

(2001) 05 DEL CK 0021

In the Delhi High Court

Case No : IA No. 3075 of 2000 in Suit No. 610 of 2000

C.J. International Hotels Ltd. and Others

APPELLANT

Vs

N.D.M.C. and Others

RESPONDENT

Date of Decision : 18-05-2001

Acts Referred:

Arbitration Act, 1940 — Section 20
Army Rules, 1954 — Rule 66, 66(1)
Constitution of India, 1950 — Article 136, 166, 21, 227
Delhi Rent Control Act, 1958 — Section 14
Evidence Act, 1872 — Section 35

Citation : (2001) 60 DRJ 562

Hon'ble Judges : S.K. Mahajan, J

Bench : Single Bench

Advocate : Mr. M.S. Chandhiok, Mr. Prashant Pakiddey, Ms. Manmeet Arora and Mr. A.S. Chandhiok, for the Appellant; Mr. Mukul Rohtagi, Addl. Solicitor General and Mr. Arvind Shah, for the Respondent

Judgement

S.K. Mahajan. J.

1. plaintiff No. 1 is the owner of a five star hotel being run under the name and style of Hotel Le Meridian. The hotel is constructed on a plot of land bearing No. 8. Windsor Place, New Delhi. The land on which the hotel is constructed was taken from the defendant-NDMC on license basis for which is license agreement dated 16th April, 1981 was executed between the NDMC and M/S Pure Drinks New Delhi Limited. This agreement was substituted by another license agreement dated 14th July, 1982 between the plaintiff No.1 and the NDMC. The parties are governed by the license agreement dated 14 the July, 1982. Though it is the stand of the plaintiff in the suit that this agreement has been modified by few subsequent agreement, however, according to the defendant-NDMC, the parties continued to be governed by the agreement only an indulgence was shown to the plaintiffs to make payment of the license fee in Installments.

2. In or about 1989, a sum of more than Rs. 6 crores had become due from the

plaintiff to the NDMC and a notice dated 7th December, 1989, was , Therefore , sent by the NDMC to the plaintiffs to make payment of the arrears of license fee amounting to Rs.6,84,091,331.89 paise. plaintiffs were also called upon to show cause as to why the allotment/license of the hotel site in question be not cancelled due to non-payment of the license fee besides, dis-connection of electricity supply and taking action under the provisions of the public premises (eviction of Unauthorised Occupants) Act. By still another letter dated 6th march, 1990 the NDMC called upon the plaintiffs to stop the use of the plot of land Along with construction raised thereon for any purpose whatsoever and to hand over vacant possession of the same to the NDMC and further to pay the amount of more the Rs 13 crores being the arrears of license fee and other charges.

3. Upon the aforesaid threats being given, the plaintiffs filed a suit being Suit No. 1139/90 u/s 20 of the Arbitration Act, 1940 for appointment of an arbitrator. An application was filed in this suit for an ad-interim injunction. This application was dismissed by D.P. Wadhwa. J. on 16th October, 1990. While dismissing the application, the learned Judge observed as under:-

"Now in the present case before me, offers had been invited and that of the petitioner being the highest, was accepted. The license agreement with Pure Drinks is dated 16.4.1982. It was much after the license agreement with the Bharat Hotels Ltd. had been entered into. Then, as noted above, many meetings had been held by NDMC with for construction of hotel project and those meetings had been attended by representatives of Bharat Hotels Ltd. As well as the petitioner. As far back as in 1981 the petitioner was well aware of the license fee paid by Bharat Hotels Ltd. and yet it had agreed to offer at a higher rate. The land of the petitioner hotel is far better located than that of the Bharat Hotels Ltd. Rights of the parties even otherwise arise out of contractual obligations and any comparison with Bharat Hotels Ltd. is not only misplaced but thoroughly inappropriate. In the circumstances, NDMC, can't be restrained from exercising its rights under the license agreement on the failure of the petitioner to abide by the terms of the license agreement in making payments. Court would be loathe to exercise any discretion in favor a party in the grant of interim stay when it seeks to back out from its solemn obligation undertaken in a mutually agreed upon contract. The Court also cannot start with any presumption that a solemn obligation need not be adhered to on account of some specious plea. Here are two parties bargaining on equal termed. they have agreed to certain terms which deemed to them to be good. It is too late in the day for the petitioner to contend, that any terms under the lease agreement were unreasonable of wrong.

NDMC has been constituted under the Punjab Municipal Act, 1911 as extended to Delhi. It has various functions to perform as a local body. The license fee and other charges payable to the NDMC under the agreement form parts of its municipal funds. But for the claim raised by the petitioner moneys are certainly due to NDMC under the agreement. while granting moratorium of the payments falling due it was agreed that these payments will be made in equal half yearly

Installments and in case of delay interest was payable at the rate of 15% per annum. Now when the petitioner has itself given a go by to the agreement regarding payment of license fee and the license for revoked/cancelled on that account, the whole of the arrears of license fee with interest becomes due and payable to the NDMC. NDMC is a local body and funds needed for various functions to be performed by it under the Punjab Municipal Act. Balance of convenience certainly lies in favor of the NDMC. Further I am of the view that the disputes raised by the petitioner are not bona fide. Its only purpose appears to be in raising the disputes to delay the payment of lawful dues to NDMC under the agreement. Petitioner is using prime land where hotel building has been constructed without paying anything of it. It has offered to pay during the course of hearing only Rs. 1 crores only against an agree minimum amount of Rs. 2.68 crores. It has suppressed its accounts and has raised claims which are not tenable. It got extensions in the completion and commission of the hotel project and also moratorium on the license fee payable. When the hotel project got into operation and license fee became due and payable and moratorium ended, as it was only then it dawned upon the petitioner that the licensed fee was excessive or that it had claim for damages which points it never raised while seeking extension or moratorium. It was contended before me that the hotel of the petitioner Le Meridian was the best in the chain of hotels of similar names in the world over and that irreparable loss would occasion to the petitioner if NDMC was allowed to exercise its right to re-entry. I could not appreciate this type of argument. NDMC has invoked the provisions of the P.P. Act and it is not that it has taken the law into its own hands. Further if under the agreement a right accrues to NDMC on account of any default committed by the petitioner, the petitioner certainly cannot complain about that. Petitioner must have known the consequences of his default. Conduct of the petitioner does not commend to me and this conduct disentitles the petitioner to any discretionary relief.

I find that it is the petitioner who is in breach. It is utilizing land and building in breach of the agreement. Equity certainly is not in its favor. NDMC put trust on the representations of the petitioner and granted extension of time for completion and agreed to moratorium on payments running into crore of rupees and to accept the same in twenty half yearly Installments. It even agreed to forgo interest on the amount which had already fallen due and accepted the request of the petitioner to charge interest only if the Installments were delayed. It appears the petitioner never honestly intended to pay. This application is, Therefore, dismissed with costs, counsel fee Rs. 2,000/-.

4. An appeal was preferred against the judgment of D.P. Wadhwa. J. and during the pendency of the appeal, an out of Court settlement was arrived at between the parties which resulted in the execution of the supplementary agreement dated 11th March 1991. Since much emphasis has been laid by the plaintiff upon this agreement more particularly clause of the agreement, it will be useful to read some of the agreement, it will be useful to read some of the clauses to understand the real impact of the same.

"4. That the Licensee has already paid a lump sum Rs. one crore on 29.1.91. and a sum of the 54,26,348/- on 10.2-91 and has paid a sum of Rs 53,78,298/- on 10th March, 1991 along with execution of this supplementary agreement. Thereafter the licensee will pay a minimum amount of Rs. 45 lacs every months. This amount will be paid by licensee in a manner so as to square up this with a maximum period not exceed 180 months w.e.f. 1st April, 1991.

7. That the LICENSEE has agreed to withdraw all claims and/or counter-claims pending in any court, Judicial and/or quasi-judicial authority against the LICENSOR. The LICENSOR has also agreed to withdraw its claim preferred before the estate officer in respect of which schedule of payment has been mutually agreed to between the LICENSOR and the LICENSEES and further incorporated in this supplement to previous agreement. The licensee will be at liberty to make any representation in respect of the license fee which will be examined by the LICENSER on merits as and one it is so preferred.

8. That the LICENSEE will strictly adhere to the above schedule of payment in monthly Installments as contained in this supplement to Agreement. Non-payment of any Installment as per terms I conditions of this agreement will constitute breach of the terms and conditions of original license deed dated 14.7.1982. and the present Supplement to Agreement. It is further made clear that in case of default of any monthly Installment, the licensor will also claim further interest at the rate of 21% p.a. (as against 15% stipulated in license agreement dated 14.7.1982) along with the arrears and interest already agreed to in this Agreement and the entire amount will be claimed in lump sum.

9. This supplementary agreement will form an integral part of the license deed already executed by the LICENSOR and the LICENSEE, on 14.7.1982 and subsequent Supplement agreement executed on 20.7.1984, 20.11.1984 and 31.3.1987, the other terms and conditions will remain the same and are to be read in conjunction thereof and these will form a compact unit of the license deed dated 14.7.1982."

5. This agreement was followed by two further supplementary agreements dated 14th August., 1985 and 31st march, 1998 whereby the amount of Installment of Rs. 45 lacs mentioned in the 1991 agreement was increased to Rs. 60 lacs by the 1995 agreement and to Rs. 1 crore by the 1998 agreement. with the execution of 1991 agreement, the plaintiff withdrew all its respective claims, suits and appeals, etc. pending in different courts. The stand of the plaintiff is that the agreement was arrived at and the claims, suits, appeals, etc. pending in different courts were withdrawn by the plaintiffs on the understanding that the defendant-NDMC in terms of clause 7 of the agreement would examine the case of the plaintiffs of the agreement would examine the case of the plaintiffs on merit about the payment of license fee in respect of the hotel.

6. Immediately after the execution of the agreement, the plaintiff represented to the defendant-NDMC that it should not discriminate between different hotels

without objectively considering the submission made by the plaintiffs in relation to the charge of the higher license fee. The case of the plaintiffs is that despite various representations, the defendant-NDMC did not take a final decision on the representations of the plaintiffs in respect of license fee and the same was, therefore, not been examined on merits. In the meantime, the plaintiffs continued to make the payment of the license fee at the rate of Rs. 2.68 crores per year in terms of the 1991 agreement. It is the submission of the plaintiff that all dues towards license fee had been paid up to the year 2003. On 25th September, 1998, however, the NDMC gave another notice to the plaintiffs calling upon them to pay the arrears of license fee. It was stated that in case of entire outstanding dues were not deposited, action would be taken under the provisions of the Public Premises (Eviction of Unauthorised Occupants) Act against the plaintiffs. On 28th June, 1999 the NDMC sent a show cause notice to the plaintiffs calling upon them to deposit Rs 109, 82,16,368/- allegedly due to the NDMC up to 30th June 1999. This was naturally disputed by the plaintiffs and it was asserted that license fee up to the year 2003 stood paid and no amount was payable by them to the NDMC. Thereafter certain meetings took place between the parties, however, no amicable solution was arrived at between them. A notice dated 12th November 1999, was then issued by NDMC to the plaintiffs informing the plaintiff that the re-valuation of the license fee was neither possible nor warranted. A meeting of the plaintiffs representative also took place with the chairman of the NDMC on 22nd November, 1999. Plaintiffs allege that in that meeting the chairperson of the plaintiffs hotel agreed to pay a sum of Rs. 3 crores on the clear understanding that an independent agency/committee would be constituted by the NDMC to determine the fair and equitable quantum/rate of license fee. However, the chairperson refused to have agreed to the appointment of any such committee and gave one week's time to the plaintiffs to make payment failing which it has threatened that the license would be cancelled and possession of the hotel would be taken. On this threat being given, the plaintiffs filed a petition being Civil Writ Petition No. 7163/99 in this Court.

7. In the aforesaid Writ Petition filed by the plaintiffs, they prayed for issue of a Writ of Certiorari or any other appropriate Writ order or direction for quashing the show cause notice dated 28th June, 1999 and 12th November, 1999 and for issue of an appropriate writ order or direction for quashing the show cause notice dated 28th June, 1999 and 12th November, 1999 and for issue of an appropriate writ order or direction directing the respondents to constitute a committee of independent persons to evaluate the legitimate fair license fee payable in respect of the land having regard to the license fee paid by other hotels which were similarly situated as well as the economic viability of the plaintiffs hotel consistent with the supplementary agreement dated 11th March, 1991. Certain other reliefs were also claimed in this Writ petition. This Petition was dismissed by A.K. Sikri, J. by order dated 7th March, 2000 on the ground that since the matter involved disputed questions of fact, the same cannot be decided in the Writ petition. While dismissing the petition, the Court continued the interim order granted earlier till

31st March, 2000. present suit was thereafter filed by the plaintiffs for an injunction restraining the defendant from taking any action pursuant to the show cause notices mentioned above and from causing any construction to the amenities like water and electricity to the premises of the plaintiffs. plaintiffs also claimed a decree for specific performance of the agreement dated 14th July, 1982 as allegedly modified by the agreements dated 11th March, 1991: 4th August, 1995 and 31st March, 1998. Along with the suit, an application for temporary injunction was also filed by the plaintiffs. By this order. i propose to dispose of this application of the plaintiffs for the grant of an ad-interim injunction.

8. The stand of the plaintiff is that on the execution of the supplementary agreement dated 11th March, 1991 as also of 4th August, 1995 and 31 March, 1998 the defendant-NDMC had promised to examine the matter regarding payment of license fee and consider the representation of the plaintiffs and to arrive at a decision on the representation after hearing the plaintiffs. It is submitted that based on these promises, the NDMC induced the plaintiffs to withdraw all their claims including the appeals filed against the order of D.P. Wadhwa. J. and the NDMC is, Therefore, estopped from claiming anything more than what had been agreed to in the agreement dated 11th March, 1991, namely, the license fee at the rate of Rs 2.68 crores per year. It is also their submission that the NDMC had agreed to form a committee to go into the question of the license fee to be paid by the plaintiffs and considered the representation after giving hearing to them. It is submitted that till date the representation of the plaintiffs has not been considered and no decision has been taken thereon. It is submitted that in terms of the agreement dated 11th March, 1991 the parties had clearly agreed that the plaintiff would make a representation in respect of the license fee which would be examined by the NDMC on merits. It is submitted that acting on the promises made by the NDMC, the plaintiffs paid the license fee as per that agreement and the license fee till 2003 stood paid. It is submitted that by the supplementary agreement of 1995 and 1998 Installments of Rs 45 lacs and which were agreed to be paid by 1991 agreement were increased to 60 lacs by the 1995 agreement and Rs. 1 crore by the 1998 agreement. It is submitted that clause 7 of the 1991 agreement was not modified by the 1995 agreement and 1998 agreement and it was, Therefore, the duty of the defendant-NDMC to consider the representation of the plaintiffs in respect of payment of license fee. this allegedly having no been done, It is submitted that the NDMC has no right whatsoever to claim the alleged license fee at the rate of 21% of the gross turn over of the hotel. It is also the contention of the plaintiffs that in a note dated 5th November, 1989 made by the Lieutenant Governor on the file, the Lieutenant Governor had observed as under:-

NOTE OF THE LT. GOVERNOR OF DELHI DATED 25.11.1989

"This file has been with me for sometime as I wish to ponder over the issue involved.

I have seen the note of N.D.M.C. as well as the as the LSG Department. The hotel has been constructed after a very long delays. The N.D.M.C. has so far not been able to recover any of his dues from the hotel. It has made several claims against CJ International Hotels Ltd. The N.D.M.C., has not made any payments to L & DO. In turn the management claims the project is not viable financially. That they have suffered on the part of delays by the N.D.M.C., DESU and others. That the license fee should be reduced etc. Considering the fact that the financial institutions are also tied up with this project, the matter has figured in parliament, The public Accounts committee has also considered it and given its report. This is also to be gone into and view taken. To my mind, Therefore, the matter needs to be looked into all its facts.

For long each side is blaming the other and made their claims on each other without any results as such it would be best to constitute a committee to look into the issue in its totality and make appropriate recommendations."

9. It is submitted that the Lieutenant Governor having decided to constitute a committee to look into the issue in its totality and make appropriate recommendations, the NDMC could not refuse to appoint the committee and till such time the committee was constituted and the matter was looked into, the NDMC cannot threaten to recover the license fee from the plaintiffs at the rate of 21% of the gross turnover of the hotel.

10. Appearing on behalf of the NDMC, the contention of Mr. Mukul Rohtagi, learned Additional solicitor general, is that the parties are governed by the 1982 agreement. It is submitted that the plaintiff with open eyes having given a bid for the land and having agreed to pay the license fee of Rs. 2.68 crores per year, 21 % of the gross turnover of the company cannot now wriggle out of its contractual obligations and refuse to pay on the ground that the license fee being claimed by the defendant-NDMC was not viable. It is also submitted that no reliance can be placed upon the note of the Lieutenant Governor firstly for the reason that the Lieutenant Governor firstly for the reason that the Lieutenant Governor had no role to play in the contractual obligations between the parties and no legal right will accrue to the plaintiff because of the said note and secondly it is the submission of learned Additional Solicitor General that these notes are meant for official use and do not confer any vested right in favour of any party. It is also the submission of the defendant that the note was made sometime in 1989 and the suit was filed by the plaintiffs after the said note was made on the file. It, Therefore, submitted that the argument of the defendant this plea will be barred by principles of res-judicata inasmuch as a plea which might and ought to have been taken in the earlier litigation between the parties as a ground of defense or attack would be deemed to have been a matter directly and substantially in issue in the suit. It is submitted that the plaintiff could have taken this plea in the earlier suit decided by D.P. Wadwa. J. On 13th October, 1990 and the same having decided against the plaintiff, the present suit is otherwise barred by principles of res-judicata. It is submitted by Mr. Rohtagi

that execution of a fresh agreement did not make any difference in the contractual obligations to which the parties had agreed in the lease agreement dated 14th July, 1982. It is submitted that supplementary agreements clearly stipulated that except for the indulgence shown to the plaintiffs to pay the arrears of license fee in Installments, all other causes, of the main agreement dated 14th July, 1982 were to remain the same which include the quantum of license fee agreed to be paid by the plaintiffs to the defendant-NDMC. It is further argued by Mr. Rohtagi that the NDMC in any case had considered that representation of the plaintiffs as is clear from the notice dated 12th November, 1989 given by the defendant to the plaintiffs where it is clearly mentioned "your reply dated 27th July, 1999, in view of the show cause notice and subsequent letters for re-writing the contract for the past for reducing the license fee had been examined. The matter regarding possible nor warranted". It is submitted that this clearly shows that the matter regarding the reduction of license fee was examined by the defendants-NDMC but it was not found possible to reduce the same and the same was accordingly rejected. It is submitted that the entire attempt of the plaintiffs was to somehow avoid payment of the license fee which amounts to almost about Rs. 110 crores. It is submitted that in terms of the balance Sheets filed on recorded by the plaintiffs, huge amount of license fee is admittedly due from the plaintiffs to the defendant-NDMC.

11. At the state of deciding the application for temporary injunction, the Court is not required to go into the merit of the case in detail. What the court has to examine is: i) the plaintiff has a prima facie case to go for trial: ii) protection is necessary from that species of injuries known as irreparable before his legal right can be established. and iii) that the mischief of inconvenience likely to arise from withholding injection will be greater than what is likely to arise from granting it. The principles governing the grant of injection are well settled. The power is discretionary and is to be exercised on sound judicial principles. Where no violation of the rights of the plaintiff was involved, the interim injunction should not be granted. It is on these principles that the Court has to examine the respective case of the parties.

12. A narration of events mentioned above clearly show that the case set up by the plaintiffs is entirely based upon clause 7 of the supplementary agreement dated 11th March, 1991 as allegedly modified by the 1995 and 1998 agreements, A passing reference has also been made to the note of the Lieutenant Governor and also to the promises alleged to have been made by the defendant - NDMC to the plaintiffs that it would not recover the license fee till such time the presentation of the plaintiffs for reconsideration of the license fee was examined and decided by the NDMC after giving a hearing to the plaintiffs. Mr. Amarjit Singh Chandhok, learned Senior Advocate, appearing on behalf of the plaintiffs has referred to the judgments reported as S.N. Mukherjee Vs. Union of India, ; Travancore Rayon Ltd. Vs. Union of India (UOI), and Mahabir Prasad Santosh Kumar Vs. State of Uttar Pradesh and Others, to contend that a reasoned decision should have been given on the representation of the plaintiffs.

Merely by writing in the notice dated 12th November, 1999 that re-valuation of the license fee was neither possible nor warranted, it cannot be said that the NDMC has considered the representation of the plaintiffs on merits and in any case the NDMC ought to have given a speaking order on the said representation.

13. In *S.N. Mukherjee Vs. Union of India* (Supra), it was held by the Supreme Court that in view of the expanding horizon of the principles of natural justice, the requirement to record reason can be regarded as one of the principles of natural justice which govern exercise of power by administrative authorities. The rules of natural justice are not embodied rules. The extent of their application depends upon the particular statutory framework whereunder jurisdiction has been conferred on the administrative authority. With regard to the exercise of a particular power by an administrative authority including exercise of judicial or quasi-judicial functions the legislature, while conferring the said power, may feel that it would not be in the larger public interest that the reasons for the order passed by the administrative authority be recorded in the order and be communicated to the aggrieved party and it may dispense with such a requirement. The recording of reasons by an administrative authority serves a salutary purpose, namely, it excludes chances of arbitrariness and assures a degree of fairness in the process of decision making. Therefore, the requirement that reasons be recorded should govern the decisions of an administrative authority exercising quasi-judicial functions irrespective of the fact whether the decision is subject to appeal, revision or judicial review. It is, however, not required that the reasons should be as elaborate as in the decision of a Court of law. The extent and nature of the decisions would depend on particular facts and circumstances. The Court in this case was examining the validity of the findings of the sentence recorded by the General Court Martial and it was in that context that the Court had observed that the object underlying the rules of natural justice was to prevent mis-carriage of justice and secure fair play in action. The Court was examining the provisions of the Army Act and the Rules framed there under and the Court had made these observations keeping in view the provisions of Rule 66 of the Army Rules. The Court in the facts of that case observed that there was no such requirement in order provisions relating to recording on findings or sentence and Rule 66(1) proceeds on the basis that there is no such requirement because if such a requirement was there, it would not have been necessary to make a specific provision for recording of reasons for the recommendation to mercy. The said provisions thus negative a requirement to give reasons for its findings and sentence or court martial and reasons were required to be recorded only in cases where the court martial made a recommendation of mercy. The Court was, Therefore, of the opinion that at the stage of recording of findings and sentence the court martial was not required to record its reasons and at that stage reasons are required only for the recommendation to mercy if the court martial makes such a recommendation.

14. In *Travancore Rayon Limited Vs. Union of India* (Supra), the Court was examining the provisions of the Central Excises and Salt Act and the Court,

Therefore, observed that when judicial power is exercised by an authority normally performing executive or administrative functions, there should be disclosure of reasons in support of the order on two grounds: i) that the party aggrieved in a proceeding before the High Court or the Supreme Court has the opportunity to demonstrate that the reasons which persuaded the authority to reject his case were erroneous; and ii) that the obligation to record reasons operates as a deterrent against possible arbitrary action by the executive authority invested with the judicial power.

15. In *Mahabir Prasad Santosh Kumar Vs. State of Uttar Pradesh* (Supra), the Court was examining the provisions of the Sugar Dealers' Licensing Order, 1962 and it was in that context that the Court held that the power of the District Magistrate was quasi-judicial; exercise of the power of the State Government was subject to the supervisory power of the High Court under Article 227 of the Constitution and of the appellate power of the Supreme Court under Article 136 of the Constitution. It was, Therefore, held that the High Court and the Supreme Court would be placed under a great disadvantage if no reasons were given and the appeal was dismissed without recording and communicating any reasons.

16. A reading of the aforesaid judgments clearly show that the Supreme Court in all these cases was concerned with the exercise of powers by the administrative authority under a statute or the rules framed under the statute and it was in that context that the Supreme Court observed that the administrative authority exercising quasi-judicial functions must give reasons to arrive at the finding so as to avoid any arbitrariness therein. In my opinion, none of these judgments would be applicable to the facts of the present case. In the present case, the defendants were dealing with a representation which the parties had agreed to be dealt with under the contract, the NDMC was not exercising judicial or quasi-judicial powers while dismissing the representation of the plaintiffs. Prima facie, I am of the view that the NDMC after having examined the matter on the basis of the material before it and having decided that the reconsideration of the license fee was neither possible nor warranted, was not required to give any detailed reasons for the same.

17. It is next contended by Mr. Chandhiok that the note of the Lieutenant Governor dated 5th November, 1989 was binding upon the NDMC and the defendant-NDMC, Therefore ought to have constituted a committee to look into the entire aspect of the fixation of license fee. It is submitted that the notes, correspondence, etc. made by the Government were relevant u/s 35 of the Evidence Act, of course, what evidentiary value must attach to the statements contained in these reports is a matter which would have to be decided by the Court after considering these reports. For this, he has placed reliance upon the judgments reported as AIR 1952 271 (Nagpur); *Khatri and Others Vs. State of Bihar and Others*, ; *P.C. Purushothama Reddiar Vs. S. Perumal*, ; *M/s. Jain Malleables Vs. Bharat Sahay*, ; and *Gurbax Singh Vs. Usha*, 1991 RLR 390.

18. In *Chandulal Vs. Pushkar Raj and Others* (Supra), the Court was examining a

case under the provisions of C.P. Land Revenue Act and the Court observed that reports made by the Revenue Officers, though not regarded as having judicial authority where they express opinions on the private rights of the parties, are entitled to great consideration being reports of public officers made in the course of duties insofar as they supply information of official proceedings and historical facts and also insofar as they are relevant to explain the conduct and acts of the parties in relation to them and the proceedings of the Government founded on them. The Court was concerned with a dispute between the private parties where the Revenue Officers had made certain reports on the rights of the parties and the Court was, Therefore, considering the question as to whether at the time of deciding the rights of the parties, report of the Revenue Officers should be taken into consideration.

19. In *Khatari and Others (IV) Vs. State of Bihar and Others (Supra)*, the Court was considering the case of certain under-trial prisoners who had alleged that they were blinded by the members of the State police force acting as police officials and their fundamental right to life guaranteed under Article 21 was, Therefore, violated and for this violation, the State was liable to pay compensation to them. It was while dealing with this question that the Court was of the opinion that as to whether or not the petitioners in that case were blinded by the members of the State police force and the police officials and whether the State can be made to pay compensation for such acts of the police officials, the report of the investigation conducted by an officer of the Government into the conduct of the police officials was relevant for considering the matter raised in that petition. In that case, the report of the Investigating Officer, appointed by the State Government, to look into the conduct of the police officials was a relevant piece of information to enable the Court to give a finding under public law.

20. In *P.C. Purushothama Reddiar Vs. S. Perumal (Supra)*, the Court was examining the election matter involving corrupt practices adopted by a candidate and the Court in those circumstances held that the issue before the Court was whether the respondent in that case had arranged certain election meetings on certain dates and for deciding this question the police reports in question were extremely relevant to establish that fact. It was again a case where the report of the police officers were directly relevant for deciding the question of the corrupt practices adopted by a particular candidate.

21. Again in *M/s. Jain Mallebles Vs. Bharat Sahay (Supra)*, the Court was examining the question under the Delhi Rent Control Act and was concerned as to whether or not a Government servant who was in possession of the official accommodation could ask its tenant to vacate the premises on the ground that the Government servant has been ordered to vacate the official accommodation or in default to incur certain obligations. It was in that context that the Court relied upon a special order of the Assistant Director of Estates calling upon the Government servant to vacate the Government accommodation allotted to him

failing which he would be charged market rent w.e.f. June 1, 1996 at the rate fixed by the Government from time to time. The Court in this case relied upon certain nothings of the Government and the aforesaid order to come to a finding that since the Government servant could continue to occupy the Government accommodation only subject to certain obligations, he would be entitled to have recourse u/s 14A of the Delhi Rent Control Act for vacating the tenant from the premises in question.

22. In my view, none of these judgments can be any assistance to the plaintiffs. In all these cases, the Court was concerned with certain reports, notes and orders of the Government which were directly relevant to the matter in dispute between the private parties and had a bearing on the merits of the case. In my view, the case in hand involves the rights of the parties under a contract which has been arrived at by them consciously with eyes wide open. Any right which a party claims against the other has to flow from the agreement between them. The Lieutenant Governor, in my view, has no role to play in the contractual obligations between the parties and no legal right will accrue to the plaintiff because of the note of the Lieutenant Governor. Moreover, these notes are meant for official use and do not give any vested right to any of the parties who may like to take advantage of the same.

23. In a case reported as Bachhittar Singh Vs. The State of Punjab, , the Court was concerned with the termination of services of an Assistant Consolidation Officer. The said officer was first suspended from service for his having tampered with official records and on an enquiry being held against him by the Revenue Secretary of the Pepsu Government, he was dismissed on the basis of the enquiry. Against the order of dismissal, he preferred an appeal before the State Government. It appeared that he had submitted an advance copy of his appeal to the Revenue Minister of Pepsu who called for the records of the case immediately. After perusing the records, he wrote on the file that the charges against the delinquent were serious and they were proved. He, however, expressed the opinion that as the delinquent was a refugee and had a large family to support, his dismissal would be too hard and instead of dismissing him outright, he should be reverted to his original post of Qanun(sic) and warned that if he did not behave properly in future, he would be dealt with severely. The delinquent taking support of this note and contended that since the Minister himself had recommended that leniency should be shown to him, the order of dismissal should be set aside. It was also argued that the Minister having reduced the punishment from dismissal to reversal, the Chief Minister could not sit over that order and still direct dismissal of the delinquent. While dealing with this note of the Minister, the Supreme Court held that :-

"Before something amounts to an order of the State Government two things are necessary. The order has to be expressed in the name of the Governor as required by clause (1) of Article 166 of the Constitution and then it has to be communicated. The Constitution requires that the action must be taken by the

authority concerned in the name of the Governor. It is not till this formality is observed that the action can be regarded as that of the State. Constitutionally speaking the Minister is no more than an adviser and that the head of the State, the Governor is to act with the aid and advice of his Council of Ministers. Therefore, until such advice is accepted by the Governor whatever the Minister or the Council of Ministers may say in regard to a particular matter does not become the action of the State until the advice of the Council of Ministers is accepted or deemed to be accepted by the Head of the State. Indeed, it is possible that after expressing one opinion about a particular matter at a particular stage a Minister of the Council of Ministers may express quite a different opinion, one which may be completely opposed to the earlier opinion. Therefore to make the opinion amount to a decision of the Government it must be communicated to the person concerned. It is of the essence that the order has to be communicated to the person who would be affected by that order before the State and that person can be bound by that order. For, until the order is communicated to the person affected by it, it would be open to the Council of Ministers to consider the matter over and over again and, Therefore, till its communication the order cannot be regarded as anything more than provisional in character."

It is thus clear that for an order to be binding, firstly it must be communicated to the person who is to be affected by the order and until the order is communicated to the person affected, it would be open to the authorities to reconsider the matter and till this communication, the order cannot be regarded as anything more than provisional in character.

In the present case, all that the Lieutenant Governor had written in the note is that the matter be reconsidered. This note was never communicated to any of the parties. It was a mere noting on the file and was an opinion of the Lieutenant Governor which, in my view, cannot be held to be binding between the parties.

As observed above, the plaintiff had offered its bid for taking on license the land on which the hotel is constructed. The terms and conditions of the auction were known to the plaintiffs before the auction without a demur and with full knowledge of the commitments which the bids involved. The Government's acceptance of those bids was the acceptance of willing offers made to it and on such acceptance the lease agreement was executed between the parties which is binding between them. The commercial considerations may have revealed an error of judgment in the initial assessment of profitability of the adventure but that is a normal incident of trading transactions. Those who contract with open eyes must accept the burden of the contract along with its benefit. Reciprocal rights and obligations arising out of contract do not depend for their enforceability upon whether a contracting party finds it prudent to abide by the terms of the contract. By such a test, no contract could ever have a binding force. The plaintiffs entered with full knowledge of conditions, which they had willingly and voluntarily embarked. Merely because the plaintiffs are not finding

the license fee payable under the agreement to the viable for purposes of running the hotel, it cannot ever be said that a licensee can work out the license if he finds it profitable to do so and he can challenge the conditions under which he agreed to take the license, if he finds it commercially inexpedient to conduct his business. The supplementary agreement of 1991, in my opinion, does not at all modify or vary the terms of the license entered into between the parties on 14th July, 1982. The only concession given by the 1991 agreement was to enable the plaintiffs to pay the amount in Installments. A reading of the preamble of the 1991 agreement clearly shows that the plaintiff had approached the defendant-NDMC for an out of Court settlement and also for grant of Installments in the payment of license fee payable up to 27th September, 1990 and interest accrued thereon up to 31st March, 1991 as well as to liquidate the current demand and the NDMC-defendant after considering the said request of the plaintiffs had agreed to grant Installments for the payment on account of license, deferred payments and interest. The agreement nowhere provides that because of the parties having entered into supplementary agreement, the plaintiffs would not be liable to pay the license fee @ 21% of the gross turn over of the hotel. The parties never intended to change the license fee payable under the 1982 agreement but it agreed only to the payment of arrears and the current demand in the manner mentioned in the supplementary agreement. All other clauses of the 1982 agreement were to remain the same and after consideration of the representation of the plaintiffs, the defendant-NDMC having decided that the matter regarding reconsideration of the percentage of turn over was neither possible nor warranted, the plaintiffs had to pay the license fee in accordance with the terms of the 1982 agreement.

The only question which remains to be considered is as to how this license fee was to be calculated. While the case of the defendants is that the plaintiffs were required to pay 21% of the annual gross turn over of the hotel as disclosed by the balance sheets, the plaintiffs' case is that even assuming that the plaintiffs are required to pay the license fee @ 21% of the gross turn over of the hotel, it has to be 21% of the gross turn over as certified by the certified auditors of the plaintiffs. The question is as to what is the gross turn over as certified by the certified auditors of the plaintiffs. A chart has been placed on record by the defendant-NDMC showing the annual gross turn over of the hotel from 1988-89 to 1998-99 and the amount of license fee payable by the plaintiffs has been calculated in terms of the said annual gross turn over. The said chart is being reproduced for ready reference as under:-

ANNUL DEMAND OF license FEE C.J. INTERNATIONAL HOTEL YEAR GROSS TURN OVER AMOUNT OF ANNUAL license FEE

1982-88 2,68,00.00

1988-89 14,49,55,728.92 3,04,40,703

1989-90 17,83,75,211.23 3,74,58,794

1990-91	17,64,71,968.54	3,70,59,113
1991-92	29,29,08,640.64	6,15,10,815
1992-93	38,20,23,220.57	8,02,24,876
1993-94	44,79,06,922.07	9,40,60,454
1994-95	56,99,58,926.31	11,96,91,375
1995-96	82,09,31,048.83	17,23,95,520
1996-97	86,08,27,229.50	18,07,31,718
1997-98	81,43,00,604.68	17,10,03,127
1998-99	104,42,30,000.00	21,92,88,300

The plaintiffs have placed on record the balance sheets of the hotel from 1988-89 to 1998-99 and the aforesaid chart has been prepared on the basis of the gross turnover of the hotel which includes the commission payable to the travel agents, income derived by way of interest from banks and certain other income like income from telecommunication services, etc. The plaintiffs have, however, placed on record the certificates of the certified auditors of the company. According to these certificates, for the purpose of computing the gross turn over of the hotel, the following appropriations based on the alleged accepted accounting principles, industry norms and practices were applied to gross receipts of the hotel to arrive at the appropriate and correct gross turn over for the purpose of the license fee payable to the defendant-NDMC:-

"1) The licensee hotel has to pay 3% of the gross receipts generated on rooms as Franchiser Fee to the Franchiser. The licensee Hotel Therefore is demure and defacto entitled only to 97% of the room receipts which amount is being included in Gross turn over.

ii) Receipts from various outlets including from Room revenue is a composite charge and includes the element of license Fee of 21% also. As the license fee is not intended required to be paid on license fee, appropriate adjustment by netting the amount after removal of element of license fee from gross receipts is being included in the gross turn over from the licensee hotel.

iii) The licensee hotel also extends facilities like Telephone, Telex, Fax, etc. to its customers which services are primarily rendered by MTNL. Amounts payable to such external Govt. Agencies have been excluded from the gross receipts. Similarly, license fee paid for beverage license and luxury tax have also not been included in the amount of gross turn over.

iv) Credit card commission paid on gross receipts being collection charges have been treated as a charge on the gross turn over. Similarly, bad debts are also being treated as a direct revenue loss affecting gross turn over.

v) Direct costs in respect of food and beverages, which could be alternatively sourced from outside agencies, need not form part of the gross turn over. Therefore, the income generated attributable directly to the building as a setting remains included in the gross turn over. Similarly, other income is also being included sans cost of direct consumables/commission.

vi) In accordance with the terms of the license deed, while the building Along with fixture, etc. remains vested with the licensor, the licensee hotel is required to maintain and keep the building and its surroundings in a manner befitting a 5 star hotel. We are advised that in this view of the matter, and till such time the NDMC claims the building to be vested in it and such claims is not refuted in the court of law, expenses on Insurance and repairs and renewals of the buildings, etc. are chargeable from NDMC and Therefore adjustable against the license fees."

Though it is mentioned in the agreement that it is the gross turn over of the hotel as certified by the certified auditors of the hotel on which the license fee is payable by the plaintiffs, however, prima facie, in my view, plaintiffs may not be entitled to all the appropriations mentioned by the auditors in their certificates. Prima facie, it appears to the Court that only that income which is compulsorily payable by the plaintiffs in terms of an agreement which it might have arrived at with the third party or statutory liability necessarily payable may only have be deducted for the purpose of arriving at the gross turn over of the hotel. The franchisee fee payable is 3% by the NDMC to the franchisee and it is only the 97% of the receipts which are received by the hotel. Prima facie, this 3% may have to be deducted from the room tariff. Luxury tax on behalf of the Government is also received by the hotel at the time of providing its services to the guests and since this tax does not come in the hands of the hotel, this way also have to be deducted from the gross turn over of the hotel. The other amount which may have to be deducted from out of the gross turn over of the hotel as shown in the balance sheets is the credit card commission as the amount which is received by the hotel on payments received through credit cards is net of commission charged by the credit card companies. Other component which may have to deducted from the gross turn over is the interest income on the deposits with banks. The only other receipt to which the plaintiffs may be entitled to deduction is the telephone receipts. The plaintiffs may be said to be acting as agents for the Mahanagar Telephone Nigam Limited while the telecommunication services are provided to the guests. The payment, Therefore, which is actually made to the Mahanagar Telephone Nigam Limited may have to be deducted from out of the gross amount which is received by the plaintiff for providing telecommunication services so that the balance amount received by the hotel is taken as its income. Besides these deductions which, prime facie, may be permissible from the gross turn over of the hotel, in my view, the plaintiffs are not entitled to any other deduction from out of the gross turn over of the hotel. The cost of food and beverages is a part of running of the hotel and cannot, in my opinion, be deducted from out of the gross turn over of the hotel.

If this is deducted from the gross turn over, what will be arrived at is the gross income and not the gross turn over. At this stage of deciding this application the Court is not deciding finally as to what would be the gross turn over of the hotel on which it is liable to pay the license fee and it is only a prima facie view of the Court that the aforesaid outgoings may have to be deducted from the gross turn over as reflected in the balance sheets.

Since, in my opinion, none of the supplementary agreements modified the terms of the agreement of 14th July, 1982 providing for payment of license fee @ 21% of the gross turn over of the hotel, plaintiffs are, prima facie, liable to pay license fee @ 21% of the gross turn over to be calculated on the basis of the gross turn over as mentioned in the balance sheets filed on record by the plaintiffs and deducting from this turn over the amount to be calculated in terms of the aforesaid paragraph. The plaintiff being prima-facie liable to pay license fee at the rate of 21% of the gross turn over of the hotel, in my opinion, there is no question of the plaintiff suffering irreparable loss in case it has to pay the license fee in terms of the agreement. Defendant-NDMC is a civic authority and for purposes of providing service to the people it requires funds. Public benefit in the present case outweighs the case of the plaintiffs in withholding the amount legitimately due to the NDMC. Balance of convenience clearly lies in favor of the larger public interest rather than in favor of the plaintiffs. The only indulgence to which the plaintiffs may be entitled is to pay the arrears of license fee in Installments. Since the amount which may be calculated on the basis of the above formula may be quite heavy, the plaintiffs will be at liberty to deposit the said amount in four equal quarterly Installments, first of which will be paid within three weeks from the date of this Order.

I, accordingly, restrain defendant-NDMC, its agents and employees from interfering with the possession of the plaintiffs over the land and building situate at 1, Windsor Place, Janpath, New Delhi in any manner whatsoever and from disconnecting, withholding or causing to be withheld any amenities including water and/or electricity to the plaintiffs hotel, subject to the plaintiffs depositing the entire license fee in the manner directed in this order, calculated @ 21% of the gross turn over of the hotel arrived at on the basis of the observations made in this Order. Prima facie, I am also of the opinion that the plaintiff will also have to pay interest on this amount calculated for the time being at the rate of 10% p.a.

With these observation, the application of the plaintiffs stands disposed of. Any observation made in this order will not be taken as expression of opinion on the merits of the case.