereof. By reason thereof also, provisions have been made for grant of renewal of the existing licenses.

In the aforementioned situation, paragraph 2 of the said letter dated 22/23.10.2001 is not in consonance with the October, 2000 policy inasmuch as thereby the running business have been permitted to be taken over, which is not authorised in law.

10. The contention of the respondent to the effect that such a renewal was to be effected by asking the existing contractors to participate in the bid, in our considered opinion, is misconceived. The contract between the parties as was obtaining on the date when the 2000 policy came into force was personal in nature. Either by reason of the said policy, the contract was to be or not to be renewed. If it was to be renewed, only bilateral negotiation Therefore was permissible. Such renewal of contract in terms of the new existing policy was dependent upon the performance of contract. How and in what manner such performance of contract is to be judged had also been the subject matter of the modalities laid down therefore. For judging of such performance on the part of the licensees, inspection is made and annual reports are submitted by the competent authority, certificates Therefore are issued and in the event, the performance of any of the contractors is not up to the mark, the same is communicated to him. By the said methodology more or less the pattern adopted by an employer in the case of an employee is followed. If by reason of the said policy decision, the petitioners were entitled to renewal, their cases could have been considered Therefore only on the touchstone of the conditions precedent laid down therefore. It was not open to the respondents herein to take into consideration any other factor, which was not germane therefore.

11. A license granted in favor of a person may not be renewed, but he has a right to be considered therefore.

In Principles of Judicial Review by De Smith, Woolf & Jowell, published in 1999, it is stated:-

"Non-renewal of an existing license is usually a more serious matter than refusal to grant a license in the first place . Unless the licensee has already been given to understand when he was granted the license that renewal is not to be expected, non-renewal may seriously upset his plans, cause him economic loss and perhaps cast a slur on his reputation. It may Therefore be right to imply a duty to hear before a decision not to renew irrespective of whether there is a legitimate expectation of renewal, even though no such duty is implied in the making of the original decision to grant or refuse the license."

12. In D. Nataraja Mudaliar Vs. The State Transport Authority, Madras, , the Apex Court held:-

"7. ...The transport tribunals function quasi-judicially and this imports some imperative. You must tell the man whose fundamental right you propose to

negative the materials you may use in your decision. You must act on relevant considerations, properly before you, not on rumour or hearsay, ex cathedra assertions or inscrutable hunch.

8. The Authority must remember that a permit holder has an ordinary right of renewal unless it is shown that outweighing reasons of public interest lead to a contrary result. Permits are not bounty but right, restricted reasonably by the Motor Vehicles Act."

13. Renewal of a license, as is well known, is a valuable right. Such a valuable right could not have been denied to the petitioners herein arbitrarily. It can be refused only on cogent and valid grounds. Licenses are granted and renewed in terms of the provisions of a policy decision. The competent authority derives their power there under. They, thus, must act strictly in terms of the provisions thereof. Their actions must be fair, reasonable and equitable.

14. A policy decision, which is contrary to the statute, cannot be upheld. It may be that the doctrine of legitimate expectation may give way to public interest, but such public interest must exist. Although a public interest may prevail over the private interest, the same would require serious application of mind on the part of the appropriate authority where for it was obligatory on its part to give an opportunity of hearing to the petitioners.

15. The respondents further took a positive stand before the Kerala High Court. They could not resile there from.

Furthermore, their action is wholly contrary to or inconsistent with their solemn stand taken before a court of law. It must be deprecated in no uncertain terms.

16. It may be that in the fresh bid, the respondent No. 4 received offers for a much higher amount but that by itself would not head to the conclusion that the policy decision of the Railway Administration would not be given effect to.

17. Once it is held that the petitioners herein had a legal right to grant of renewal of the catering contract, the respondent No. 4 herein was bound to give effect thereto.

18. Doctrine of Legitimate Expectation is based on fairness. It is true that a writ of mandamus may not issue only on the basis of the said doctrine, but once it is held that the same was coupled with an existing legal right with a corresponding legal duty upon the respondents, a writ of mandamus may issue.

19. It will be appropriate to notice at this stage that the Patna High Court in CWJC No. 65 of 2000 (M/s. Poorvanchal Caterers v. Union of India), decided on 04.01.2001 did not go into the said question as the requisite plea of Legitimate Expectation was not raised.

20. It has further been brought on record by the petitioner that the respondents have renewed the existing contract of some caterers. No Explanation has been offered by the respondents as to why the petitioners would be differently treated.

21. It is also a well-settled principle of law that a valid policy decision adopted by the State must be given effect to. Any deviation or departure from the policy decision would attract the wrath of Article 14 of the Constitution of India (See *State of Mysore and Another Vs. H. Srinivasmurthy*,

22. In a case of this nature, thus, requirement of existence of the public law element for entertaining a writ petition is wholly satisfied.

23. For the reasons aforementioned we are satisfied that the action on the part of the respondents herein for awarding licenses through financial bidding was bad in law so far as the existing licenses are concerned. We hasten to add, however, that the existing contractors are not entitled to renewal of their existing contract as a matter of right but their cases are required to be considered subject to the fulfillment of the pre-conditions laid down therefore.

24. The decision of the Apex Court in *State of West Bengal and Others Vs. Niranjan Singha*, whereupon Mr. Makhija strongly relied upon, does not lay down any principle which would be inconsistent with any principle stated by us, in the fact of the present case.

25. Although having regard to the fact that these writ petitions should have been allowed, but a question arises whether that would be appropriate in the facts and circumstances of these cases. In these cases, third-party interests have already been created; a large number of contracts had been awarded and they must have invested a huge amount in carrying out the contract for the last few months.

This Court in exercise of its jurisdiction under Article 226 of the Constitution of India may mould the relief(s). Keeping in view the facts and circumstances of these cases, we are of the opinion that interest of justice would be sub-served if in stead and place of directing the respondents to renew contracts of the petitioners; some compensation is granted to them. We think that grant of 5% of the difference in the amount of fee, which was received by the respondents from new contractors vis. a vis. the amount, which had been paid by the petitioners by way of renewal fee, would sub-serve the interest of justice, leaving the parties to sue the respondents herein for other and further damages, if they desire so to do. It is directed accordingly. These writ petitions are, thus, disposed of. The respondents must also bear the costs of the writ petitions incurred by the petitioners, which is quantified at Rs. 10,000/-.